

2011 WL 7769736 (Ill.App. 1 Dist.) (Appellate Petition, Motion and Filing)  
Appellate Court of Illinois, First District.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,

v.

Karen BAILEY, Defendant-Appellant.

No. 1-09-1020.

May 17, 2011.

Appeal from the Circuit Court of Cook County, Illinois

07 CR 13619

Honorable Angela Munari Petrone, Judge Presiding.

**Petition for Rehearing for Defendant-Appellant**

Michael J. Pelletier, State Appellate Defender, [Alan D. Goldberg](#), Deputy Defender, [Adrienne River](#), Assistant Appellate Defender, Office of the State Appellate Defender, 203 North LaSalle Street - 24th Floor, Chicago, Illinois 60601, (312) 814-5472, Counsel for Defendant-Appellant.

**\*1 I. In ruling on Issue IV, this Court makes a factual error. And, on the merits, the Court rules that the trial court properly found Williams to be a credible witness on the issue of whether Bailey's decisions were against Wilson's medical interests-although Williams did not so testify. In addition, the Court errs in ruling that it could be inferred from the lack of evidence about how Bailey spent Wilson's cash that money was still available to Bailey.**

In Issue IV, Bailey argued in part that the trial court erred in sentencing Bailey by ruling that Bailey had acted against Wilson's best medical interests by deciding that Wilson should not receive medication other than [Tylenol](#). (Def.'s Br. at 44-45) In rejecting this argument, this Court first makes a factual error: it incorrectly states that this medication choice was made after Wilson's hip-replacement surgery upon discharge from a hospital. (Slip Op. at 30) But there was no evidence that this medication decision followed hip-replacement surgery. Williams testified \*2 that the decision occurred upon Wilson's discharge from a nursing home where Wilson stayed upon release from Christ Hospital in March 2006. <sup>1</sup> (R.V. T33) No witness testified at sentencing or at trial about what treatment Wilson received at Christ Hospital. And the only evidence about Wilson's hip-replacement surgery was that it occurred prior to May 2004: Dr. Evans, who treated Wilson at a different hospital in May 2004, testified that an X-ray done during that hospitalization showed that both Wilson's hips had been previously replaced. (R.III. S202-04) The trial court did not make a finding that the [Tylenol](#) choice was made following hip-replacement surgery. <sup>2</sup> Therefore, the opinion's references to directions to hospital workers following hip-replacement surgery are incorrect. <sup>3</sup>

In addition, on the merits of the issue, this Court errs by holding that the record establishes that the choice of [Tylenol](#) and the decision against the paramedics taking Wilson to the hospital were against Wilson's best medical \*3 interests. (Slip Op. at 31) This Court reasons that the trial court could find Williams's testimony to be credible and reliable. (Slip Op. at 31) But Williams did not testify that these decisions were against Wilson's medical interests - and of course, had she done so, it would have been improper as she was not a medical expert. So there was no testimony about the appropriateness of these medical decisions for the trial court to assess for credibility or reliability. (Slip Op. at 31) Absent supporting medical testimony, the trial court erred in finding that Bailey did not act in Wilson's best medical interests, and this Court erred in affirming that finding. This Court should remand for resentencing or reduce Bailey's sentences.

Bailey also argued in Issue IV that the trial court erred at sentencing by concluding without basis that large amounts of Wilson's money were still available to Bailey. (Def's Br. at 42-44; Reply at 16) This Court holds that the trial court did not so err: Our review of the record indicates that the trial court had a more than sufficient basis for finding that defendant would have a "great amount of money out there" awaiting her release. The evidence in the record establishes that defendant made several large cash withdrawals, including one of approximately \$85,000, from which the funds have never been accounted. Thus it was logical for the trial court to infer that defendant still had access to the monies that she had not yet spent at the time of trial. (Slip Op. at 30)

But the lack of evidence presented at trial of how Bailey spent all the cash she withdrew was not the equivalent of evidence that cash was left in her possession. As this was a criminal trial, the defense was not obligated to put on any evidence accounting for how the cash was spent. It is not logical to infer from the lack of such an accounting that some of the money was retained. Because the trial court noted more than once in its ruling that \*4 money remained available to Bailey, it cannot be found that the weight placed on this improper factor lacking an evidentiary basis was insignificant, and resentencing must be ordered. (R.V. T98, 102)

**\*5 II. This Court does not fully address the arguments made in Issue II. In addition, the record does not support the holding that the trial court did not err in finding that the defense witness's testimony that Wilson could speak was contradicted by medical evidence. And the opinion incorrectly states that Bailey argued in this Court that a minor error of the trial court denied her a fair trial.**

In Issue II, Bailey argued that the trial court had made numerous mischaracterizations of the evidence that contributed to its ruling that Wilson was not able to consent to the financial transactions and to its finding that the sole defense witness, David Service, was not credible. (Def's Br. at 26 et seq.) Rather than enumerating and discussing each asserted mischaracterization, this Court only characterizes them generally as "minor errors or slips of the tongue." (Slip Op. at 23-24) Rehearing should be granted so that this Court can fully address Bailey's argument by specifically addressing each of the asserted factual errors:

- Bailey's [dementia](#) had been severe for several years;
- A person with dementia would have difficulty communicating;
- David Service could not remember if Wilson signed a power of attorney;
- Mary Ann Wilson could not sign her name;
- David Service's testimony that Wilson could walk was contradicted by medical testimony;
- David Service was impeached on his testimony that his parents bought him the truck;
- Wilson bought David Service the truck before he married into the family;
- David Service bought materials for remodeling for his own home; and
- David Service never showed receipts for any of the remodeling \*6 work.

While this Court does address one asserted error of the trial court-its finding that David Service's testimony that Wilson could speak was contradicted by medical testimony-it incorrectly held that Service's testimony was so contradicted. (Slip Op. at 24) No doctor testified that Wilson was never able to talk. There was evidence that Wilson had a [swallowing disorder \(dysphagia\)](#) in May 2006 but no evidence of how long she had it. (R.I. P30) Also, there was no evidence that the disorder rendered her

unable to speak but only that the disorder can cause speaking problems. (R.I P31) Furthermore, Dr. Gaziano, who testified that Wilson had the disorder, also testified that Wilson spoke during the May 2006 hospitalization when he treated her. (R.I. P32) And it was stipulated that, on a day in May 2006, Wilson initiated conversation with a caseworker. (R.III. S95) Therefore, Service's testimony that Wilson could speak was improperly rejected as contradicted by medical evidence and was actually corroborated by other witnesses.

Finally, the opinion indicates incorrectly that Bailey argued that she was denied a fair trial by the trial court's mistake in referring to "Home Depot" instead of "Menards." (Slip Op. at 23-24) Rather, Bailey argued that the trial court incorrectly stated that Service's store purchases were for remodeling at his home and that this error, combined with others, was used by the trial court in rejecting Service's credibility as a defense witness. (Def.'s Br. at 31-32; Reply at 7) The argument concerned the trial court's mischaracterization of the use of the purchased materials and not the trial \*7 court misspeaking in identifying the store. Appellate counsel noted that the purchases were actually made at Menards just to avoid confusion in the presentation of her argument. (Def.'s Br. at 31; Reply at 7) Appellate counsel did not intend to imply that such a minor error denied Bailey a fair trial. Therefore, the phrase ("saying 'Home Depot' instead of 'Menards'") should be deleted from the opinion. (Slip Op. at 24)

### \*8 CONCLUSION

For the foregoing reasons, Karen Bailey, Defendant-Appellant, respectfully requests that this Court grant rehearing.

#### Footnotes

- 1 Q: "And was there a discharge summary for May Ann Wilson from Evergreen Park Nursing Home?  
A: Yes.  
Q: And what did that discharge summary indicate that Karen Bailey as a power of attorney had requested as a result of her being power of attorney?  
A: It indicated that the family had made a decision that Mary Ann would not be on any medications when going home, except Tylenol." (R.V. T33) (Emphasis added.)
- 2 But the trial court incorrectly stated that the decision to give Tylenol had been made after Wilson's discharge from Christ Hospital. (R.V. T107)
- 3 An additional reference to hip-replacement surgery appears on page 31: "The record also establishes that defendant had power of attorney for health care for Wilson at the time of her hip replacement surgery and thus had control over the decision to give her only Tylenol, as opposed to stronger pain medications." (Slip Op. at 31) (Emphasis added.)