

## Having no standard jury trial waiver form is bad form

02/05/13

The New Jersey court system relies upon a straggling variety of standard forms used each day for a variety of purposes. In criminal cases, there are standard forms used to memorialize the arraignment of a defendant on a new indictment, a form that must be filled out by a defendant seeking to enter a guilty plea, a form to advise a criminal defendant of his right to appeal, and countless others. It is therefore quite surprising that our court system does not employ a standardized form allowing a criminal defendant to waive his constitutional right to a jury trial and to consent to being tried before a judge. Unfortunately, the failure to have such a standardized form, and the failure of a trial judge to adequately explore with a particular criminal defendant his right to a jury trial, and whether his waiver of that right was knowing and voluntary, has led to the reversal of a very serious conviction.

In the recently decided case of *State v. Blann*, decided by the Appellate Division of the Superior Court on January 9, 2013, the defendant faced very serious first degree robbery charges. Following a bench trial, the defendant was convicted and sentenced to an 18-year prison term, with 85% of that prison term required to be served before being considered for parole. On appeal, the defendant argued that his waiver of his right to a jury trial was ineffective, and the Appellate Division agreed, granting him a new trial.

In ordering a new trial, the Appellate Division noted that our Court Rules contain a specific provision allowing a criminal defendant to waive his right to a jury trial. The rule, Rule 1:8-1(a) requires that a request to waive a trial by jury be placed in writing. In *Blann*, there was no written waiver as required. However, the failure to have memorialized the waiver of a jury trial was not the reason that Mr. Blann's conviction was reversed. This is so because our courts have previously held that the absence of a written waiver of the right to a trial by jury does not deprive the defendant of any substantive rights so long as "the trial record indicates a thorough understanding of, an unequivocal assent in open Court by the defendant, personally, to his attorney's agreement to waive jury trial."

Therefore, the Appellate Division in the *Blann* case analyzed the record of the trial proceedings to determine whether the trial court had conducted an inquiry to determine whether the waiver of the right to a jury trial was thoroughly understood by the defendant. The Appellate Division noted that the trial court brought up the issue of the defendant's waiver of the jury trial on two occasions. However, on each of those occasions, the inquiry was limited to whether the defendant wanted to be tried before the court instead of by a jury. Weighing the limited expiration of whether the defendant understood his right to a jury trial against prior written court opinions on the issue, the Appellate Division in *Blann* concluded that:

there is nothing in this record from which we can conclude that Blann's waiver was voluntary and knowing. There was no signed jury waiver form as required by Rule 1:8-1(a). The trial judge engaged in no colloquy with defendant to ascertain his understanding of his constitution right to a jury trial and whether his request to waive that right was knowing and voluntary, and made no findings to that effect on the record.

Of the three Appellate Division Judges to hear the appeal in *State v. Blann*, one filed a dissenting opinion. Although the dissent agreed with the holding of the majority that the trial judge's handling of the jury waiver was inadequate, he concluded that reversal was not warranted. The fact that there was a dissenting opinion in this case in the Appellate Division will permit the State to have this matter reviewed by the New Jersey Supreme

Court as a matter of right. It is to be expected that the State will pursue such an appeal, and the Monitor will monitor the issue closely.

The dissenting opinion in the *Blann* case observed that there was a type of written jury trial waiver form available in Atlantic County, where the Blann case was tried. That form, which is used in other counties in New Jersey, states in its entirety:

The above-named defendant, charged with \_\_\_\_\_, having been advised of the nature of the charge(s) against him/her and of him/her right to trial by jury, does hereby waive trial by jury, and requests to be tried by the Court.

Notwithstanding that a type of written waiver form is available in some counties, even the dissent agreed that no official form for use throughout the State has been promulgated, and that current practice in New Jersey courts regarding the waiver of a right to trial by jury should be re-examined so that trial courts are obligated to conduct a more searching inquiry than is currently customary of whether a defendant understands his right to trial by jury, and wishes to knowingly and voluntarily waive that right.

What makes this issue even more troubling is that it has been lingering around our court system for several years, without resolution. In a 2007 report of the Supreme Court Criminal Practice Committee, a recommendation was made that a standardized form of jury trial waiver be promulgated that contains a much more detailed advisement to a criminal defendant of his right to jury trial, and the effect of a waiver of jury trial. The Supreme Court Criminal Practice Committee made this recommendation in light of a 2006 opinion in a case known as [State v. Tyrone Henry](#) in which the same issue raised in *State v. Blann* had been raised. The portion of the Supreme Court Criminal Practice Committee Report. It does not appear that any action was taken on this recommendation, and the failure to act has led directly to the issues described in the *State v. Blann* case.

The time has come for our courts to revise Rule 1:8-1(a) to require an on-the-record and searching inquiry of the defendant to determine whether a request to waive the right to trial by jury is a knowing and voluntary one, and to issue a standardized form to be used throughout the State to memorialize, in writing, a defendant's knowing and voluntary waiver of his right to trial by jury.

#### **Attorney**

- Darren M. Gelber

#### **Practice**

- Criminal Defense