

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

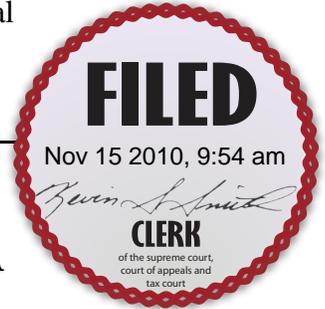
ATTORNEYS FOR APPELLANT:

CHRISTINE A. MAJEWSKI
Law Office of Christine A. Majewski
Mishawaka, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

JOSE L. MACIAS,)

Appellant/Defendant,)

vs.)

No. 20A03-1004-CR-237

STATE OF INDIANA,)

Appellee/Plaintiff.)

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0907-FA-22

November 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Jose Macias appeals from his conviction of Class A felony Dealing in Cocaine.¹ Macias contends that his waiver of his right to jury trial was not knowing and voluntary and that the State failed to produce sufficient evidence to rebut his entrapment defense. We affirm.

FACTS AND PROCEDURAL HISTORY

At some point on or before June 24, 2009, a concerned citizen named “Hugo” contacted Elkhart Sheriff’s Department undercover Officer “UC193” and informed UC193 that cocaine powder was being sold from a certain trailer in the Roxbury Trailer Park. (Tr. 30-31). Acting as an intermediary, Hugo contacted Macias, who lived in the trailer in question, and Macias shortly thereafter telephoned UC193. (Tr. 33). UC193 agreed to purchase one half ounce of cocaine from Macias for \$350.00. (Tr. 33). The next day, UC193 went to Macias’s trailer and was allowed in. (Tr. 35). Macias removed 6.49 g of cocaine base from his pocket, which UC193 purchased for \$210.00. (Tr. 35, 92). Macias referred to the amount as “two balls[,]” which was street terminology for approximately two eighths or one quarter ounce of cocaine. Tr. p. 36. At no point did Macias express any reservations about completing the transaction. (Tr. 32-37). After the sale, Macias indicated that he might be able to have more cocaine for sale the next day and tentatively arranged another sale to UC193 for “later in the week.” Tr. p. 45.

On July 27, 2009, the State charged Macias with Class A felony dealing in cocaine. (Appellant’s App. 2). The trial court found Macias guilty as charged and

¹ Ind. Code § 35-48-4-1(b)(1) (2008).

sentenced him to thirty-two years of incarceration and a \$10,000.00 fine, with the fine suspended. (Appellant's App. IV).

DISCUSSION AND DECISION

I. Whether Macias Knowingly and Voluntarily Waived his Right to Trial by Jury

Macias contends that his waiver of his right to a jury trial was not knowing, voluntary, and intelligent.

The United States and Indiana Constitutions guarantee the right to trial by jury. *See Poore v. State*, 681 N.E.2d 204, 206 (Ind. 1997); *Gonzalez v. State*, 757 N.E.2d 202, 204 (Ind. Ct. App. 2001), *trans. denied*.

....
A person charged with a felony has an automatic right to a jury trial. *Poore*, 681 N.E.2d at 207. We will presume that a defendant did not waive this right unless he affirmatively acts to do so. *Id.* To constitute a valid waiver of the right to a jury trial, the defendant's waiver "must be voluntary, knowing and intelligently made with sufficient awareness of the relevant circumstances surrounding its entry and its consequences." *Gonzalez*, 757 N.E.2d at 206 (quoting *Williams v. State*, 159 Ind. App. 470, 474, 307 N.E.2d 880, 883 (1974), *trans. denied*). *See also Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984). The defendant must express h[is] personal desire to waive a jury trial and such a personal desire must be apparent from the court's record, whether in the form of a written waiver or a colloquy in open court. *Gonzalez*, 757 N.E.2d at 205.

O'Connor v. State, 796 N.E.2d 1230, 1233-34 (Ind. Ct. App. 2003) (footnote omitted).

At a pretrial hearing on February 18, 2010, the following exchange occurred:

THE COURT: All right. Now, Mr. Macias, you have the right to have 12 persons, citizens of the country decide your guilt or innocence in this action. Do you understand that?

MR. MACIAS: Yes.

THE COURT: And are you willing to give up that right, have a trial to the Court, and I will make the decision on guilt or innocence without a jury?

MR. MACIAS: Yeah. Just before you.

THE COURT: Is that agreeable?

MR. MACIAS: Yes.

THE COURT: And is that what you want?

MR. MACIAS: Yes.

THE COURT: Either of you, counsel, have any questions on the waiver?

[Macias's Counsel]: No, your honor.

[Prosecutor]: No, your honor. The state also waives its right to a jury trial.

Tr. p. 19.

The above exchange clearly establishes that Macias knowingly, intelligently, and voluntarily waived his right to a jury trial. *See O'Connor*, 796 N.E.2d at 1234 (concluding that waiver was valid when defendant waived jury trial after being advised that she had right to trial by twelve persons and that waiver would result in the trial court alone hearing the case). Macias does not identify what other advisements should have been made, and we are aware of no case law requiring more than the trial court gave him here.

Macias also seems to argue that the later invocation of his right to jury trial should act as a withdrawal of his earlier waiver, even if valid. "Once appellant ha[s] effectively waived his right to trial by jury, the withdrawal of the waiver rested within the sound discretion of the trial court." *Woodson v. State*, 501 N.E.2d 409, 411 (Ind. 1986). "Although the right to a jury trial is of fundamental dimension, one who knowingly relinquishes that right has no constitutional right to withdraw that relinquishment or waiver." *Hutchins v. State*, 493 N.E.2d 444, 445 (Ind. 1986). On March 8, 2010, the day on which Macias's bench trial was to start, the following exchange occurred:

THE COURT: ... Mr. Macias, you understand that you have the right to a trial before a jury. Correct?

MR. MACIAS: Yes.

THE COURT: And you're wanting to waive that trial by jury and have a trial to the Court. Is that correct?

MR. MACIAS: Before a jury. I want a trial before a jury.

[Prosecutor]: Judge, if I may. The Court's record should reflect that back on February 18, 2010, the defendant made a knowing and voluntary waiver of his right to a jury trial. In reliance upon that, the Court has not called a jury today; and as the state is preparing for a bench trial which was scheduled to commence at 10:30 in the morning, the state, in reliance upon the defendant's representation, also waived its right to a jury trial.

[Macias's Counsel]: Your Honor, I believe that Jose is expressing that he's changed his mind. That's all I can say.

THE COURT: It is 11 o'clock on Monday, March 8. This matter was set for a jury trial March 8, 2010, a long time ago. And when the defendant appeared on February 18, 2010, he agreed that he would be tried to the Court. He made that waiver of trial by jury in open court on February 18, 2010. The state also waived its right to a trial by jury.

Now we're here on the day of the jury -- or the bench trial -- excuse me -- and the bench trial was scheduled to begin at 1:30 p.m. today. We have given the courtroom to another court to use for a jury trial. We did not call a jury because this defendant waived his right to a trial by jury. We moved this case up from 1:30 p.m. to approximately 10:30 a.m. so that we could get this case started early. It would appear that the defendant has now changed his mind.

It would be clear to me that we're not going to have a jury trial today, but it's also clear to me that the defendant has, in fact, waived his right to trial by jury, and he's given it up.

I remember specifically questioning Mr. Macias on February 18 about his waiver. He indicated it was knowing and voluntary.

The state did not waive its right to a jury trial until such time as the defendant had clearly, knowingly, and with the advice of his counsel given up his right to a jury trial.

So we're going to proceed with a bench trial today. It would appear that the defendant is at least potentially trying to game the system, take advantage of the situation.

In any event, we'll proceed. The -- the record reflects that the defendant waived his right to a trial by jury, and in addition to that, everyone has relied upon his waiver of his trial by a jury.

He's here. There is no jury. We could have had a jury. We're not having a jury because the defendant told us he didn't want one. So we're going to proceed with his bench trial today.

Macias has failed to show that the trial court abused its discretion in denying his request to withdraw his jury trial waiver. Macias has failed to show any prejudice from the trial court's refusal to accept his withdrawal or that he was misled in any way, and has not pointed to any change in circumstances that might warrant reevaluation by the trial court. *See Hutchins*, 493 N.E.2d at 446 (“He fails to enlighten this Court in any specific sense as to how the case for the defense was changed or harmed and therefore fails to demonstrate an abuse of discretion on the part of the trial court in denying his request for a jury trial.”), *Woodson*, 501 N.E.2d at 411 (“There is nothing in this record to demonstrate that Baratz misled appellant in any way, or is there any demonstration of any change in circumstance which would cause a valid reevaluation of appellant's waiver.”). Moreover, given the timing of Macias's request, we cannot say that the trial court's suspicion that Macias was trying to “game the system” was entirely unreasonable. The trial court did not abuse its discretion in this regard.

II. Whether the State Produced Sufficient Evidence to Rebut Macias's Entrapment Defense

When reviewing the sufficiency of the evidence, we neither weigh the evidence nor resolve questions of credibility. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995). We look only to the evidence of probative value and the reasonable inferences to be drawn therefrom which support the verdict. *Id.* If from that viewpoint there is evidence of probative value from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt, we will affirm the conviction. *Spangler v. State*, 607 N.E.2d 720, 724 (Ind. 1993).

The defense of entrapment is set forth in Indiana Code section 35-41-3-9 (2008), which provides as follows:

- (a) It is a defense that:
 - (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
 - (2) the person was not predisposed to commit the offense.
- (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

Once an entrapment defense is raised, the State bears the burden of showing that the defendant was predisposed to commit the crime beyond a reasonable doubt. *Dockery v. State*, 644 N.E.2d 573, 577 (Ind. 1994). Factors that indicate a predisposition to sell drugs include a knowledge of drug prices, use and understanding of terminology of the drug market, solicitation of future drug sales, and multiple drug sales. *Jordan v. State*, 692 N.E.2d 481, 484 (Ind. Ct. App. 1998). Predisposition may also be established by evidence that the defendant could readily access sources to buy contraband in a short period of time. *Smith v. State*, 565 N.E.2d 1059, 1063 (Ind. 1991).

Here, although UC193, through Hugo, initially approached Macias to arrange a drug purchase, there is no indication of any coercion or undue influence. The evidence most favorable to the verdict indicates that Macias telephoned UC193 “a little while” after UC193 had Hugo telephone Macias to arrange a drug purchase. Macias gave UC193 his address and negotiated with him a sale of cocaine for a fair market price, indicating a knowledge of drug prices. Macias showed no hesitation in allowing UC193 into his residence or in producing the cocaine he sold to him. Macias referred to the amount of cocaine he sold to UC193 as “two balls,” which is street terminology for

approximately one quarter ounce of cocaine. Finally, Macias indicated that he might be able to have more cocaine for sale the next day and tentatively arranged another sale for “later in the week.” In summary, the State produced ample evidence that Macias was predisposed to deal cocaine and that UC193 did nothing more than provide him with the opportunity to do so, which does not constitute entrapment. The State produced sufficient evidence to rebut Macias’s claim that he was entrapped.

We affirm the judgment of the trial court.

DARDEN, J., concurs in result.

BROWN, J., concurs.