

Rios v. State, No. PD-0441-21 (Tex. Crim. App.-Dec. 7, 2022)

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Issue & Answer. The defendant is not able to read the English language (or doesn't read it well). The trial court did not secure an explicit jury trial waiver from the defendant. Nonetheless, the judgment and a few pass slips note in the English language that the defendant waived a jury trial. Under these circumstances did the defendant knowingly, intelligently, and voluntarily waive his right to a jury trial? **No.**

Facts. The State convicted the defendant of continuous sexual abuse of a child. The defendant pled not guilty but did not execute a written jury waiver and the trial judge did not admonish the defendant regarding his right to a jury trial.

The defendant testified in an appeal abatement hearing focused on determining whether he validly waived his right to a jury trial. He explained that he is a native Spanish speaker and reads little English. He remembered trial counsel bringing an interpreter only to one of the many pretrial settings he attended. On multiple court appearances, he also recalled counsel handing him a blank pass slip to sign "so that trial counsel could prove that [defendant] was present and get a new court date." The four pass slips leading up to trial had check marks next to "trial by the court." However, the defendant testified that he did not know what that meant. On one setting defendant recalled being surprised by a meeting with a probation officer attempting to conduct a presentence investigation report in advance of an open plea he did not want. According to the defendant when he confronted his attorney about this, his attorney explained that it would cost another \$5,000 if he wanted a trial. The defendant also explained that the trial itself was a surprise. The defendant was under the impression that he was appearing for another pretrial setting on the day his case ultimately proceeded to a bench trial.

The probation officer who previously attempted a presentence investigation report testified at the abatement hearing. It was her impression that the defendant was genuinely confused about the posture of his case. He also did not know the potential punishment outcomes and sex offender registration obligations.

Trial counsel testified at the abatement hearing and confirmed his practice of having clients sign blank pass slips that he would later complete with pertinent information. Trial counsel confirmed the defendant did not want an open plea but disputed whether the defendant was aware he had chosen to have a trial before a judge.

The parties stipulated that clerks prepare judgments using software that prepopulates parts of the judgment "including that jury waiver recital if the clerk uses the form for defendants convicted after a bench trial."

The Fifth Court of Appeals in Dallas upheld the defendant's conviction and found that he validly waived his right to a jury trial because boilerplate recitations contained in the auto-populated judgment and the check marks appearing in the English language pass slips.

Analysis 1. Because the waiver of the right to a jury trial is a "waivable-only right" a court may consider the issue on appeal absent a trial objection (as is the case here). The State argues that case law establishes a "presumption of regularity" in judgments that reflect waivers of rights. But regardless of legal presumptions, the record simply fails to establish the State met its burden to show an intelligent and knowing waiver. There are numerous factors for consideration in determining a valid jury trial waiver: (1) whether the defendant knew about his right and the nature of his right, (2) whether the defendant executed a written waiver, (3) whether the trial court provided an admonishment, (4) the defendant's education and background, (5) the level of the defendant's involvement in his defense, (6) the defendant's ability to understand discussions surrounding his waiver, (7) the words and actions of the defendant, (8) discussions with trial counsel about the right to a jury trial, (9) what language the defendant understands, (10) the lack of an objection, and (11) whether there is a docket entry indicating an express waiver. The defendant here does not speak English well, there is no explicit waiver of a jury trial in the record, jury waiver was not discussed in open court, and the pass slips were proven to be of little value given the manner in which they were executed.

Even if the defendant knew he had the right to a jury trial there is no evidence he knew the nature of that right-"a waiver cannot be knowing and intelligent unless the record shows that the defendant at least had sufficient awareness of the relevant circumstances and likely consequences of waiving his right to a jury."

Waiver of jury trial is not only a "waivable-only right" the denial of a jury trial is structural error. This means not only can a court review the error without an objection, but that the error is reversible without an analysis of harm. It is an error that affects the framework of a trial.

Dissenting (Keller, J.). The record supports a waiver of jury trial: "(1) the judgment recites that he waived a jury, (2) pass slips signed by Appellant indicated that his trial would be before the court, (3) a trial was conducted without a defense objection to the absence of a jury, (4) Appellant testified during both phases of trial without objecting to the absence of a jury, and (5) Appellant's motion for new trial failed to complain about the lack of a jury trial."

Comment. Courts of appeal looking for expedient ways to dispose of cases frequently find a waiver to exist simply because something somewhere in the record (often boilerplate) indicates waiver. The Fifth Court is not wrong to recognize presumptions such as judgment regularity (the judgment reflects it so it must be true). But presumptions are just presumptions. They aren't sacrosanct, and they shouldn't operate contrary to logic. It's nice to see the Court of Criminal Appeals essentially say, "hey this case involves actual facts."

Here is probably the most consequential holding in this case:

The parties and majority agree that a violation of a defendant's right to a jury trial is structural error defying a harm analysis because the error affected the framework of the trial. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). So do a number of other courts. This is a question that neither this Court nor the United States Supreme Court has resolved. This Court does not usually recognize structural errors until the United States

Supreme Court identifies them, but we believe resolution of this issue is sufficiently clear that we will deviate from our usual practice and hold that a violation of the federal constitutional right to a jury trial is structural error.