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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/30/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0064
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
JEFFREY KUCZYNSKI,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-173996

The Honorable Cari A. Harrison, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Katia Mehu, Assistant Attorney General
Attorneys for Appellee

Michael J. Dew Phoenix
Attorney for Appellant

N O R R I S, Judge

¶1 Jeffrey Kuczynski appeals his conviction and sentence for trafficking in stolen property. Kuczynski argues, first, the superior court should have held an evidentiary hearing

before deciding to proceed in his absence, and second, violated his constitutional right to self-representation. We disagree with both arguments and affirm his conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 When the court arraigned Kuczynski on February 23, 2009, it warned him he could be tried in absentia if he failed to appear for trial. Subsequently, at the initial pretrial conference on April 8, 2009, the court warned Kuczynski he could be tried in absentia if he failed to appear for any comprehensive pretrial conference, final trial management conference, or trial. Then, at a February 8, 2009 status conference that occurred when Kuczynski was representing himself, the superior court warned him he could be tried in absentia if he failed to appear for a settlement conference, final trial management conference, or trial.

¶13 While Kuczynski was still representing himself, he failed to appear at a March 19, 2010 court-ordered settlement conference.¹ Advisory counsel informed the court his assistant had told Kuczynski the settlement conference "might get vacated but it was still on." Advisory counsel told the court he had explained to Kuczynski he must keep in contact "to make sure

¹Subsequently, advisory counsel informed the court Kuczynski had attempted to appear at the settlement conference but "never quite made it there" because he thought he might be taken into custody for failing to appear at the conference.

what is going on." Counsel further explained that when his assistant sought Kuczynski's current contact information, Kuczynski claimed he had no address and no telephone and said he would contact counsel. Counsel's assistant told Kuczynski this was not acceptable, but Kuczynski refused to offer any contact information. Kuczynski ultimately made no attempt to contact advisory counsel before the settlement conference. After the court considered advisory counsel's statements, the court issued a bench warrant for Kuczynski's arrest, granted the State's request that the proceedings continue in absentia, and appointed advisory counsel as counsel of record.

¶4 At the March 29, 2010 trial management conference for an April trial date, Kuczynski failed to appear despite the court's warnings. Defense counsel explained to the superior court that while Kuczynski had contacted him "periodically," counsel still had no way to initiate contact with him. Counsel further explained that whenever he tried to give Kuczynski any information over the phone, Kuczynski would hang up on him. Counsel, however, said he had been able to tell Kuczynski the date of the upcoming April trial. The superior court continued the trial to June and stated trial would proceed in Kuczynski's absence if he failed to appear.

¶5 At the final trial management conference on May 25, 2010, Kuczynski again failed to appear despite the earlier

warnings. Even so, defense counsel noted he was ready for trial. Defense counsel again explained to the court that he had telephone contact with Kuczynski, "but as far as anything meaningful, he would constantly hang up once I started giving him any information." Accordingly, counsel had been unable to inform Kuczynski of the June trial date. Counsel further explained he still had no contact information for Kuczynski.

¶6 On June 1, 2010, the day trial was scheduled to begin, Kuczynski failed to appear. The court ordered trial to begin the next day. The next day, Kuczynski again failed to appear. Defense counsel again explained to the court the difficulties he had experienced in attempting to speak to Kuczynski. The court then found defense counsel had made numerous attempts to have "meaningful contact" with Kuczynski, but Kuczynski had avoided contact with counsel. While the court also found Kuczynski knew of the June trial date, defense counsel never told the court he had been able to inform Kuczynski of the June date and the record does not indicate Kuczynski otherwise knew of it. Regardless, the court ordered the trial to proceed in absentia. Thereafter, Kuczynski failed to appear on each day of the trial. On June 7, 2010, the jury found Kuczynski guilty. On October 26, 2010, Kuczynski was arrested on the bench warrant. On February 28, 2011, Kuczynski filed a motion to vacate the judgment and/or for a new trial. The superior court denied the

motion, stating the law did not allow a person "to avoid having a trial" by "simply failing to appear." On April 5, 2011, the court sentenced Kuczynski to six-and-a-half years in prison with 428 days of presentence credit.

DISCUSSION

I. Trial in Absentia

¶17 Kuczynski argues the superior court should have held an evidentiary hearing to determine if his absence from the proceedings was voluntary before allowing him to be tried in absentia. The superior court did not abuse its discretion in deciding to go forward with the case in Kuczynski's absence, and further, did not need to hold a hearing before deciding to do so.

¶18 Rule 9.1 of the Arizona Rules of Criminal Procedure provides that a court may infer a defendant's absence from a proceeding is voluntary if the defendant had notice of the time of the proceeding, had notice of the right to be present, and had been warned that the proceeding would go forward in the defendant's absence if the defendant failed to appear. Ariz. R. Crim. P. 9.1. Once the inference of voluntary absence is established, it is the defendant's burden to prove the absence was involuntary. *State v. Fristoe*, 135 Ariz. 25, 34, 658 P.2d 825, 834 (App. 1982). Due process does not require a court to hold a hearing on voluntariness unless the defendant

demonstrates his or her absence may have been involuntary. See *id.*, 658 P.2d at 834.

¶19 But Rule 9.1 is not the only means for a court to infer involuntary absence. While the record does not establish Kuczynski knew about the June trial date, it nonetheless demonstrates Kuczynski was voluntarily absent from the proceedings. Kuczynski was aware the trial date was subject to change and had received repeated warnings of the consequence should he fail to appear at trial.² As an out-of-custody defendant, he had "the responsibility to remain in contact with his attorney and the court." *State v. Bishop*, 139 Ariz. 567, 571, 679 P.2d 1054, 1058 (1984). Kuczynski, however, actively avoided contact with counsel and prevented counsel from giving him any meaningful information about his case, including the date of trial. On this record, the superior court properly concluded Kuczynski had attempted to prevent the trial from going forward and therefore his absence was voluntary. See *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996) (even though defendant did not have actual notice of trial dates, court did not abuse its discretion in finding his

²By the time Kuczynski refused to have contact with his counsel, the superior court had set trial seven separate times -- three times while Kuczynski represented himself. Kuczynski was present at all of those settings. Therefore, Kuczynski was aware of the importance of staying informed of the date of trial.

absence voluntary when court admonished defendant of the consequence of absence, defendant failed to appear at the pretrial conference, and defendant failed to keep in contact with counsel).

¶10 Moreover, Kuczynski never argued in the superior court he was involuntarily absent, never offered the superior court any facts to suggest his absence was involuntary, and never asked the court to hold an evidentiary hearing to determine if his absence was involuntary. Under these circumstances, the superior court was not required to conduct an evidentiary hearing before it ordered the trial to proceed in Kuczynski's absence, but could instead rely upon the information already before it to determine Kuczynski's absence was voluntary.³

II. Appointment of Counsel

¶11 Kuczynski also contends the superior court violated his constitutional right of self-representation when it appointed counsel to represent him once it ordered the

³Kuczynski also argues it was structural error to try him in absentia, relying on *State v. Garcia-Contreras*, 191 Ariz. 144, 953 P.2d 536 (1998). But his reliance on this case is misplaced. In *Garcia-Contreras*, the superior court denied the defendant the right to be present during jury selection when it refused to give the defendant a short continuance to allow him to dress in his civilian clothing and instead gave him the choice of either attending jury selection in jail garb or not attending at all; the defendant elected to not appear in jail garb. *Id.* at 147-149, ¶ 9-22, 953 P.2d at 539-41. Here, Kuczynski's absence was not forced upon him, but was of his own choice.

proceedings to continue in absentia. Kuczynski argues that by failing to appear at trial, he only waived his right to be present, not his right to represent himself. We disagree.

¶12 A defendant has a constitutional right to waive counsel, *State v. Moody*, 192 Ariz. 505, 509, ¶ 22, 968 P.2d 578, 582 (1998), but the right to proceed without counsel does not exist in a vacuum. *State v. De Nistor*, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985). This right is balanced against the government's right to a "fair trial conducted in a judicious, orderly fashion." *Id.* (quoting *United States v. Dujanovic*, 486 F.2d 186, 186 (9th Cir. 1973)). Here, Kuczynski actively avoided being informed of the trial date and failed to appear at trial in an attempt to prevent the matter from proceeding to trial. Trial courts "confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1062, 25 L. Ed. 2d 353 (1970). Under the circumstances Kuczynski created, the superior court properly appointed counsel for Kuczynski when he failed to appear at the settlement conference, just as it warned him it would do, and properly kept counsel in place through the completion of trial after Kuczynski began his obstructionist conduct and refused to have any meaningful contact with his counsel. See *Faretta v. California*, 422 U.S. 806, 834 n.46, 95

S. Ct. 2525, 2541 n.46, 45 L. Ed. 2d 562 (1975) (court may terminate self-representation by a defendant who engages in obstructionist misconduct).⁴

CONCLUSION

¶13 For the foregoing reasons, we affirm Kuczynski's conviction and sentence.

_____/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

_____/s/
DIANE M. JOHNSEN, Judge

_____/s/
JON W. THOMPSON, Judge

⁴We note there is nothing in the record to indicate the superior court would not have allowed Kuczynski to represent himself once again if he had simply appeared and filed the appropriate motion.