

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 1, 2011

v

LAURINO JAMES SCAFONE,

Defendant-Appellant.

No. 298072
Oakland Circuit Court
LC No. 2009-008934-AR

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his bench trial conviction of aggravated assault, MCL 750.81a. We reverse and remand for a new trial.

On January 23, 2008, defendant was charged with aggravated assault after he was allegedly involved in a physical altercation that occurred in a restaurant parking lot on December 9, 2007. Defendant pleaded not guilty. Jury selection was scheduled for October 3, 2008. However, on that date the prosecuting attorney filed a document entitled “Motion to Amend Complaint and Warrant and/or Citation Pursuant to Plea Negotiation.” Handwritten on this form “motion” were words to the effect that defendant waived to a bench trial to be set for October 9, 2008, and that the prosecutor waived a jury trial. Included on this form “motion” was a paragraph that stated: “APPROVED AS TO FORM AND SUBSTANCE. All irregularities of procedure and arraignment on the amended complaint are waived by the defendant.” Under that paragraph, defendant’s attorney, Craig Rosso, and the prosecuting attorney placed their signatures. No proceedings were conducted with regard to this “motion” and no court order in its regard was entered. A bench trial began on October 9, 2008. During the course of the bench trial, defendant’s attorney indicated that he did not believe that defendant would testify and he did not testify. On October 10, 2008, defendant was found guilty as charged. He was sentenced on November 18, 2008, to ten days in jail and ordered to attend a twelve week anger management program, as well as pay hundreds of dollars in fines, costs, and restitution.

Thereafter, defendant filed a motion for a new trial in the circuit court, arguing in relevant part that he was denied the effective assistance of counsel because he was not allowed to testify and he was denied his right to a jury trial. The circuit court noted that during the course of the trial, defendant’s counsel indicated that he had conferred with defendant and did not believe that defendant would testify. Because defendant did not “speak up on this point,” his

right to testify was deemed waived. Further, the circuit court held that defendant did not preserve his claim that he was denied his right to a jury trial, that a stipulation to waive that right was agreed to by his counsel, and defendant failed to establish, factually or legally, any prejudice or that waiver was not voluntary. Thus, defendant's claim of appeal was denied. Defendant sought delayed leave to appeal from this Court, which was granted. *People v Scafone*, unpublished order of the Court of Appeals, entered November 1, 2010 (Docket No. 298072).

On appeal, defendant first argues that he was denied his constitutional right to a jury trial because he was neither informed of his right nor did he waive his right to a jury trial; thus, his conviction must be reversed. We agree.

As explained by this Court in *People v Cook*, 285 Mich App 420; 776 NW2d 164 (2009):

The adequacy of a jury trial waiver is a mixed question of fact and law. A criminal defendant has a constitutionally guaranteed right to a jury determination that he is guilty beyond a reasonable doubt. However, with the consent of the prosecutor and the approval of the trial court, a defendant may waive his right to a jury trial. In order for a jury trial waiver to be valid, however, it must be both knowingly and voluntarily made. [*Id.* at 422-423 (citations omitted).]

Criminal procedure in district court is governed by MCR 6.610. Pursuant to that rule, a defendant must be informed of certain rights, including his right to a jury trial, which is not deemed waived unless the defendant has been informed of the right and has waived that right in writing or orally on the record. MCR 6.610(D)(3).

The prosecutor concedes that an invalid jury trial waiver is a structural error requiring reversal. However, the prosecutor argues, reversal is not warranted in this case because the trial court merely failed to follow the procedural requirements for obtaining defendant's waiver—the waiver was not invalid. We disagree. As this Court held in *Cook*, 285 Mich App at 422, compliance with the requirements of MCR 6.402(B), a similar rule to MCR 6.610(D)(3), ensures that a defendant's waiver is knowing and voluntary. As in that case, here, the district court did not comply with MCR 6.610(D)(3); thus, we must look to any other record evidence that defendant knowingly and voluntarily waived his right to a jury trial. The prosecutor has failed to demonstrate that defendant, at any time during these proceedings, was informed of his right to a jury trial. And we could find no evidence in the record that defendant was ever informed of such right.

Further, there is no record, either written or oral, of defendant waiving his right. The prosecutor contends that “[d]efense counsel signed a form waiving defendant's right to a jury trial,” and that is sufficient to establish that defendant waived his right. However, first, the “form” was not a jury waiver form, it was a “Motion to Amend Complaint and Warrant and/or Citation Pursuant to Plea Negotiation.” But neither the complaint nor warrant were amended and there is no evidence of a plea negotiation. Defendant was charged with and tried for aggravated assault. And the court never conducted any proceedings or entered any order regarding this purported form “motion.” Second, defendant did not sign it, his attorney signed the “motion” purporting to waive defendant's right to a jury trial. A purported written waiver signed only by counsel does not constitute a valid waiver. *Cook*, 285 Mich App at 424. Accordingly, there is

no evidence on the record that defendant was informed of his right to a jury trial and voluntarily waived that right. Thus, defendant's purported waiver of his right to a jury trial was constitutionally invalid and a structural error exists that requires reversal of defendant's conviction. See *id.* at 427. In light of our resolution of this issue, we need not consider defendant's other issue on appeal.

Reversed and remanded for a new jury trial or a bench trial after a valid jury waiver. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio