Montana Law Review Online

Volume 79 Article 13

4-3-2019

PREVIEW: *City of Kalispell v. Salsgiver*: Can a Default of Appearance Waive the Right to a Jury Trial for a "Serious" Misdemeanor?

Britton Fraser
Alexander Blewett III School of Law

PREVIEW: *City of Kalispell v. Thomas Salsgiver*: Can a Default of Appearance Waive the Right to a Jury Trial for a "Serious" Misdemeanor?

Britton Fraser

Oral argument is scheduled for 9:30 a.m. on Friday, April 5, 2019 at the University of Montana's George Dennison Theater in Missoula. Appearing for the Appellant is Nick Aemisseger, Regional Deputy Public Defender. Appearing for Appellee is Brad Fjeldheim, Assistant Attorney General for the State of Montana.

I. INTRODUCTION

City of Kalispell v. Thomas Salsgiver asks the Court to decide whether the Montana Constitution's waiver of the right to jury trial by default of appearance, when applied to a "serious" misdemeanor, violates the federal constitutional right to a jury trial.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

Thomas Salsgiver was arrested on March 17, 2015 on one count of Partner Family Member Assault ("PFMA") and one count of Criminal Mischief.[2] Because it was Salsgiver's first PFMA charge, it constituted a misdemeanor with a maximum sentence of one year in prison.[3] At his arraignment, Salsgiver signed an Order for Conditions of Release that required him to "personally appear for all court proceedings" and warned that his "[f]ailure to appear [would] result in a waiver of jury trial."[4] The municipal court informed him of the date and time of the next hearing.[5] On the date of the hearing, Salsgiver failed to personally appear, but his public defender was present; the municipal court scheduled a bench trial

[1] Appellant's Opening Brief at 1, *City of Kalispell v. Salsgiver*, https://supremecourtdocket.mt.gov/APP/connector/5/842/url/321Z246_03WCCVM23003RME.pdf (Mont. Jan. 5, 2018) (No. DA 16-0445); Order at 1, *City of Kalispell v. Salsgiver*, https://supremecourtdocket.mt.gov/APP/connector/8/890/url/321Z31S_0C35QCM1D000006.pdf (Mont. Jan. 25, 2019) (No. DA 16-0445). Salsgiver also appeals aspects of the fines and incarceration imposed by the municipal court. However, the Supreme Court's Order requesting supplemental briefs indicates that its focus will be the jury trial right under the Montana and U.S. Constitutions.

[2] Appellant's Opening Brief, *supra* note 1, at 1.

[3] *Id.*; MONT. CODE ANN. § 45-5-206 (2019).

[4] Appellant's Opening Brief, *supra* note 1, at 2.

[5] *Id.*

and issued a warrant for Salsgiver's arrest.[6] The trial date eventually fell on November 12, 2015.[7]

About six months later, authorities arrested Salsgiver pursuant to the bench warrant, and the municipal court arraigned him, informed him of his trial date, and released him.[8] After his release, Salsgiver filed a motion for jury trial, arguing that his failure to appear was not a voluntary, knowing, and intelligent waiver of his right to a jury trial as the Sixth Amendment of the U.S. Constitution requires, but the municipal court denied the motion.[9] At the bench trial, Salsgiver continued to object that he never waived his right to a jury trial; nonetheless, the trial continued, and the municipal court found him guilty on both charges.[10]

Salsgiver appealed to the district court on two issues: first, whether a defendant charged with a crime carrying a maximum sentence of one year has a right to a jury trial under the Sixth and Fourteenth Amendments of the United States Constitution; and second, if so, whether the State met its burden to show a knowing, intelligent, and voluntary waiver of that right.[11] The district court concluded that Salsgiver's failure to appear despite the municipal court's warning about the consequence of his absence was a sufficient reason to revoke his right to a jury trial.[12] Salsgiver appealed to the Montana Supreme Court.[13]

III. SUMMARY OF THE ARGUMENTS

A. Appellant Thomas Salsgiver

Salsgiver argues that in matters involving a "serious" offense, under the Sixth Amendment, a defendant may only waive the jury trial right knowingly, intelligently, and voluntarily.[14] Citing

---

[6] *Id*. at 4–5.

[7] Appellee's Response Brief at 4, *City of Kalispell v. Salsgiver*, https://supremecourtdocket.mt.gov/!toCaseResults?documentId=321Z27J_06FMBXD1F00000S&fileType=pdf (Mont. June 17, 2018) (No. DA 16-0445).

[8] *Id*. at 4–5.

[9] Appellant's Opening Brief, *supra* note 1, at 5–6; Appellee's Response Brief, *supra* note 7, at 5.

[10] Appellant's Opening Brief, *supra* note 1, at 6–7.

[11] Appellee's Response Brief, *supra* note 7, at 10.

[12] *Id*. at 11–14.

[13] Appellant's Opening Brief, *supra* note 1, at 10.

[14] *Id*. at 12–13. *See also*, Johnson v. Zerbst, 304 U.S. 458 (1938) (establishing that federal constitutional waivers are only valid if made knowingly, voluntarily, and intelligently, which means that the defendant must have the capacity to understand the rights he is waiving and his waiver may not be coerced).

Duncan v. Louisiana,[15] he defines a "serious" offense as one that carries a possibility of more than six months in prison, regardless of whether it is classified as a misdemeanor or felony.[16] Salsgiver also argues the waiver provision in the Order for Conditions of Release he signed did not constitute a knowing, intelligent, and voluntary waiver of a jury trial.[17] He emphasizes that waiver "may not be accepted . . . unless . . . made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" and that it must be "a free and deliberate choice rather than intimidation, coercion or deception;"[18] Salsgiver argues that signing a form as a condition of being released, without counsel present, is not a "free and deliberate choice."[19]

In contrast, rather than articulating a standard for waiver like the federal system, the Montana Constitution provides for waiver of the jury right by default of appearance.[20] Salsgiver points out that the Montana cases on which the City of Kalispell relies only allow waiver by default of appearance in cases involving "petty" offenses—not the "serious" PFMA offense Salsgiver faced.[21] When applied to "serious" offenses, Salsgiver argues that the waiver provision under the Montana Constitution is superseded by the U.S. Constitution's requirement that a defendant facing a serious charge can only waive his jury trial right knowingly, intelligently, and voluntarily.[22] He contends that "mistake and negligence" cannot form the basis of waiver.[23]

B. Appellee City of Kalispell

The City of Kalispell ("the City") concedes that Salsgiver had a right to a jury trial under the Sixth Amendment and Montana Constitution for the PFMA charge.[24] However, it argues that Salsgiver's default of appearance at the Omnibus Hearing was a

---

[15] 391 U.S. 145, 149 (1968); *see also* Baldwin v. New York, 399 U.S. 66, 69 (1970).

[16] Appellant's Opening Brief, *supra* note 1, at 15–16.

[17] *Id.* at 25.

[18] *Id.*

[19] *Id.* at 25–27 (internal quotations and citations omitted).

[20] MONT. CONST. art. II, § 26.

[21] Appellant's Opening Brief, *supra* note 1, at 16–17; *see also* City of Missoula v. Cox, 196 P.3d 452 (Mont. 2008); State v. Trier, 277 P.3d 1230 (Mont. 2012); City of Missoula v. Girard, 303 P.3d 1283 (Mont. 2013).

[22] Supplemental Brief of Appellant at 2–5, *City of Kalispell v. Salsgiver*, https://supremecourtdocket.mt.gov/!toCaseResults?documentId =321Z32P_0CRR0YEDT000006&fileType=pdf (Mont. Feb. 22, 2019) (No. DA 16-0445).

[23] *Id.* at 8–9.

[24] Appellee's Response Brief, *supra* note 7, at 17.

valid waiver under both the Montana and the federal constitutions.[25] In support, the City contends that no specific form of waiver is required for a defendant to validly waive his jury trial right.[26] Furthermore, it argues that federal courts have upheld Sixth Amendment waivers "when a court orders a defendant's compliance and the defendant violates that order."[27] The City claims that when Salsgiver signed and then violated the conditions of release form that required his personal appearance at all court proceedings, he implicitly waived his jury trial right.[28]

This waiver, according to the City, was made knowingly, intelligently, and voluntarily, and was consequently valid under the U.S. and Montana Constitutions.[29] It argues that Montana's totality of the circumstances test set forth in *State v. McCartney*[30] appropriately determines valid waivers in misdemeanor offenses.[31] The City also asserts there is nothing in the record to suggest Salsgiver either signed the conditions of release or failed to appear involuntarily.[32] It argues that he waived his right knowingly and intelligently in compliance with the Sixth Amendment.[33] Because Salsgiver signed both an initial statement of rights that reflected his right to trial by jury and a conditions of release form that stated he would waive the right to jury by failure to appear, the City asserts that he knew that his failure to appear would waive his right to a jury trial.[34] Additionally, the City cites the United States Supreme Court's decision in *Adams v. United States ex rel. McCann*[35] to support its contention that absence of counsel does not prohibit a defendant from validly waiving his right to a jury trial.[36] The City concludes that the totality of circumstances demonstrate that Salsgiver's default of appearance was a valid waiver under Montana's constitution, and his signature on court documents

---

[25] Supplemental Brief of Appellee at 2, *City of Kalispell v. Salsgiver*, https://supremecourtdocket.mt.gov/!toCaseResults?documentId=321Z32T_0CVPCYH83000006&fileType=pdf (Mont. Feb. 25, 2019) (DA 16-0445).

[26] *Id*. at 3; *see also* United States v. Robinson, 8 F.3d 418, 422 (7th Cir. 1993); United States v. Cochran, 770 F.2d 850, 851 (9th Cir. 1985).

[27] Supplemental Brief of Appellee, *supra* note 25, at 4; *see also* United States v. Goldberg, 67 F.3d 1092, 1099–1101 (3rd Cir. 1995).

[28] Supplemental Brief, of Appellee *supra* note 25, at 7.

[29] *Id*. at 10.

[30] 585 P.2d 1321, 1325 (Mont. 1978).

[31] Supplemental Brief of Appellee, *supra* note 25, at 11, citing *McCartney*, 585 P.2d at 1325.

[32] *Id.* at 16.

[33] *Id*. at 17.

[34] *Id.* at 19; *See, e.g.* State v. Walker, 188 P.3d 1069, 1076 (Mont. 2008) (holding that documents signed by a defendant may be used to demonstrate awareness of individual rights).

[35] 317 U.S. 269, 272–73 (1948).

[36] Supplemental Brief of Appellee, supra note 25, at 20.

demonstrated a voluntary, knowing, and intelligent waiver of his right to jury trial under the federal constitution.[37]

IV. ANALYSIS

Both the City and Salsgiver concede that the Montana Constitution is unambiguous that upon default of appearance a case may be tried without a jury.[38] For felony matters,[39] the Montana Supreme Court has previously ruled that waiver may only be accomplished upon written consent of the parties, as well as have been made knowingly, voluntarily, and intelligently.[40] In the federal system, courts have allowed waiver of the right to a jury trial to take a variety of forms, but the fundamental right to a jury trial extends to crimes punishable by six months or more of imprisonment.[41]

Until this matter, the default of appearance provision of the Montana Constitution had only been applied to cases involving crimes with less than six months of imprisonment, which consequently did not implicate the federal right to a jury trial.[42] Therefore, the Montana Supreme Court must determine whether, when applied to crimes with a potential sentence of six months or more of imprisonment, Article II's default of appearance provision infringes upon a defendant's right to a jury trial under the U.S. Constitution.

Salsgiver advocates applying the totality of the circumstances test from *McCartney* to require a knowing, intelligent, and voluntary waiver for these "serious" misdemeanors. This is a different approach from previous Montana cases involving waiver by default of appearance, which did not implicate any federal rights, so the Court only asked whether the defendant demonstrated an inability to comply with the court order mandating personal appearance.[43] Yet, the City's contention that no specific form or mode of waiver is necessary to waive a federal right seems just as applicable to the matter as a knowing, intelligent, and voluntary analysis. Therefore, to account for this new area that has not yet

---

[37] *Id*.

[38] Supplemental Brief of Appellant, *supra* note 18, at 5–6; Supplemental Brief of Appellee, *supra* note 20, at 2; MONT. CONST. art. II, § 26.

[39] MONT. CODE ANN. 45–2–101(23) (establishing that crimes in which the sentence imposed upon conviction is death or imprisonment in a state prison for a term exceeding one year).

[40] State v. Dahlin, 289 Mont. 182, 188 (1998); State v. Reim, 374 Mont. 487, 498 (2014); *see also* MONT. CODE ANN. § 46–16–110(3).

[41] Singer v. U.S., 380 U.S. 24, 36–37 (1965); Baldwin v. New York, 399 U.S. 66, 68–69 (1970).

[42] Appellant's Opening Brief, *supra* note 1, at 16.

[43] Supplemental Brief of Appellant, *supra* note 22, at 10.

come before the Court, the Court could address the intersection of the federal and Montana constitutional rights by essentially creating a three "tiered" classification for waivers of the jury trial right.[44] The first tier would remain waiver by default of appearance for "petty" offenses, which both parties agree is valid under the Montana and federal Constitutions. The second tier would address the ostensible area of conflict between the two constitutions, which would allow for a waiver by default of appearance to be valid if it was knowingly, intelligently, and voluntarily made.[45] This is the classification at-issue here. The third tier would encompass waiver in felony cases, which is already addressed through Montana statutes and the U.S. Constitution.[46]

If applied here, the *McCarthy* standard of a knowing, intelligent, and voluntary waiver based on the totality of the circumstances would likely favor the City. Salsgiver's claim that signing the conditions of release form was not a "free and deliberate" choice is misplaced; the relevant, uncoerced choice was Salsgiver's failure to appear at the hearing because that was when he allegedly waived his jury trial right. Although there may have been an element of coercion involved when Salsgiver signed the conditions of release form, it is likely not enough to overcome the warnings contained in the conditions of release that speak to the "knowing and intelligent" part of the analysis. These provisions warned Salsgiver of the consequence of his failure to appear, which is a separate inquiry from whether the actual failure to appear was "voluntary" or not.[47]

Relying on the *Johnson* standard for valid federal constitutional waivers, the City's argument that Salsgiver's

---

[44] This "tiered" system is not explicitly mentioned by either party but could be the natural result of Appellee's reasoning and strike a balance between the provisions of Article II § 26 of Montana's Constitution and the Sixth Amendment of the U.S. Constitution.

[45] This would be unlike the standard for waiver by default of appearances for "petty" offenses, as in those cases the burden of proof is on the defendant to show some inability to comply with the court order to be present at the proceeding. Here, the burden to show waiver would switch to the State to demonstrate the knowing, intelligent and voluntary waiver. *See* U.S. v. Miller, 382 F. Supp. 2d 350, 362 (N.D.N.Y. 2005) (discussing burden-shifting in Miranda waivers).

[46] MONT. CODE ANN. § 46–16–110(3); Singer v. U.S., 380 U.S. 24, (1965).

[47] Moran v. Burbine, 475 U.S. 412, 421 (1986) (discussing how "voluntarily" and "knowingly and intelligently" are analyzed separately in Miranda waivers); State v. Nixon, 298 P.3d 408, 417 (Mont. 2013) (discussing the same distinction between "voluntarily" and "knowingly and intelligently" for state-level Miranda waivers).

acceptance of the conditions of release and default of appearance was made knowingly and intelligently would likely succeed in the proposed second-tier classification. The documents informed Salsgiver of his right to a jury trial and warned him he would waive that right by failing to appear; Salsgiver likely met the knowing and voluntary requirements because his signature after reading the documents evidenced his awareness of his rights and how they could be lost.[48] However, the City presents no evidence that Salsgiver voluntarily failed to appear.[49] This may not be dispositive, however, as the Court may find that, in the absence of any "intimidation, coercion, or deception" preventing Salsgiver from appearing, his awareness of the consequence of failing to attend demonstrates his voluntary choice not to appear.

V. CONCLUSION

The three-tiered classification system is one possible analytical framework through which the Supreme Court may resolve this dispute. At the very least, it is likely that the Court will find that the knowing, intelligent, and voluntary standard to demonstrate waiver applies to crimes in Montana that carry a sentence of six months or more. With that standard in mind, the voluntariness of Salsgiver's failure to appear will likely be the linchpin deciding the outcome of this matter.

[48] Supplemental Brief of Appellee, *supra* note 25, at 19; *see also* State v. Walker, 188 P.3d 1069, 1076–77 (Mont. 2008) (finding that explaining all the "nuances or effects of waiving the right to a jury trial is unnecessary").

[49] Supplemental Brief of Appellee, *supra* note 25, at 16–17.