

CHAPTER 2

JURY TRIAL

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CHAPTER 2

JURY TRIAL

I. OVERVIEW

A. JURY NULLIFICATION

The right to trial by jury is one of the most important of our legal system. There are movements afoot to reduce the right or reduce the amount of control lawyers have over the case.

Article I, Section 19 of the Constitution of Indiana provides: “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.” One definition of jury nullification is “the right of the jury to return a verdict of not guilty despite the law and the evidence where a strict application of the law would result in injustice and violate the moral conscience of the community,” although a jury is not permitted to disregard or ignore the law. Holden v. State, 788 N.E.2d 1253 (Ind. 2003). It is improper for a court to instruct a jury that they have a right to disregard the law. Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994).

The principle of jury nullification in criminal cases exists in the Constitution of only four states: Maryland, Oregon, Georgia, and Indiana. Despite efforts of the Indiana Supreme Court to nullify this constitutional provision, it is still valid and must be zealously defended.

Walden v. State, 895 N.E.2d 1182 (Ind. 2008) (Rucker, J., dissenting and suggesting that the following instruction be given in guilt phase of habitual offender trials, “Even where the jury finds that the State has proven the statutory elements of the offense beyond a reasonable doubt, the jury still has the unquestioned right to determine whether in this case returning a verdict of guilty promotes fairness and the ends of justice”).

Holden v. State, 788 N.E.2d 1253 (Ind. 2003) (although holding that trial court did not err in refusing to give defense instruction telling jury of its right “to refuse to enforce law’s harshness when justice so requires,” Court did not say that a nullification instruction would never be appropriate and did not say that attorneys may not argue nullification).

Note: Holden provides an interesting history of jury nullification debate and seems to indicate that permitting the jury to construe the law for itself, while not disregarding the law completely, is the proper compromise. Such an instruction may succeed in some instances.

B. RIGHT TO TRIAL BY JURY APPLIES TO MISDEMEANORS AND INFRACTIONS TOO

Indiana Criminal Rule 22 regulates the right in misdemeanor cases, requiring the accused to request a jury at least 10 days prior to the first scheduled trial date. Failure to make the request is considered a valid waiver, as long as the record reflects the accused was advised (orally by the court or in writing) of the right and the consequences. See section III on page 2-9.

Article I, § 20 of the Indiana Constitution provides: “In all civil cases, the right of trial by jury shall remain inviolate.” Thus, a person accused of speeding, or any other traffic infraction has the right to a jury trial. Cunningham v. State, 835 N.E.2d 1075 (Ind. Ct. App. 2005).

Gates v. Indianapolis, 999 N.E.2d 592 (Ind. Ct. App. 2013) (Ind. Const. Art. 1, § 20 confers right to jury trial for alleged violations of pet-related ordinances because the nature of the action was legal, not equitable, and the action was quasi-criminal).

Schumm v. State, 886 N.E.2d 781 (Ind. Ct. App. 2007) (although once criminal in nature, traffic infractions are now civil and subject to Article I, § 20 of the Indiana Constitution).

Reynolds v. State, 698 N.E.2d 390 (Ind. Ct. App. 1998) (Court rejected claim that Indiana and U.S. Constitution guarantee defendant a jury trial on his refusal to submit to chemical breath test, because the refusal statute is quasi-administrative in nature).

DeCola v. State, 113 N.E.3d 252 (Ind. Ct. App. 2018) (because expungement was not triable by a jury at common law, petitioners seeking expungement are not entitled to a jury trial).

C. RIGHT TO JURY TRIAL AND “RECIDIVIST FACTOR”

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), Court held that other than a fact of prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See also Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004).

Bunting v. State, 854 N.E.2d 921 (Ind. Ct. App. 2006) (in operating while intoxicated with prior conviction prosecution, defendant was not denied his rights under U.S. and Indiana Constitutions to have a jury determine whether he had a prior conviction for OWI, after he stipulated to fact, he had prior conviction; State alleged the existence of a sentencing enhancement factor, not the commission of a separate crime with discrete elements).

U.S. v. O’Brien, 130 S.Ct. 2169 (2010) (machine gun provision of 18 U.S.C. § 924(c)(1)(B)(ii), which imposes 30-year mandatory minimum sentence when the firearm used in certain crimes is a machine gun, is an element of the offense that must be proved to a jury beyond a reasonable doubt, rather than a sentencing factor to be proved to the judge at sentencing).

Hitch v. State, 51 N.E.3d 216 (Ind. 2016) (trial court’s determination at sentencing that defendant committed a crime of domestic violence, which rendered him ineligible to possess a firearm, did not violate his 6th Amendment right to a jury trial).

Cf.

Horton v. State, 51 N.E.3d 1154 (Ind. 2016) (failure to confirm defendant’s personal waiver of jury trial before proceeding to a bench trial on second phase of a D-felony domestic battery charge based on a prior conviction was fundamental error).

Saylor v. State, 55 N.E.3d 354 (Ind. Ct. App. 2016) (defendant’s guilty plea to his habitual offender charge was not knowing, voluntary, and intelligent because he did not personally waive his right to jury trial).

D. WAIVER

Record must reflect intelligent and voluntary waiver of right to jury trial. For black letter law in felony cases, see II.F. on page 2-6. For misdemeanor cases see III.B.1(d) on page 2-11.

1. Felony cases – cannot waive unless prosecutor and court agree

See II.B. on page 2-3.

2. Misdemeanor cases – must request jury trial at least 10 days before first scheduled trial date

See III.B.1(d) on p. 2-11.

E. NUMBER OF JURORS

The number of jurors is determined by the leading charge. In bifurcated proceedings, the number of jurors is determined by the level of the underlying charge.

In felony cases, jurors consist of 12 people unless the prosecutor and defense agree to less than that number. See IV.A.2(a) on page 2-15.

For Class D or Level 6 felony cases and misdemeanors, the jury is 6 people, regardless of whether the trial is in County, Superior, or Circuit court. See IV.B.1. on page 2-14.

II. FELONY CASES

A. ABSOLUTE RIGHT UNDER STATE AND FEDERAL CONSTITUTIONS

1. State

Indiana Constitution, Article 1, §13 provides in part: “In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury...”

2. Federal – Sixth Amendment

The Sixth Amendment right to trial by jury is fundamental to the American scheme of justice. Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968).

3. Denial of right is fundamental error

Right to jury trial is “of fundamental dimension,” and denial of that right cannot constitute harmless error. Eldridge v. State, 627 N.E.2d 844, 849 (Ind. Ct. App. 1994).

B. ALL CRIMINAL TRIALS BY JURY, UNLESS COURT AND PROSECUTOR ASSENT TO WAIVER

Ind. Code § 35-37-1-2 provides: “The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. Unless a defendant waives the right to a jury trial under the Indiana Rules of Criminal Procedure, all other trials must be by jury.”

Good v. State, 267 Ind. 29, 366 N.E.2d 1169 (1977) (judge in criminal case has duty to assume defendant will want jury trial and to arrange affairs of the court accordingly).

There is no constitutional right not to be tried by jury except where fair trial is impossible or unlikely. Singer v. United States, 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630 (1965); United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

Lewis v. State, 911 N.E.2d 76 (Ind. Ct. App. 2009) (although there are circumstances that may exist which render the denial of a bench trial constitutionally suspect, the fact that defendants suffer from mental illness does not).

A prosecutor may refuse to waive the jury trial right. Lewis v. State, 911 N.E.2d 76 (Ind. Ct. App. 2009) (prosecutor’s policy to refuse to waive jury trials for Class D felonies did not deprive defendant of effective assistance of counsel, equal protection, or violate privileges and immunities clause of Indiana Constitution).

State ex rel. Helm v. Fraser, 298 N.E.2d 423 (1973) (State had right to demand jury trial in face of defendant’s claim that any jury in county would be prejudiced against him due to prior adverse newspaper publicity; defendant had not shown inefficacy of alternative remedies such as change of venue).

C. HABITUAL OFFENDER (HO) PROCEEDING

1. No right to separate jury

When a defendant alleged to be a HO is tried by jury on underlying offense, jury also determines status as habitual offender. Ind. Code § 35-50-2-8(h).

Habitual offender procedures do not unconstitutionally subject defendant to two trials. Dorton v. State, 419 N.E.2d 1289, 1297 (Ind. 1981).

Cornelius v. State, 467 N.E.2d 1200, 1202 (Ind. 1984) (defendant not entitled to separate jury for HO phase where: (1) the possibility of prejudiced jury having adverse effect on defendant was not great during HO phase of trial; and (2) defendant given reasonable opportunity to examine jurors during initial selection process).

Wise v. State, 272 Ind. 498, 400 N.E.2d 114 (1980) (bifurcated trial under Ind. Code § 35-50-2-8 does not violate right to trial by impartial jury, because jury not asked to find defendant guilty of another charge, but to find facts which would enhance sentence).

2. Waiver in HO proceeding

Safeguards and precautions attendant to waiver of jury trial apply to waiver of habitual offender jury hearing. Snyder v. State, 654 N.E.2d 15, 19 (Ind. Ct. App. 1995) *rev'd on other grounds*. Defendant must personally waive the right to the jury trial, or its waiver may not be considered knowing, voluntary, and intelligent. Bradt Miller v. State, 113 N.E.3d 255 (Ind. Ct. App. 2018)

Saylor v. State, 55 N.E.3d 354 (Ind. Ct. App. 2016) (defendant's guilty plea to his habitual offender charge was not knowing, voluntary, and intelligent because he did not personally waive his right to the jury trial of his HO status).

Dixie v. State, 726 N.E.2d 257, 260 (Ind. 2000) (waiver of right to trial by jury sufficient to include waiver of trial by jury at HO proceeding; court not required to separately advise concerning right to jury in HO phase in order for defendant to waive right at the trial phase).

Jones v. State, 810 N.E.2d 777 (Ind. Ct. App. 2004) (defendant who waived jury trial on underlying charges did not voluntarily, knowingly and intelligently waive jury on habitual charge that had been discussed in plea negotiations but not filed at time of waiver).

Bell v. State, 173 N.E.3d 709 (Ind. Ct. App. 2021) (appellate counsel was ineffective for failing to raise claim defendant did not validly waive jury trial right on direct appeal when colloquy failed to advise defendant of jury trial right and defendant did not personally express desire to waive it).

3. Where defendant pleads guilty to underlying offense, but leaves HO allegation pending

It is essential that the defendant understand the ramifications of a guilty plea and be aware of rights he is waiving. To be knowing, voluntary, and intelligent, a guilty plea to a repeat sexual offender and habitual offender enhancement must contain a waiver to the right to a jury trial. Young v. State, 143 N.E.3d 965 (Ind. Ct. App. 2020). If the record does not show the accused was advised or knew his guilty plea waived the right to a jury determination of pending HO allegation, conviction on the underlying offense must be vacated. Snyder v. State, 654 N.E.2d 15, 20 (Ind. Ct. App. 1995), *rev'd on other grounds*.

Davis v. State, 937 N.E.2d 8 (Ind. Ct. App. 2010) (required advisement does not apply to progressive enhancement of auto theft based on a previous conviction; defendant failed to prove that he was not advised of his right to jury trial on habitual and auto theft enhancements phases of his trial). Hogan v. State, 966 N.E.2d 738 (Ind. Ct. App. 2012) (although record does not include an advisement of defendant's waiver of his habitual offender jury right, this did not constitute ineffective assistance of counsel; defendant failed to present any evidence that he would have chosen to proceed with a jury trial had trial court explicitly informed him of that right or that he lacks the felony convictions necessary to establish his HO status).

4. Where defendant pleads guilty to both underlying offenses and HO allegation

Court's advisement that accused is waiving right to jury trial on all charges informs defendant he is waiving right to jury trial on HO charge. Snyder v. State, 654 N.E.2d 15, 20 (Ind. Ct. App. 1995).

5. Jury entitled to determine habitual offender status as a matter of fact and of law

Indiana Constitution Art. I, § 19 applies to status determination in HO proceeding, and the jury in that proceeding has the right to determine law and facts for itself. Seay v. State, 698 N.E.2d 732, 734 (Ind. 1998).

Walden v. State, 895 N.E.2d 1182 (Ind. 2008) (trial court does not have to instruct jury regarding jury nullification beyond telling jury that (1) they "may" find defendant a habitual offender if State proved case beyond a reasonable doubt and (2) "under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law."; Art. I, § 19 of Indiana Constitution was unnecessary to Seay decision).

D. CONTEMPT PROCEEDING

While petty contempt charges may be tried without a jury, serious criminal contempt charges must be tried with a jury if defendant insists on this mode of trial. Codispoti v. Pennsylvania, 94 S.Ct. 2687 (1974); Holly v. State, 681 N.E.2d 1176 (Ind. Ct. App. 1997). Sentences up to six months may be imposed for criminal contempt convictions without guilt or innocence being determined by a jury. Taylor v. Hayes, 418 U.S. 488, 496 (1974). Although a court may find a person in contempt multiple times arising out of a single proceeding, the sentence, without a jury trial, may not exceed six months. Fearman v. State, 89 N.E.3d 435 (Ind. Ct. App. 2017).

Jones v. State, 847 N.E.2d 190 (Ind. Ct. App. 2006) (defendant had right to jury trial when trial court sentenced her to 200 days for contempt).

Wine v. State, 147 N.E.3d 409 (Ind. Ct. App. 2020) (no IAC for failing to raise argument that 720-day sentence on four counts of contempt violated jury trial right because sentence was cumulative for multiple contemptuous acts and not based on single episode of contempt).

E. REPEAT SEX OFFENDER PROCEEDING

Smith v. State, 825 N.E.2d 783 (Ind. 2005), held that Ind. Code § 35-50-2-14, which places the responsibility to determine if a person has a prior applicable sexual offense on the trial court rather than the jury, is constitutional under both the Indiana and United States Constitutions. Under Indiana Constitution, Article I, § 19, the Legislature could structure an "automatic" sentencing enhancement scheme without a jury trial on the status determination. Seay v. State, 698 N.E.2d 732 (Ind. 1998). That is what the Legislature has done in the case of Indiana's Repeat Sexual Offender Statute. Thus, a jury determination of repeat sexual offender status is not required for enhancement. As to claim that Ind. Code § 35-50-2-14 violates the U.S. Constitution, the Court noted that the statute increased the defendant's sentence based on facts of his prior convictions for sex offenses, thus it falls outside the Sixth Amendment right to jury trial under Apprendi v. New Jersey, 530 U.S. 466 (2000).

F. FIREARM ENHANCEMENT PROCEEDING

Under Indiana's firearm enhancement statute, Ind. Code § 35-50-2-11, prosecutor may seek to have person who committed certain offenses sentenced to an additional fixed term of five (5) years imprisonment if the State can show beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense.

Barnett v. State, 24 N.E.3d 1013 (Ind. Ct. App. 2015) (defendant's knowing and intelligent

waiver of a trial by jury as to facts underlying firearm sentencing enhancement did not violate his Sixth Amendment right to jury trial).

G. WAIVER REQUIREMENTS

1. Assent of prosecutor and judge

Successful waiver requires assent of prosecutor and judge. Perkins v. State, 541 N.E.2d 927, 928 (Ind. 1989).

Arnold v. State, 460 N.E.2d 494, 496 (Ind. 1984) (no error where court did not assent to defendant's motion to waive jury trial, even though State did not object to waiver).

2. Knowing, voluntary, and intelligent

Waiver must be made in knowing, intelligent, and voluntary manner, with sufficient awareness of surrounding circumstances and consequences. Doughty v. State, 470 N.E.2d 69 (Ind. 1984). Specifically, waiver of jury trial must be made by defendant: (1) in knowing and voluntary manner; (2) personally expressed viva voce or in writing; and (3) memorialized on the court's record. Perkins v. State, 541 N.E.2d 927, 928 (Ind. 1989).

(a) Knowing, voluntary, and intelligent

Ford v. State, 248 Ind. 439, 229 N.E.2d 634 (1967) (waiver not intelligent where judge told defendant that to determine sentence in bench trial, judge would weigh finding of presentence investigation, whereas jury's verdict would not be disturbed; judge improperly induced defendant to waive jury trial—if court had policy of weighing finding of presentence investigations to determine sentence, it was responsibility of counsel, not court, to so inform his client);

Gonzalez v. State, 757 N.E.2d 202 (Ind. Ct. App. 2001) (to knowingly waive jury trial, defendant does not have to be made aware that foregoing possibility of jury nullification is consequence of waiving jury trial—waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and “likely” consequences, but court could not conclude that nullification is so likely to occur that defendant must be informed of this consequence before he can knowingly waive right).

(b) Defendant must personally assent to waiver

Defendant's assent under Ind. Code § 35-37-1-2 [then Ind. Code § 35-1-34-1] means: (1) before trial begins; (2) personal assent; (3) reflected in the record, (4) either in writing or in open court. Good v. State, 267 Ind. 29, 366 N.E.2d 1169 (1977).

3. Personal waiver must be reflected in record

Right to jury trial must be made personally and cannot be waived by trial counsel. Kellems v. State, 849 N.E.2d 1110 (Ind. 2006). Record must reflect that waiver was made, so that question of effective waiver can be reviewed even though no objection was made at trial.

Kellems v. State, 849 N.E.2d 1110 (Ind. 2006) (trial court did not secure a waiver from defendant personally, thus waiver was not voluntary and defendant was entitled to a new trial; although defendant was advised of his right to jury trial, personally indicated that he understood the right and was in court when his lawyer told judge that he assented to a bench trial, judge never communicated personally with defendant to determine whether he understood his right to a jury trial and that he was waiving the right).

Horton v. State, 51 N.E.3d 1154 (Ind. 2016) (court declined to carve out an exception to personal waiver requirement of Indiana Constitutional jury trial right in bifurcated cases

where defendants have just experienced a jury trial and thus were probably aware of right).

Brown v. State, 495 N.E.2d 178 (Ind. 1986) (defendant's response "Yes sir," to court's inquiry as to whether defendant wished to waive jury trial sufficiently established defendant's personal assent to waiver of trial by jury). See also McSchooler v. State, 15 N.E.3d 678 (Ind. Ct. App. 2014).

Garcia v. State, 916 N.E.2d 219 (Ind. Ct. App. 2009) (defendant's attorney's representation that defendant wanted to proceed to a bench trial did not waive right to jury trial on enhancement phase of class D felony OWI trial and HSO phase).

Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (where trial counsel files a waiver of jury trial without defendant's signature, record is insufficient to show personal waiver of jury).

Goody v. State, 587 N.E.2d 172, 173 (Ind. Ct. App. 1992) (adequate reflection of personal waiver where record states, "both the prosecutor and the defendant in person now informs [sic] the court they desire to waive trial by jury...).

Eldridge v. State, 627 N.E.2d 844, 848 (Ind. Ct. App. 1994) *rev'd on other grounds* (record failed to establish intelligent, knowing, and personal waiver where "Initial Hearing Rights" form advised defendant of right to jury trial as misdemeanor, but not as a felon). See also Reynolds v. State, 703 N.E.2d 701, 704 (Ind. Ct. App. 1999).

Hannah-Womack v. State, 623 N.E.2d 439 (Ind. Ct. App. 1993) (no knowing and voluntary waiver of right to jury trial where record is devoid of any written or verbal waiver of jury trial by defendant).

(a) Cannot infer voluntariness from record

Knowing, voluntary and intelligent waiver of right cannot be inferred from record of trial court events which does not evidence personal choice. Perkins v. State, 541 N.E.2d 927 (Ind. 1989).

Record reflection must be direct and not merely implied; must show personal communication of defendant to court that defendant chooses to relinquish right. Doughty v. State, 470 N.E.2d 69, 70 (Ind. 1984).

Zakhi v. State, 560 N.E.2d 683, 685 (Ind. Ct. App. 1990) (submission to bench trial with counsel at one's side does not constitute a knowing, voluntary, and intelligent waiver).

Cunningham v. State, 433 N.E.2d 405 (Ind. Ct. App. 1982) (no valid waiver where neither oral record, written record, nor any of affidavits reflected personal assent by defendant to waiver of trial by jury).

(b) On-record colloquy preferred but not required

While it is preferable for judge to advise defendant orally of right to jury trial and consequences of waiver of right, procedure is not required by United States, Indiana Constitutions, nor by Ind. Code § 35-37-1-2. Poore v. State, 681 N.E.2d 204, 208 (Ind. 1997); Kindle v. State, 161 Ind.App. 14, 313 N.E.2d 721 (1974).

Earl v. State, 450 N.E.2d 49 (Ind. 1983) (no error in failing to conduct on-the-record colloquy where: (1) defendant signed express written waiver after time to consult with attorney; and (2) after jury trial was originally scheduled, he appeared in open court with counsel at time of waiver).

Practice Pointer: However, a recorded colloquy with court would obviate necessity of appeals, or to require a shibboleth. Goody v. State, 587 N.E.2d 172, 173 (Ind. Ct. App. 1992).

4. Defendant cannot waive rights if absent from trial

Defendant's absence from trial is not sufficient to show waiver of right to trial. Carr v. State, 591 N.E.2d 640 (Ind. Ct. App. 1992) (court erred by finding defendant knowingly and voluntarily waived right to jury trial by his absence at trial—defendant had not waived his right and was entitled to have jury determine whether he was a habitual offender).

5. Submission to bench trial

Mere submission to bench trial with counsel at one's side cannot be deemed waiver. Perkins v. State, 541 N.E.2d 927, 928 (Ind. 1989).

Zakhi v. State, 560 N.E.2d 683 (Ind. Ct. App. 1990) (waiver ineffective where: (1) defense attorney stated in open court "we will waive a jury trial"; (2) record did not indicate defendant personally waived jury trial, vocally or in writing, and (3) defendant not adequately informed by court or counsel of ramifications of waiver).

6. Court may conclude knowing and intelligent waiver

If waiver is made in writing after defendant has had time to consult with attorney or is made orally in open court in the presence of counsel, knowing and intelligent waiver may be found. Earl v. State, 450 N.E.2d 49, 50 (Ind. 1983).

Reynolds v. State, 703 N.E.2d 701, 703-05 (Ind. Ct. App. 1999) (court not required to advise defendant of right to jury trial before accepting waiver, and court may consider responses made by defendant to advisement of rights given in open court by defendant's attorney; defendant has capacity to waive right if competent to stand trial).

7. Waiver a precondition to treatment in lieu of prosecution

Defendant must waive right to jury trial to avail himself of opportunity to request treatment in lieu of prosecution. Hammond v. State, 594 N.E.2d 509, 512 (Ind. Ct. App. 1992).

If a substance abuser requests treatment in lieu of prosecution, the court must advise the defendant that to make a request the defendant must waive a jury trial. Ind. Code § 12-23-7.1-2(5).

Perry v. State, 401 N.E.2d 705, 706-08 (Ind. Ct. App. 1980) (waiver of jury trial voluntary where defendant elected to seek treatment as drug abuser; no abuse of discretion in refusing to permit defendant to withdraw waiver of jury trial when he was brought to trial after leaving drug treatment program).

(a) Object to waiver if found to be ineligible for treatment

Pier v. State, 446 N.E.2d 985, 986-87 (Ind. Ct. App. 1983) (defendant failed to preserve error for appeal where he waived jury trial and failed to contemporaneously object to continued validity of his waiver upon learning that he was ineligible for treatment as an alcoholic in lieu of prosecution).

H. WITHDRAWAL OF WAIVER

1. Court's discretion

There is no constitutional right to withdraw a valid waiver. Davidson v. State, 249 Ind. 419, 233 N.E.2d 173 (1968).

Woodson v. State, 501 N.E.2d 409, 411 (Ind. 1986) (once defendant waives right to jury trial, withdrawal of waiver rests within discretion of court).

(a) Changed circumstances

Robey v. State, 555 N.E.2d 145, 148 (Ind. 1990) (no error in denying motion to withdraw waiver; defendants show no assertion or evidence that a reevaluation of waiver was necessary based on change in circumstances nor any indication defendants had been misled).

2. Error to deny withdrawal of waiver in some situations

There are some circumstances in which the courts will find an error to deny withdrawal of waiver.

Stevenson v. State, 163 Ind.App. 399, 324 N.E.2d 509 (1975) HN 3 (where defendant, prior to consultation with counsel, waived his right to jury trial and requested withdrawal of waiver on day prior to trial, immediately after his first meeting with counsel);

Williams v. State, 159 Ind.App. 470, 307 N.E.2d 880 (1974) (where: (1) jury trial waiver was executed as part of plea-bargaining negotiations; (2) bargain was not consummated; and (3) waiver induced by State's unfulfilled promises).

III. MISDEMEANOR CASES

A. INDIANA CONSTITUTION – RIGHT TO JURY TRIAL

Ind. Constitution, Art. 1, § 13, 'In all criminal prosecutions,' includes prosecutions for misdemeanors. Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250, 252 (1951).

B. CR 22 – WRITTEN DEMAND REQUIRED

One charged with a misdemeanor has no right to jury trial, unless he makes a written demand for it. Indiana Criminal Rule 22 provides in part:

A defendant charged with a misdemeanor may demand trial by jury by filing a written demand therefor not later than ten (10) days before his first scheduled trial date. The failure of a defendant to demand a trial by jury as required by this rule shall constitute a waiver by him of trial by jury unless the defendant has not had at least fifteen (15) days advance notice of his scheduled trial date and of the consequences of his failure to demand a trial by jury.

1. Outline of steps to obtain trial by jury under Indiana Criminal Rule 22

- (1) Court must give defendant at least 15 days advance notice of right to jury trial and consequences of failure to make demand for jury trial.

Note: fundamental error for court not to advise defendant. Weidner v. State, 530 N.E.2d 774, 775 (Ind. Ct. App. 1988);

- (2) Defendant must file a written demand 10 days before first scheduled trial date. Combs v. State, 533 N.E.2d 1241, 1242 (Ind. Ct. App. 1989).
- (3) Defendant's failure to make timely request waives right. **Note:** waiver must be intelligent and voluntary. Poore v. State, 681 N.E.2d 204, 206 (Ind. 1997).
- (4) Court may grant jury trial after time has elapsed, upon written agreement between State and defendant. Indiana Criminal Rule 22.
- (5) If right improperly denied, seek writ of mandamus.

(a) Court must give at least 15 days' notice and advise of consequences

To trigger waiver, defendant must have at least fifteen (15) days advance notice of his scheduled trial date and of the consequences of his failure to demand a trial by jury. See

Indiana Criminal Rule 22; Liquori v. State, 544 N.E.2d 199, 201 (Ind. Ct. App. 1989); Bex v. State, 952 N.E.2d 347 (Ind. Ct. App. 2011).

(1) Written advisement sufficient

Misdemeanant is considered fully informed of right to jury trial and consequence of failure to exercise right when: (1) written advisement given fully explaining right; (2) defendant has opportunity to raise questions about it. Belazi v. State, 525 N.E.2d 351 (Ind. Ct. App. 1988).

Greene v. State, 670 N.E.2d 38, 39 (Ind. Ct. App. 1996) (defendant waived jury trial where at initial hearing he was given and signed a form advising him of various rights, including right to trial by jury—form included admonishment that if jury trial were not requested at least ten days prior to trial, then right to trial by jury would be waived; defendant attempted to explain circumstances surrounding charge, but never requested trial by jury).

Young v. State, 973 N.E.2d 643 (Ind. Ct. App. 2012) (signed advisement form given to defendant during initial hearing sufficiently warned her of right to jury trial and consequence of failing to make a timely request for jury trial results in waiver of the right).

Fiandt v. State, 996 N.E.2d 421 (Ind. Ct. App. 2013) (defendant waived his right to jury trial “by default” even though trial court did not personally secure a jury trial waiver from him on the record).

(2) Fundamental error not to advise defendant

Court must advise defendant of right to jury trial and of consequences of failure to make demand for jury trial.

Weidner v. State, 530 N.E.2d 774, 776 (Ind. Ct. App. 1988) (advisement insufficient and no valid waiver where court advised “You have a right to a public and speedy trial by court or by jury. If you sought to have a jury trial you must notify this court in writing of that request at least ten days before the matter is set for a court trial.” This advisement was insufficient because he did not disclose failure to make request would waive defendant’s right to jury trial). See also Levels v. State, 972 N.E.2d 972 (Ind. Ct. App. 2012).

Vukadinovich v. State, 529 N.E.2d 837, 838 (Ind. Ct. App. 1988) (fundamental error to deny defendant’s attempted exercise of right to jury trial where: (1) record showed defendant was generally advised of right to jury trial by document entitled “Your Rights;” (2) document made no mention of Indiana Criminal Rule 22 “10-day rule” or consequences of failing to adhere to it; and (3) court failed at any point to advise defendant of statutory time constraints).

(3) No advisement, no waiver

Absent advisement, there is no valid waiver. Wilson v. State, 453 N.E.2d 340, 342 (Ind. Ct. App., 1983).

Casselmann v. State, 472 N.E.2d 1310, 1311 fn. 1 (Ind. Ct. App. 1985) (fundamental error to deny defendant jury trial without first eliciting waiver from him personally where record discloses no advisement).

Bex v. State, 952 N.E.2d 347 (Ind. Ct. App. 2011) (nothing in record establishes that defendant had at least 15 days of advance notice of scheduled trial date and consequences of failing to demand a jury trial, as both required by Indiana Criminal Rule 22).

(b) Timely demand for jury trial

Indiana Criminal Rule 22 prevents last second demands for trials by jury.

Combs v. State, 533 N.E.2d 1241 (Ind. Ct. App. 1989) (defendant waived right to jury trial by filing demand 10 days before actual trial date, instead of before first scheduled date; under Indiana Criminal Rule 22 “scheduled trial date” refers to first scheduled trial date).

(1) Exception - getting jury trial after time has elapsed

Indiana Criminal Rule 22 provides in pertinent part: “The trial court shall not grant a demand for a trial by jury filed after the time fixed has elapsed except upon written agreement of the state and defendant, which agreement shall be filed with the court and made a part of the record. If such agreement is filed, then the trial court may, in its discretion, grant a trial by jury.”

(c) Substantive amendment requires clock to be reset

Where trial court approves substantive amendment that adds additional count and holds another initial hearing during which defendant is informed anew of his right to jury trial, defendant should be permitted to reevaluate his jury trial decision in light of the newly-added charge; because defendant needs time to examine his defenses, his perceived chances in jury trial versus bench trial, and any other relevant considerations before deciding whether he wants jury trial, Indiana Criminal Rule 22 should be reset when the additional charge is filed. Tripp v. State, 729 N.E.2d 1061 (Ind. Ct. App. 2000), *abrogated on other grounds by* Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007).

(d) Waiver

Waiver if accused does not request jury trial at least 10 days before first scheduled trial date. Indiana Criminal Rule 22; Hutchins v. State, 493 N.E.2d 444 (Ind. 1986). In order to establish a valid waiver in a misdemeanor case, the record is sufficient if: (1) it does not contain a request for a trial by jury; (2) it evidences that the defendant was fully advised of the right to a trial by jury and of the consequences for failing to timely request the right; and (3) it reflects that the defendant was able to understand the advice. Duncan v. State, 975 N.E.2d 838 (Ind. Ct. App. 2012).

(1) Accused must be given adequate, timely notice

Defendant who fails to make timely jury request waives right if he has been advised in timely manner of both: (a) right to jury trial, and (b) consequences of failing to make timely demand.

Notice may be given: (1) orally; (2) in writing which defendant acknowledges in open court; and (3) by videotape viewed before appearing in court. Liquori v. State, 544 N.E.2d 199, 200-02 (Ind. Ct. App. 1989) (orally); Jackson v. State, 644 N.E.2d 595, 596 (Ind. Ct. App. 1994) (in writing which defendant acknowledges in open court); and Frederick v. State, 658 N.E.2d 941, 944 (Ind. Ct. App. 1995) (by videotape viewed before appearing in court).

Eldridge v. State, 627 N.E.2d 844, 847 (Ind. Ct. App. 1994) (if notice not given, defendant’s failure to request a jury trial is not waiver); see also Hudson v. State, 109 N.E.3d 1061 (Ind. Ct. App. 2019).

Duncan v. State, 975 N.E.2d 838 (Ind. Ct. App. 2012) (*pro se* defendant did not waive his right to jury trial where judge noted defendant’s right to jury trial but did not mention the requirement to timely request a jury trial if one was desired, or the consequences of failing to do so; fact defendant was subsequently

represented by counsel and never requested jury trial is not itself a sufficient substitute for being expressly advised of rights).

Dadouch v. State, 126 N.E.3d 802 (Ind. 2019) (Court reversed the trial court's finding that defendant had been properly advised because defendant was never advised he had to file a demand for a jury trial within ten days before the first scheduled trial date or his failure to file a demand within that period would result in the waiver of his right).

Wiley v. State, 150 N.E.3d 710 (Ind. Ct. App. 2020) (implied waiver of right to misdemeanor jury trial was not knowing and therefore invalid).

(2) Inferring valid waiver depends on choice of guilty plea or bench trial

The court may infer from the record a knowing and voluntary waiver. The Indiana Supreme Court makes it easier to infer proper waiver if the accused opts for a bench trial. Showing to find valid waiver is stricter if the accused pleads guilty. Poore v. State, 681 N.E.2d 204, 207 (Ind. 1997). See subsections (5) and (6)(a) on pp. 2-13.

Duncan v. State, 975 N.E.2d 838 (Ind. Ct. App. 2012) (having counsel is not itself a sufficient substitute for defendant being expressly advised of his rights; likewise, it does not matter whether defendant requested a jury trial; defendant did not waive his right to trial by jury because he was never properly advised).

(3) Defendant must express personal desire to waive

Defendant must express a personal desire to waive and such desire must be apparent from the court's record, whether in the form of a written waiver or a colloquy in open court. O'Connor v. State, 796 N.E.2d 1230 (Ind. Ct. App. 2003).

Poore v. State, 681 N.E.2d 204, 207 (Ind. 1997) (filing of signed jury trial waiver adequately reflects personal desire to waive); see also Young v. State, 973 N.E.2d 643 (Ind. Ct. App. 2012).

Hanna-Womack v. State, 623 N.E.2d 439 (Ind. Ct. App. 1993) (conviction reversed, nothing in record indicates defendant personally waived her right, either verbally or in writing).

Zakhi v. State, 560 N.E.2d 683, 685 (Ind. Ct. App. 1990) (court of appeals cannot infer knowing and intelligent waiver from record that does not demonstrate defendant's personal choice).

Bradt Miller v. State, 113 N.E.3d 255 (Ind. Ct. App. 2018) (defendant did not personally waive his jury trial right for habitual-offender enhancement).

Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (a waiver of jury form signed by defense counsel is not sufficient to waive defendant's right to a jury trial if the form is not signed by the defendant).

But See:

Martinez v. State, 82 N.E.3d 261 (Ind. Ct. App. 2017) (personal waiver is not required for misdemeanor defendants); Horton v. State, 51 N.E.3d 1154, 1158, n.1 (Ind. 2016); and Cheesman v. State, 100 N.E.3d 263 (Ind. Ct. App. 2018).

(4) Neither attorney nor judge can waive right to jury trial

Failure to file a timely demand for jury trial is a mistake, not a strategic choice, and prejudice is presumed where the attorney's error deprives the defendant of his fundamental right to jury trial. Pryor v. State, 973 N.E.2d 629 (Ind. Ct. App. 2012).

Shady v. State, 524 N.E.2d 44, 45-46 (Ind. Ct. App. 1988) (waiver not effective where defendant's first attorney, in defendant's absence, waived jury trial; defendant submitted uncontroverted affidavit stating that he had not authorized first attorney to waive trial by jury on his behalf).

Marcum v. State, 509 N.E.2d 895, 896 (Ind. Ct. App. 1987) (denial of right to jury trial where court compelled defendant to be tried without jury because defendant failed to attend pretrial conference; record fails to show personal waiver, failure to attend pretrial conference did not in itself constitute knowing, intelligent, and voluntary waiver).

Lewis v. State, 929 N.E.2d 261 (Ind. Ct. App. 2010) (prejudice is presumed where attorney's error deprived defendant of his fundamental right to a jury trial). See also Pryor v. State, 973 N.E.2d 629 (Ind. Ct. App. 2012).

Livers v. State, 994 N.E.2d 1251 (Ind. Ct. App. 2015) (record was insufficient to evaluate defendant's ineffective assistance of counsel claim on direct appeal regarding counsel's failure to timely file a demand for jury trial).

(5) Submission to bench trial and not requesting jury trial is not waiver of right

Submission to a bench trial with counsel cannot be deemed a waiver of the right to a jury trial. Perkins v. State, 541 N.E.2d 927, 928 (Ind. 1989).

Duncan v. State, 975 N.E.2d 838 (Ind. Ct. App. 2012) (fact defendant never requested a jury trial, timely or otherwise, does not matter because he was never properly advised of right to jury trial).

(6) Intelligently and voluntarily made if bench trial

Record must reflect sufficient evidence of defendant's ability to know and understand what he was doing when he waived his right to a jury trial.

Poore v. State, 681 N.E.2d 204, 207 (Ind. 1997) (intelligent and voluntary waiver of right to jury trial may be inferred where defendant had received form telling him of his right to jury trial, had completed G.E.D. and some college education, both he and attorney signed written waiver, and because of defendant's criminal history had familiarity with judicial process).

(7) Read and understand advisement

Neither U.S. nor Indiana Constitution imposes duty on court to specifically question defendant about reading ability and understanding of need to demand jury trial.

Greene v. State, 670 N.E.2d 38, 39 (Ind. Ct. App. 1996) (defendant adequately advised where at initial hearing he was given advisement of rights form that included procedure to demand jury trial and consequence of failure to do so, defendant signed and dated form and did not request jury trial, nor mention that he couldn't read or didn't understand form).

(a) If guilty plea

In order for a form written waiver to be effective, the record must disclose defendant could read, did read, and understood the rights enumerated therein.

Poore v. State, 681 N.E.2d 204, 208 (Ind. 1997).

See generally: Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Williams v. State, 263 Ind. 165, 325 N.E.2d 827 (1975); Hadley v. State, 636 N.E.2d 173 (Ind. Ct. App. 1994), *trans. denied*; Slone v. State, 590 N.E.2d 635 (Ind. Ct. App. 1992).

(e) State's consent not necessary for bench trial for misdemeanor

The State has no right to demand a jury trial in misdemeanor cases and its consent is not necessary for a bench trial. State v. Bonds, 94 N.E.3d 333 (Ind. Ct. App. 2018).

(f) Seek mandamus if right improperly denied

When defendant is denied by the trial court that which she has a fundamental constitutional right to have, that court is divested of all further jurisdiction to proceed with prosecution. Action for mandate proper to compel performance of such act. State ex rel. Rose v. Hoffman, Judge, 227 Ind. 256, 85 N.E.2d 486 (1949).

Gillespie v. Gilmore, 159 Ind. App. 449, 307 N.E.2d 480 (1974) (defendant properly filed her request for trial by jury at arraignment, and had legal right to trial by jury; judge had imperative duty to grant her request; after request denied, court no longer had jurisdiction of action, defendant could immediately bring action for mandate to compel inferior court to perform that which it had legal duty to do and grant defendant's request for trial by jury).

(g) On-record colloquy not required

Trial court not required to use on-the-record hearing to advise defendant of right to trial by jury and consequences of waiving that right. Earl v. State, 450 N.E.2d 49, 50 (Ind. 1983).

Hutchins v. State, 493 N.E.2d 444, 445 (Ind. 1986) (C.R. 22 makes no mention of on-the-record hearing).

(h) Need not explain difference between jury or bench trial

No requirement that judge explain difference between trial by court and trial by jury; nor is there a requirement that the record demonstrate that defendant understood the difference. Liquori v. State, 544 N.E.2d 199, 201 (Ind. Ct. App. 1989).

(i) Representation by counsel not essential

Representation by counsel is not essential in order for a defendant to waive the right to a jury trial under Indiana Criminal Rule 22. Belazi v. State, 525 N.E.2d 351, 352 (Ind. Ct. App. 1988).

(j) Right to jury for trial de novo regardless of jury waiver in underlying city court trial

Defendant can request a jury trial for a trial de novo in circuit or superior court regardless of whether he or she requested a jury in the city-court proceeding. Taylor v. State, 120 N.E.3d 635 (Ind. Ct. App. 2019).

2. Constitutionality of Indiana Criminal Rule 22

A person charged with a felony has the automatic right to a jury trial. However, a person charged with misdemeanor gets jury trial only upon filing of written demand within certain time. Hutchins v. State, 493 N.E.2d 444, 445 (Ind. 1986).

Belazi v. State, 525 N.E.2d 351, 352 (Ind. Ct. App. 1988) (“[w]e presume the supreme court considered it [C.R. 22] constitutional. It is not our prerogative to challenge that decision.”).

Hunt v. State, 487 N.E.2d 1330 (Ind. Ct. App. 1986) (distinction cannot be made between felonies and misdemeanors as regards right to trial by jury in view of language, “in all criminal prosecutions.”).

IV. NUMBER OF JURORS

A. 12 JURORS

1. Felony cases other than Level 6

Ind. Code § 35-37-1-1(b) provides: “If a defendant is charged with: (1) murder, a Level 1, Level 2, Level 3, Level 4, or Level 5 felony, the jury shall consist of twelve (12) qualified jurors unless the defendant and prosecuting attorney agree to a lesser number.” See also Joyner v. State, 736 N.E.2d 232, 238 (Ind. 2000); see also Jury Rule 16(a).

2. No constitutional right to 12- person jury

Defendant charged with felony has constitutional right to jury. However, nothing in U.S. or Indiana constitutions guarantees right to be tried by jury of 12 persons. Minor v. State, 792 N.E.2d 59, 61 n.4 (Ind. Ct. App. 2003).

(a) May waive and agree to fewer than 12

Former Ind. Code § 35-1-30-1 [see now Ind. Code § 35-37-1-1] provision that a petit jury consist of 12 members was primarily for protection of accused and requirement could be waived by him. Smith v. State, 176 Ind.App. 37, 373 N.E.2d 1112 (1978).

(b) Defendant’s choice

Defendant may choose to proceed with less than 12 jurors. Myers v. State, 617 N.E.2d 553 (Ind. Ct. App. 1993).

McCants v. State, 686 N.E.2d 1281, 1286 (Ind. 1997) (defendant knowingly and intelligently waived jury of twelve; judge advised defendant of his right to jury of twelve, defendant and his attorney had discussed, and all parties consented to eleven-member jury, defendant personally expressed his desire to proceed).

(c) Counsel may consent on defendant’s behalf

Defendant’s attorney could consent to a trial by less than 12- person jury, even though statute required defendant’s consent, because consent did not involve fundamental right but merely a matter of trial procedure. Holliness v. State, 467 N.E.2d 4, 7 (Ind. 1984); Croney v. State, 710 N.E.2d 212, 214 (Ind. Ct. App. 1999); Judy v. State, 407 N.E.2d 380 (Ind. Ct. App. 1984).

Bex v. State, 952 N.E.2d 347 (Ind. Ct. App. 2011) (personal waiver of statutory right to number of jurors is not necessary because although the right to jury trial is a fundamental right requiring a personal waiver, the right to a jury of a certain size is not).

B. 6 JURORS

Ind. Code § 35-37-1-1(b)(2) provides: “[for] any other crime, the jury shall consist of six (6) qualified jurors.”

1. Level 6 felonies, misdemeanors, infractions or ordinance violations

Ind. Code § 35-37-1-1 provides for jury of six (6) in trials of cases consisting of level 6 felonies, misdemeanors, infractions or ordinance violations. Dyer v. State, 460 N.E.2d 511, 513 (Ind. 1984). See also Indiana Jury Rule 16(a).

2. D felony elevation to higher level felony

(a) Prior conviction to enhance

McCants v. State, 686 N.E.2d 1281, 1286 (Ind. 1997) (where information charged defendant with auto theft, but did not designate class of felony where violation of Ind. Code § 35-43-4-2.5 is Class D felony but becomes Class C felony if defendant has prior conviction of offense, defendant was not entitled to 12 person jury; for all practical purposes defendant was charged with Class D felony as facts necessary to elevate theft to Class C felony were not presented to jury).

(b) Where fact necessary to elevate also element of offense

For some offenses, a fact necessary to elevate offense to higher level felony is an element of the offense.

Peek v. State, 454 N.E.2d 450 (Ind. Ct. App. 1983) (State must allege and prove serious bodily injury to elevate battery from Class A misdemeanor to Class C felony).

(c) In D felony habitual offender (HO) determinations

Habitual offender statute, Ind. Code § 35-50-2-8, is silent on subject of jury composition. Jury acting in sentencing hearing should have same number as jury which determined guilt. Dyer v. State, 460 N.E.2d 511 (Ind. 1984) (defendant charged with class D felony theft and being a HO is entitled to only six-person jury at both guilt and HO phases of trial).

3. May consent to fewer than six

Defendant or counsel may waive the statutory right to a six- person jury.

Bex v. State, 952 N.E.2d 347 (Ind. Ct. App. 2011) (because defendant has the right to waive the presence of an entire jury, it would be inconsistent to rule that defendant could not waive the presence of one juror).

4. If trial in county court

A person accused of a level 6 felony is entitled to be tried by six-member jury in county court. Castro v. State, 442 N.E.2d 1141 (Ind. Ct. App. 1982).

Supreme Court has already found constitutional the basic classification scheme of the County Court Act permitting six-member juries in minor criminal cases. That holding can be extended to Level 6 felony cases. O'Brien v. State, 422 N.E.2d 1266 (Ind. Ct. App. 1981).

C. STATE AND FEDERAL CONSTITUTIONS

“While a felony defendant has a constitutional right to a jury trial, nothing in the federal or Indiana constitutions guarantees him a specific number of jurors. There is, in effect, no constitutional difference between a six-member jury and a twelve-member jury so long as each provides the requisite safeguard against overzealous prosecutors and eccentric judges.” Iseton v. State, 472 N.E.2d 643, 652 (Ind. Ct. App. 1984).

Williams v. Florida, 399 U.S. 78, 87, 90 S.Ct. 1893, 1898, 26 L.Ed.2d 446 (1970) (six-member jury upheld).

O'Brien v. State, 422 N.E.2d 1266, 1270 (Ind. Ct. App. 1981) (twelve-member jury not indispensable component of Indiana Constitution).

1. No less than 6 jurors

Defendant does not have substantial right to jury composed of any specific number, so long as number not less than six. Iseton v. State, 472 N.E.2d 643, 652 (Ind. Ct. App. 1984).

Ballew v. Georgia, 435 U.S. 223, 245, 98 S.Ct. 1029, 1041, 55 L.Ed.2d 234 (1978) (statutorily imposed five-member jury unconstitutional).

Bex v. State, 952 N.E.2d 347 (Ind. Ct. App. 2011) (Sixth Amendment does not bar a defendant's waiver of the presence and participation of one of six jurors).