

NEED MORE THAN SIGNED JURY WAIVER

Every person accused of an offense has the right to a jury trial unless that right is understandingly waived in open court. 725 ILCS 5/103—6 (West 2000). The Illinois Supreme Court has stated that a written jury waiver, standing alone, is insufficient to prove a valid waiver of the right to trial by jury. The court said that it never has found a valid jury waiver unless the defendant was present in open court when a jury waiver was at least discussed. It is necessary for a defendant to acknowledge in open court his knowing and understanding waiver of his right to trial by jury. *People v. Lindsey*, 201 Ill.2d 45, 265 Ill.Dec. 616, 772 N.E.2d 1268 (2002); *People v. Scott*, 186 Ill.2d 283, 238 Ill.Dec. 36, 710 N.E.2d 833 (1999). The decision concerning whether to allow a defendant to withdraw a jury waiver is within the trial court's sound discretion. *People v. Montgomery*, 192 Ill.2d 642, 249 Ill.Dec. 587, 736 N.E.2d 1025 (2000).

People v. Spracklen, 335 Ill. App. 3d 768, 772, 781 N.E.2d 1134, 1136—37 (2002)

In reaching our conclusion, we are mindful that “[i]t takes but a few moments of a trial judge's time to directly elicit from a defendant a response indicating that he understands that he is entitled to a jury trial, that he understands what a jury trial is, and whether or not he wishes to be tried by a jury or by the court without a jury. This simple procedure incorporated in the record will reduce the countless contentions raised in the reviewing courts about jury waivers.” (Internal quotation marks omitted.) *Scott*, 186 Ill. 2d at 288 (Bilandic, J., specially concurring).

People v. Ogiela, 2022 IL App (2d) 210429-U, ¶ 55

ORAL WAIVER

For example, section 115-1 of the Code provides that “[a]ll prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a jury unless the defendant waives a jury trial in writing.” 725 ILCS 5/115-1 (West 2016). Yet in *People v. Silas*, 278 Ill. App. 3d 400, 403, 215 Ill.Dec. 432, 663 N.E.2d 443 (1996), we held that “[w]here * * * a defendant has made a knowing oral waiver of his right to a jury trial in open court, the absence of a written jury waiver is harmless error and does not require reversal.”

People v. Conway, 2019 IL App (2d) 170196, ¶ 20, 139 N.E.3d 71, 77–78, reh'g denied (July 15, 2019), appeal denied, 163 N.E.3d 703 (Ill. 2021)

JURY WAIVER AFTER TRIAL COMMENCES

“a motion to waive the jury after commencement of trial [should] be addressed to the sound discretion of the trial court.” *Zemblidge*, 104 Ill.App.3d at 657, 60 Ill.Dec. 239, 432 N.E.2d 1138. A trial is deemed to have commenced after the jury is impaneled and sworn. *People v. Shick*, 101 Ill.App.2d 377, 379, 243 N.E.2d 285 (1968). Thus, the trial court has discretion to deny a jury waiver after the jury is impaneled and sworn, even if testimony has not yet begun.

People v. Rand, 291 Ill. App. 3d 431, 439, 683 N.E.2d 1243, 1248 (1997)

The trial court has discretion to allow a jury waiver after the trial begins because, at that point, the defendant no longer has an absolute right to forgo the jury and choose a bench trial.

.... our cases have appropriately drawn the line, for purposes of defining when a defendant no longer has an absolute right to waive a jury trial, at the moment the jury is sworn. This is the same bright line that defines the start of a trial for double jeopardy purposes, and we see no reason to stray from it here.

While there is a risk that, in some cases, this could result in wasted time for the court—and, even more unfortunately, for prospective jurors—we suspect that such cases will be rare. Wasting a trial judge's time with lengthy voir dire only to turn around and ask the same judge to decide the merits of the case does not strike us as sound trial strategy. Trial courts seeking to avoid the specific result in this case can also swear in the jury as soon as it has been selected, rather than having jurors come back to be sworn in the next day.

However, when Mr. Jordan asked for a bench trial, the jury had not been sworn in. Because, as we now hold, this means that the trial had not yet commenced, Mr. Jordan's right to waive a jury trial remained absolute.

People v. Jordan, 2019 IL App (1st) 161848, ¶ 24, 146 N.E.3d 65, 70

JURY WAIVER FOR RETRIAL

In *People v. Johnson* (1921), 222 Ill.App. 248, the same rule was held to apply where the defendant was granted a new trial by the trial court. Relying upon *Town of Carthage*, as well as several civil cases, the court ruled that the trial court erred in conducting the second trial

as a bench trial when there was no written waiver of the defendant's right to a trial by jury in the record. Noting that “[t]he law jealously guards the right to trial by jury,” the court held that the written waiver executed before the first trial expired after that trial had ended and a new trial awarded. (222 Ill.App. at 251-52.)

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In *People v. Schwartz* (1954), 3 Ill.2d 520, 524, 121 N.E.2d 758, 760, the Illinois Supreme Court cited *People v. Johnson* and stated that a defendant's jury waiver was set aside by a remand for a new trial *de novo*. See also *People v. Hamm* (1980), 100 Mich.App. 429, 298 N.W.2d 896 (holding that a jury waiver was nullified upon declaration of mistrial, and defendant was entitled to retrial before a jury); *United States v. Lee* (6th Cir.1976), 539 F.2d 606 (holding that the right to a jury trial is a fundamental right and a waiver should not be presumed to include second trial); Annot., 46 A.L.R.2d 919, Sec. 5, p. 926; 47 Am.Jur.2d, Jury, Secs. 65-66 (1969).

People v. Mixon, 271 Ill. App. 3d 999, 1002–03, 649 N.E.2d 441, 443–44 (1994)