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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0114
)
Appellee,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
JIMMIE LEE FORD,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006114-001 DT

The Honorable Maria Del Mar Verdin, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

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T I M M E R, Chief Judge

¶1 Jimmie Lee Ford appeals his convictions and sentences imposed after a jury trial. Ford argues the trial court erred

by (1) finding that his absence from a portion of the trial was voluntary, and (2) enhancing his sentences based on a prior Mississippi conviction for manslaughter. For the following reasons, we affirm Ford's convictions and sentences on two counts, but reverse his sentences on two counts and remand for further proceedings consistent with this decision.

BACKGROUND

¶2 In March 2008, a grand jury indicted Ford with Counts 1 and 2, aggravated assault, class three dangerous felonies; Count 3, possession of narcotic drugs, a class four felony; and Count 4, possession of marijuana, a class six felony. The State alleged as prior convictions, among others, that Ford had previously been convicted in Mississippi of two felonies: possession of a controlled substance and manslaughter.

¶3 The case proceeded to trial on October 28. The next morning, Ford did not appear in court because he had suffered some chest pains that required medical attention. Ford's counsel waived his presence for the morning session, and the court promptly continued the proceeding until that afternoon. Ford attended the afternoon session and was present for the remainder of the day. Upon learning that Ford had missed his scheduled medications at the jail, the court noted that "sometimes folks get thrown off schedule because they're being transported or in court all day" and requested "that the

sheriff's office look at this case to assure that [Ford] receives his medication as necessary, even though he is in court."

¶4 At approximately 8:15 a.m. on October 30, the trial court received a telephone call from a sergeant at the jail regarding Ford's transport status. The court summarized the conversation, which took place in the presence of both counsel, as follows:

Apparently Mr. Ford indicated that he was not getting dressed for court and he wanted to have his medication given. Mr. Ford was advised that it was not time for his medication to be distributed and he would be given medication at a later time. Mr. Ford refused to get dressed and come to court.

The court further noted that it had received information "that Mr. Ford indicated that he didn't want to get up in the wee hours; that he wanted to sleep in and that he would come to court at a later time." At about 10:25 a.m., five minutes before trial was scheduled to begin that day, the court learned that Ford was present in the building and wanted to come to court. At that time, however, the sheriff's office did not have a deputy available to transport Ford. The court continued jury selection proceedings that morning without Ford. Ford eventually arrived in time to attend the afternoon session that day and was present for the remainder of the trial.

¶15 The court subsequently found that Ford "was untimely transported as a result of his own actions." As the court stated, "[T]here is no indication today that Mr. Ford was denied medication. . . . I can't tell the sheriff whether and how to bring his inmates to court. . . . If Mr. Ford chose not to follow that process, that certainly is Mr. Ford's choice." Consequently, the court concluded that Ford's absence on the morning of October 30 was voluntary.

¶16 The jury ultimately found Ford guilty as charged. Prior to sentencing, the court conducted a hearing on the State's allegation of prior convictions, received the State's exhibits in evidence, and found, in part, that the State had proven the following: (1) that Ford was convicted in Mississippi in 2004 of possession of controlled substance, a felony, and (2) that Ford was convicted in Mississippi in 1995 of manslaughter, a dangerous felony. Thereafter, the court sentenced Ford to an aggravated prison term of 18 years each for Counts 1 and 2, a presumptive prison term of 10 years for Count 3, and a presumptive prison term of 3.75 years for Count 4. The court further ordered that the sentence for Count 2 be served consecutive to Count 1 and the sentences for Counts 3 and 4 each be served consecutive to Count 2, but concurrent with each other. Ford timely appealed.

DISCUSSION

A. Trial in absentia

¶17 Ford argues he did not voluntarily waive his right to be present at trial, and the trial court committed structural error by proceeding with jury selection in his absence. Although Ford admitted he technically chose not to be transported to court, he nevertheless contends his choice was involuntary because he was without meaningful alternatives. Additionally, Ford asserts the trial court violated his constitutional rights when it proceeded with trial rather than wait for his transport, especially when he had asked to be transported at least an hour before the start of the proceeding. We disagree.

¶18 Due process guarantees a criminal defendant the right to be present at critical stages of trial, but he may waive the "right to be present at any proceeding by voluntarily absenting himself." Ariz. R. Crim. P. 9.1; *State v. Goldsmith*, 112 Ariz. 399, 400, 542 P.2d 1098, 1099 (1975). The court may infer that Ford's absence is voluntary if he had "personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his . . . absence should he . . . fail to appear." Ariz. R. Crim. P. 9.1; *State v. Tudgay*, 128 Ariz. 1, 2, 623 P.2d 360, 361 (1981). We review the trial court's decision to proceed with trial in

absentia for an abuse of discretion. *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996).

¶9 Ford does not dispute he was aware of the trial date and that he understood the consequences if he failed to appear for trial. Rather, Ford likens his situation to that of the defendant in *State v. Garcia-Contreras*, 191 Ariz. 144, 953 P.2d 536 (1998). In that case, the in-custody defendant asked for a continuance to wait for his civilian clothing, which did not arrive in time. *Id.* at 145, ¶ 1, 953 P.2d at 537. The trial court denied the defendant's request and presented him with a choice to either appear in jail-issued clothes or waive his presence at jury selection. *Id.* The supreme court held that under the circumstances, the defendant was not given meaningful alternatives, and his choice to be absent was in fact involuntary. *Id.* at 147, ¶ 11, 953 P.2d at 539. Consequently, the supreme court concluded the trial court violated the defendant's constitutional rights. *Id.* at 149, ¶ 22, 953 P.2d at 541.

¶10 Ford argues that like the defendant in *Garcia-Contreras*, he was compelled to choose between "two equally objectionable alternatives" because he would either have to "risk harm to his health by being again transported without his medication[] or . . . miss a vital portion of trial proceedings." The record before us does not reveal that Ford

was faced with such a choice. Ford testified that on October 30, 2008, the jail woke him at about 5:00 a.m. Ford stated that he "constantly ask[ed]" for his medication, despite acknowledging that he normally receives his medication around 8:00 a.m. or later. Ford admitted that he did get his medication that day, but denied that he had refused to get up to come to court. At the trial court's request, the sheriff's office later filed a memorandum stating, in part, that in response to a comment that Ford had refused to come to court, Ford told his transporting officer, "I didn't refuse I just didn't want to get up that early." Given this record, we do not discern how Ford risked missing his scheduled medication had he followed the jail transport procedure. This is especially so as he knew the trial court had asked the sheriff's office the prior day to ensure timely provision of Ford's medication. Indeed, he did in fact receive his medication. We therefore reject Ford's contention that he had no meaningful alternatives pursuant to *Garcia-Contreras*.¹

¹ We summarily reject Ford's contention that the trial court erred by not ordering a brief continuance after Ford had indicated he wanted to be transported. Ford cites no authority, and we are not aware of any, that would require the trial court to do so simply because Ford was ready and willing to be transported to court. Moreover, were we to indulge this argument, we would in effect impermissibly allow Ford the ability to dictate the time and manner of his transport. See Arizona Revised Statutes ("A.R.S.") section 11-441(A)(5) (sheriff has authority to maintain and operate county jails);

¶11 In light of the above record, the trial court acted within its discretion in finding that Ford had voluntarily waived his right to be present at trial. See Ariz. R. Crim. P. 9.1; *Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354. It follows that the court's decision to proceed with jury selection on the morning of October 30 in Ford's absence did not violate his due process rights.

B. Sentence enhancement based on Mississippi manslaughter conviction

¶12 Ford next argues the trial court erred by enhancing his sentences on Counts 1 and 2 with the 1995 Mississippi manslaughter conviction, a dangerous felony. Specifically, Ford contends that the State's submitted evidence "did not specify under which Mississippi statute [Ford] had been convicted," and the trial court failed to make "any comparison whatsoever of the relevant Mississippi and Arizona statutes."² Thus, Ford argues the State failed to meet its burden of proving (1) the

Trombi v. Donahoe, 223 Ariz. 261, 267, ¶¶ 23-24, 222 P.3d 284, 290 (App. 2009) (recognizing court's inability to micromanage manner of inmate transport).

² When the State alleges a prior non-Arizona conviction for sentence enhancement purposes, Arizona law requires the trial court to determine whether "the foreign conviction established 'every element that would be required to prove that such offense would be a felony in Arizona . . . by comparing the statutory elements of the foreign crime with those in the relevant Arizona statute.'" *State v. Smith*, 219 Ariz. 132, 134, ¶ 10, 194 P.3d 399, 401 (2008) (citations omitted).

Mississippi manslaughter conviction would have been punishable as a class one, two, or three felony if committed in Arizona, and (2) the dangerous nature of the offense.³ Ford urges us to vacate his sentences on Counts 1 and 2 and remand for resentencing without the enhancement.

¶13 The State concedes error, but argues the appropriate remedy is to vacate the sentences on Counts 1 and 2 and remand for further proceedings to allow the State an opportunity to produce additional clarifying evidence and to permit the trial court a chance to make the necessary comparison between the relevant statutes. We agree with the State.

¶14 Ford does not raise a double jeopardy argument or point to any authority that would require us to remand this matter for resentencing without the enhancement. Indeed, both the United States Supreme Court and the Arizona Supreme Court have permitted a retrial of a prior conviction allegation when the government had failed to meet its burden of proof. *Monge v. California*, 524 U.S. 721, 729, 734 (1998); *State v. McGuire*, 113 Ariz. 372, 375, 555 P.2d 330, 333 (1976); see also *State v. McCurdy*, 216 Ariz. 567, 574-75, ¶ 19, 169 P.3d 931, 938-39 (App.

³ Pursuant to A.R.S. § 13-704(D) (2010), which consolidated Arizona's prior sentencing enhancement statutes and is substantively applicable in this case, a person who is convicted of a class three dangerous felony shall have his sentence enhanced as provided if he "has one historical prior felony conviction that is a class 1, 2, or 3 felony involving a dangerous offense."

2007) (remanding for further proceedings when appellate court could not determine precise statute under which the defendant was convicted in California); *State v. Rodriguez*, 200 Ariz. 105, 106, ¶ 6, 23 P.3d 100, 101 (App. 2001) (holding production of additional evidence to establish prior conviction after remand did not violate double jeopardy principles). Because we cannot determine the precise statute under which Ford was convicted of manslaughter in Mississippi, we vacate Ford's sentences for Counts 1 and 2 and remand for a retrial on the State's allegation of a prior dangerous felony.

CONCLUSION

¶15 For the foregoing reasons, we affirm Ford's convictions on Counts 1 - 4, affirm his sentences on Counts 3 and 4, but reverse his sentences on Counts 1 and 2 and remand for further proceedings consistent with this decision.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Jon W. Thompson, Presiding Judge

/s/
Patricia K. Norris, Judge