COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1563-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TYRAN N. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Tyran N. Anderson appeals from a judgment entered after the trial court found him guilty of disorderly conduct, contrary to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

WIS. STAT. § 947.01 (1997-98).[2] He contends that his jury trial waiver was statutorily and constitutionally inadequate because the trial court did not engage him in a colloquy confirming the written waiver. Because Anderson's jury trial waiver was not improper, this court affirms.

I. BACKGROUND

¶2 Anderson was charged with disorderly conduct in November 1998. A jury trial was scheduled to occur on December 10, 1999. On that date, defense counsel advised the trial court that he and Anderson had discussed waiving a jury trial in favor of trial to the court. The trial court informed Anderson that he would have to file the waiver of jury trial form. The trial court took a short recess, and Anderson filed a waiver of jury trial form. The trial court adjourned the case until the afternoon. When the proceedings reconvened, the case was presented to the trial court. The trial court found Anderson guilty. Anderson now appeals.

II. DISCUSSION

¶3 Anderson claims that his jury trial waiver was inadequate because the trial court and the State never affirmatively approved and consented to the waiver. He argues that case law requires the trial court to engage the defendant in a colloquy before accepting the written jury waiver. This court disagrees.

¶4 The defendant's right to a jury trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, sec. 7 of the

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Wisconsin Constitution.[3] Whether Anderson was deprived of his constitutional right to a jury trial is a question of constitutional fact that this court reviews as a question of law. *See* ***State v. Cloud***, 133 Wis. 2d 58, 61, 393 N.W.2d 123 (Ct. App. 1986). This court must apply the relevant constitutional principles to the facts of record. *See* ***State v. Mazur***, 90 Wis. 2d 293, 308-09, 280 N.W.2d 194 (1979). Waiver requires "an intentional relinquishment ... of a known right." ***Brookhart v. Janis***, 384 U.S. 1, 4 (1966).

¶5 Wisconsin also requires that a waiver of a jury trial be knowingly made by the defendant in writing or by a statement in open court with the court's approval and the state's consent. *See* WIS. STAT. § 972.02(1). The right to a jury trial can be completely waived in favor of trial by the court. *See* ***State v. Livingston***, 159 Wis. 2d 561, 569, 464 N.W.2d 839 (1991).

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[3] The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.

Article I, sec. 7 of the Wisconsin Constitution provides as follows:

> **Rights of accused.** SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

¶6 The pertinent language of WIS. STAT. § 972.02(1) requires that criminal defendants, except as otherwise provided, be tried by a jury of twelve "unless the defendant waives a jury in writing or by statement in open court or under s. 967.08 (2) (b), on the record, with the approval of the court and the consent of the state."

¶7 It is undisputed here that Anderson's jury waiver was the written alternative referenced in the statute. The document clearly reflects that Anderson signed the document himself, indicating his intent to waive a jury trial. Despite this, Anderson argues that the waiver was inadequate because the trial court did not explicitly approve it, and the State did not explicitly consent to the waiver. Anderson also suggests that ***Livingston*** requires the trial court to engage in a colloquy on the record with the defendant, even if a written waiver is submitted. This court is not persuaded by Anderson's arguments.

¶8 First, he is correct that ***Livingston*** discusses the trial court's duties relative to a defendant's decision to elect a bench trial over a jury trial. In ***Livingston***, our supreme court held

> that any waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally; he and only he has the power and authority to waive his right to a jury trial, and that power and authority is legally effective only by virtue of an affirmative act by him. Neither counsel nor the court nor any other entity can act in any way or to any degree so as to waive on the defendant's behalf his right to trial by jury. The affirmative act by the defendant, in order to constitute a personal waiver, must be such as to comply with at least one of the specific means of effecting a waiver provided in sec. 972.02(1), and the court and the state must consent in order for a waiver to occur in accordance with the statute. The record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed.

Livingston, 159 Wis. 2d at 569. The discussion about the "affirmative act" in ***Livingston*** refers only to the defendant. Clearly, in the instant case, Anderson took the "affirmative act" required when he signed the written waiver form. ***Livingston*** goes on to suggest that, "If the defendant waives the jury 'in writing' under the statute when accepting the written waiver, the judge still should question the defendant as to the voluntariness and understanding of his action." *See* ***id.*** at 570.

¶9 It is undisputed that the trial court did not do so here. Although this court frowns upon the trial court's failure to follow the advice of our supreme court in ***Livingston***, the failure to engage in such colloquy, given the particular facts of Anderson's case, is not fatal. The ***Livingston*** directive was not mandatory, but rather advisory. This court strongly urges this trial court, and all trial courts confronted with a jury trial waiver, to follow the procedure referred to in ***Livingston***, and set forth in ABA Standards Relating to Trial by Jury, 15-1.2(b) (1986). *See* ***Livingston***, 159 Wis. 2d at 570.

¶10 Despite the trial court's failure, this court concludes that Anderson's waiver was not inadequate. As noted, statutorily, Anderson explicitly and personally signed the waiver of a jury trial form, which is sufficient. The question Anderson raises is the failure of the trial court and the State to indicate its acceptance and consent. The statute requires the court to approve the waiver and the State to consent to the waiver. Although the record is sparse with respect to these requirements, it is not barren. The trial court, when advised that Anderson was considering waiving his jury trial, did inform Anderson that he would be required to fill out and file the appropriate form. When Anderson did so, the trial court took a short adjournment and set the bench trial for later that day. The bench

trial did, in fact, take place. Accordingly, the trial court implicitly accepted Anderson's jury trial waiver.

¶11 Similarly, the State willingly proceeded to the bench trial after Anderson filed his waiver of jury trial form. Accordingly, this conduct can be construed to constitute the State's consent to the bench trial. The same analysis applies in concluding that the jury trial waiver was not constitutionally infirm. The record reflects that this decision to forego a jury trial was Anderson's decision, that he was advised by counsel as to the basis for doing so, and that he willingly signed the necessary paperwork.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.