

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dennis Talbert Ricketts Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 6, 2023

Court of Appeals Case No.
22A-CR-2012

Appeal from the
Vanderburgh Superior Court

The Honorable
Robert J. Pigman, Judge

Trial Court Cause No.
82D03-2104-F4-1804

Memorandum Decision by Judge Vaidik
Judges Tavitas and Foley concur.

Vaidik, Judge.

Case Summary

- [1] Following a bench trial, the trial court convicted Dennis Talbert Ricketts Jr. of Level 4 felony burglary and Class A misdemeanor theft, found him to be a habitual offender, and sentenced him to eight years. Ricketts now appeals, arguing he did not knowingly and intelligently waive his right to a jury trial and that the court erred in sentencing him remotely. We affirm.

Facts and Procedural History

- [2] In April 2021, the State charged Ricketts with Level 4 felony burglary and Class A misdemeanor theft and alleged he is a habitual offender. The next month, the trial court ordered Ricketts to undergo a competency evaluation. After receiving reports from the psychologists, the court found Ricketts incompetent to stand trial and committed him to the Division of Mental Health. In October, the Division of Mental Health advised the court that Ricketts had been taking medications in jail and his competency had been restored.
- [3] In December, Ricketts moved for a jury trial. The trial court held a review hearing in February 2022. Ricketts appeared by video from jail. Defense counsel engaged in the following colloquy with Ricketts:

[DEFENSE COUNSEL]: Dennis, are you able to hear me?

THE DEFENDANT: Yes sir.

[DEFENSE COUNSEL]: Okay. Good. Dennis, did we have an opportunity to meet at the jail last week?

THE DEFENDANT: We did.

[DEFENSE COUNSEL]: And you understand that your trial date is set in April.

THE DEFENDANT: Yes sir.

[DEFENSE COUNSEL]: And it is your intention to go to trial, is that correct?

THE DEFENDANT: Yes sir.

[DEFENSE COUNSEL]: Last week when we met we spoke about the two types of trials. You have a right to a jury trial and you have a right to be tried by the bench.

THE DEFENDANT: Yes sir.

[DEFENSE COUNSEL]: We talked about the pros and cons of each one, didn't we?

THE DEFENDANT: Yes sir.

[DEFENSE COUNSEL]: And that's not a decision that I get to make. That is a client only decision but the purpose for today's hearing is so we can advise the Court whether we're going to proceed with a court trial or whether we're going to proceed with a jury trial. Do you know which you would like?

THE DEFENDANT: Yes. I would like the bench trial.

[DEFENSE COUNSEL]: Judge, if you think there's an additional record that needs to be made by all means.

THE COURT: No, I just – we'll just make sure that – sir, you're waiving your right to a jury trial, is that correct?

THE DEFENDANT: Yes ma'am.

Tr. pp. 25-26.

[4] Ricketts appeared in person at the bench trial. The trial court found Ricketts guilty but mentally ill of Level 4 felony burglary and Class A misdemeanor theft and determined he is a habitual offender.

[5] The trial court held a sentencing hearing in July. Ricketts appeared by video from jail. At the time, the Indiana Supreme Court's emergency order expanding

remote proceedings due to the COVID-19 emergency was in effect. Ricketts did not object to appearing remotely. The court sentenced Ricketts to eight years in the Department of Correction and recommended that he be assigned to a psychiatric unit.

[6] Ricketts now appeals.

Discussion and Decision

I. Waiver of Right to Jury Trial

[7] Ricketts contends he did not knowingly and intelligently waive his right to a jury trial under the United States and Indiana constitutions. This presents a question of law, which we review de novo. *Horton v. State*, 51 N.E.3d 1154, 1157 (Ind. 2016).

[8] The right to a jury trial is a bedrock of our criminal-justice system, guaranteed by both the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution. *Id.* at 1158. “In broad view, 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.* Waiver of the Sixth Amendment right must be “express and intelligent” while waiver of the Article 1, Section 13 right must be “knowing, voluntary[,] and intelligent[.]” *Id.* (quotations omitted). The Indiana Constitution offers greater protection. Under it, a defendant who decides to waive a jury trial must do so

personally, either in writing or orally in open court. *Id.*; *Kellems v. State*, 849 N.E.2d 1110, 1112 (Ind. 2006).

[9] Ricketts argues his waiver was not knowing and intelligent because the trial court did not ask him more questions, such as “if [he] knew what a jury trial is or how it differs from a bench trial.” Appellant’s Br. p. 12. Ricketts claims such questions were required since he had previously been found incompetent to stand trial. According to case law, however, trial courts are not required to advise a defendant about the right to a jury trial and the differences between a jury trial and a bench trial before the court accepts the waiver. *Poore v. State*, 681 N.E.2d 204, 208 (Ind. 1997); *Hutchins v. State*, 493 N.E.2d 444, 445 (Ind. 1986); 16B William Andrew Kerr, *Indiana Practice, Criminal Procedure* § 21.2 (Apr. 2022 update). “While it is advantageous for a trial judge to engage a defendant in colloquy concerning the consequences of waiving trial by jury, such an exchange is not required by either the United States or the Indiana constitutions, or by statute.” *Poore*, 681 N.E.2d at 208 (quotation omitted); *see also McSchooler v. State*, 15 N.E.3d 678, 682-83 (Ind. Ct. App. 2014).

[10] Here, at the time of the February 2022 hearing, Ricketts’s competency had been restored for several months. During the hearing, defense counsel walked Ricketts through the decision-making process. First, defense counsel confirmed that Ricketts knew there are two types of trial—jury and bench. Second, defense counsel confirmed with Ricketts that they had discussed the pros and cons of each one the week before when defense counsel visited him at jail. Third, defense counsel emphasized that only Ricketts could choose what kind of trial

he wanted. Ricketts said he wanted a bench trial. The trial court then asked Ricketts if he understood that he was waiving his right to a jury trial by electing a bench trial. Ricketts said yes. This is sufficient to establish that Ricketts knowingly and intelligently waived his right to a jury trial.

II. Remote Sentencing

- [11] Ricketts next contends the trial court erred by sentencing him remotely. Indiana Code section 35-38-1-4(a) provides that defendants “must be personally present at the time sentence is pronounced.” The Indiana Supreme Court has interpreted “personally present” to mean a defendant’s “actual physical presence.” *Hawkins v. State*, 982 N.E.2d 997, 1002 (Ind. 2013).
- [12] Indiana Administrative Rule 14 explains when and how trial courts may conduct remote proceedings using telephone or audiovisual telecommunication. On May 13, 2020, in recognition of the COVID-19 emergency, the Indiana Supreme Court issued an order modifying Rule 14 to afford trial courts “broader authority to conduct court business remotely.” *In re Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus (COVID-19)*, 144 N.E.3d 197 (Ind. 2020). Specifically, the order—which was extended to December 31, 2022—authorized courts to use “audiovisual communication to conduct proceedings whenever possible to ensure all matters proceed expeditiously and fairly under the circumstances,” including “sentencings where the defendant waives the right to be present in court.” *Id.*

- [13] “This authority, however, is not absolute.” *B.N. v. Health & Hosp. Corp.*, 199 N.E.3d 360, 363 (Ind. 2022). On a party’s objection “at the outset of the proceeding, on the record,” the trial court “must make findings of good cause to conduct the remote proceeding.” *In re Admin. Rule 17*, 144 N.E.3d at 198. “Though modified Rule 14 [was] replaced by Interim Rule 14 on January 1, 2023, the interim rule similarly requires ‘good cause shown’ to conduct testimonial proceedings . . . virtually.” *B.N.*, 199 N.E.3d at 363 (quoting *Interim Admin. Rule 14 for Remote Proc.*, 22S-MS-1 (Ind. Sept. 30, 2022)).
- [14] Ricketts acknowledges that he did not object to being sentenced remotely and must establish fundamental error on appeal. Fundamental error is an error so blatant and substantial that the trial court should act even without a request or objection from a party. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh’g denied*. It is meant to correct “the most egregious and blatant trial errors.” *Id.*
- [15] In support of his argument that the trial court committed fundamental error, Ricketts cites *Warren v. State*, 182 N.E.3d 925 (Ind. Ct. App. 2022). There, the defendant filed a written motion invoking his right to be physically present in the courtroom for sentencing. The trial court denied the motion and held a sentencing hearing at which the defendant appeared by video. On appeal, we found that the defendant did not waive his right to be present at sentencing under our Supreme Court’s May 2020 emergency order and remanded the case for a new sentencing hearing. *Id.* at 936.

[16] Unlike the defendant in *Warren*, here Ricketts did not file a motion invoking his right to be physically present at sentencing. This fact easily distinguishes *Warren* from this case. Still, Ricketts claims fundamental error occurred because he had once voiced frustration about remote proceedings. That is, during his competency evaluation in June 2021, Ricketts acknowledged to the psychologist that he could ask his attorney questions “during the course of his trial” but said it was “hard” to do so “in video court.” Appellant’s App. Vol. II p. 51.

[17] That Ricketts voiced general frustration about remote proceedings to the psychologist over a year before sentencing does not mean that the trial court committed fundamental error in sentencing him remotely. Ricketts appeared in person at trial and was represented by counsel. Ricketts then appeared by video at sentencing and was represented by counsel. Neither defense counsel nor Ricketts mentioned the fact that Ricketts was appearing on video or that there were any technology issues. In addition, Ricketts had an adequate opportunity to be both seen and heard. The court asked Ricketts if he had read the presentence investigation report, whether he understood it, and whether it was accurate; Ricketts said yes. The court then asked Ricketts if he had anything to add; Ricketts said no. After defense counsel spoke, the court asked Ricketts if he had anything to add; Ricketts again said no. Ricketts has not met the heavy burden of establishing fundamental error. *See Gary v. State*, 113 N.E.3d 237, 242 (Ind. Ct. App. 2018) (“Although we disapprove of the trial court’s failure to follow proper procedure [under Administrative Rule 14], we cannot say that

Gary’s sentencing via video conference absent a proper written waiver constituted a clearly blatant violation of basic and elementary principles of due process.”), *trans. denied*.¹

[18] Affirmed.

Tavitas, J., and Foley, J., concur.

¹ Ricketts asks us to follow the dissent in *Gary*, which opines that a trial court’s failure to follow the longstanding statutory and common law that a defendant has a right to be physically present at sentencing essentially automatically amounts to fundamental error. We decline to do so.