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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/16/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0879
) 1 CA-CR 10-0880
Appellee,) (Consolidated)
)
v.) DEPARTMENT E
)
) **MEMORANDUM DECISION**
BOBBY JOE CROCKETT, JR.,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-115231-001 DT, CR2009-161603-001 DT

The Honorable John R. Hannah Jr., Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Bobby Joe Crockett (defendant) appeals his convictions
for attempted acquisition of narcotic drugs, attempted

acquisition of dangerous drugs, and forgery. The issue presented on appeal is whether the trial court abused its discretion by finding that defendant voluntarily absented himself from his trial and thereby waived his right to be present. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 In August 2009, defendant attempted to fill two forged prescriptions for Xanax and Percocet. Defendant was charged with attempted acquisition or administration of narcotic drugs, a class 3 felony, attempted acquisition or administration of dangerous drugs, a class 3 felony, and two counts of forgery, class 4 felonies.² Trial in this matter was set for April 12, 2010. At a pretrial conference on April 5, the trial court reminded defendant that if he failed to appear for trial a warrant could be issued for his arrest and the trial could take place in his absence.³ The court denied defendant's request for a continuance, reminding him that a month earlier the court

¹ We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003).

² The state alleged that defendant committed the crimes while on release from confinement and that defendant had historical prior felony convictions.

³ Defendant was also warned that the trial could proceed in his absence at his arraignment on November 11, 2009, at the initial pretrial conference on January 10, 2010, and at the comprehensive pretrial conference on February 1, 2010.

"indicated there would not be any further continuances in this case." On April 12, defendant requested another continuance, which was denied. Defendant was again warned that if he failed to appear the trial could go ahead without him.

¶13 Defendant appeared for jury voir dire on April 13, but he failed to appear for opening statements the following day. At approximately 9:30 a.m., defendant informed his counsel that he was having chest pains and was either on his way to the hospital or waiting for transportation. Defense counsel apprised the court of the situation and objected to any part of the trial proceeding in defendant's absence. The prosecutor objected, pointing out that there were scheduling conflicts with the state's witnesses, and requested proof that defendant was being admitted to the hospital. Due to the dispute between the parties regarding defendant's health condition, the trial court found that the defendant "may" have an excuse, but decided to proceed until defendant provided proof that his illness prevented him from coming to trial. The trial court briefly recessed to allow defense counsel to contact defendant's caregiver.

¶14 At 1:00 p.m., defense counsel made an oral motion for mistrial after receiving a document from Banner Thunderbird Hospital reflecting that defendant did go to the emergency room. The paperwork stated that defendant arrived at the emergency

room at 11:00 a.m. The prosecutor argued that it appeared defendant did not even try to go to the hospital until after being told by his counsel that he would not get a continuance without some kind of documentation that he was in the hospital. The trial court denied the motion for mistrial until the defense presented information that showed defendant had to go to the hospital rather than show up for his trial. Defense counsel's request for a continuance to obtain such evidence was denied. The state rested its case at the end of the day.

¶15 On the following day, April 15, defendant did not appear in court. Defense counsel informed the court that defendant was discharged from the hospital the night before and that the x-rays came back negative for determining the source of his pain. The x-rays did show the presence of lymph nodes, and out of caution the emergency room doctor recommended that he confer with his cancer and primary care doctor immediately. Defendant was given a prescription for Percocet at the hospital. Defense counsel requested a mistrial, arguing that defendant would not be able to assist with his trial if he was taking Percocet and that the hospital would not have given him the prescription if medical personnel thought he was faking his pain. Defense counsel informed the court that defendant was not in court because he had an appointment for his "long-scheduled PET scan" that morning. The court was confused that defendant

had previously scheduled a PET scan during a time he knew he was going to be in trial. Defense counsel said defendant did not tell him about the appointment until the day of jury selection. The prosecutor stated she would be open to continuing the trial. The court denied the motion for mistrial, but did continue the trial to the following Monday, April 19, stating that "there's a possibility that all of this mess has not been a result of the defendant voluntarily absenting himself." When asked by defense counsel for the court's reasoning, it stated:

[T]he fact that he knew that he had a trial scheduled yesterday and that he was required to be here and that we would go forward without him if he was not here, and he was not here.

At that point, the burden is on him to show that his absence was something other than a choice on his part, and he still has not demonstrated that to me.

¶16 On Monday, defendant failed to appear and the trial continued in his absence. The trial court told the jury "not to consider or speculate about the defendant's absence from the courtroom." The jury convicted defendant of all four counts. The trial court issued a bench warrant for defendant's arrest.

¶17 Four months later, defendant was arrested after presenting a forged prescription to a Walgreen's pharmacist in

Phoenix.⁴ At sentencing, defendant claimed that he "almost fell out of [his] seat" during jury selection and "then the next day [he] had to be rescued [sic] to the emergency room." The court explained to defendant that it wanted confirmation that he could not be at trial, but instead defendant "never came back" and was "picked up months later." Defendant was sentenced to presumptive concurrent terms of ten years on each count, with 108 days of presentence incarceration credit.

¶18 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-120.21 (2003).

DISCUSSION

¶19 Defendant asserts that the trial court violated his constitutional rights when it proceeded to trial in his absence after receiving evidence that he was at the hospital emergency room. Whether defendant's absence was voluntary is a question of fact we review for an abuse of discretion. *State v. Bishop*, 139 Ariz. 567, 569, 679 P.2d 1054, 1056 (1984). The grant or denial of a continuance should "be disturbed only upon a showing of a clear abuse of discretion and prejudice to defendant."

⁴ Defendant refused to provide identification and gave police a false name. A search of defendant's car revealed substantial amounts of methamphetamine, marijuana, and several bottles of prescription medication not prescribed to defendant, including a narcotic prescription.

State v. Garcia-Contreras, 191 Ariz. 144, 149, ¶ 21, 953 P.2d 536, 541 (1998).

¶10 A defendant's right to be present at trial is protected by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as article II, § 24 of the Arizona Constitution. *Id.* at 146, ¶ 8, 953 P.2d at 538; see also Ariz. R. Crim. P. 19.2. "This right is not absolute however, and may be waived if the defendant voluntarily absents himself." *State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (App. 1983); see *State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977). Arizona Rules of Criminal Procedure, Rule 9.1, provides:

Except as otherwise provided in these rules, a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant 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 or her absence should he or she fail to appear.

When the foregoing requirements are met, the defendant's absence is presumed voluntary and is construed as a valid waiver of his right to be present. *Hall*, 136 Ariz. at 222, 665 P.2d at 104. If the defendant provides subsequent information to overcome the inference that he is voluntarily absent the trial court must consider that information. *State v. Reed*, 196 Ariz. 37, 39, ¶

4, 992 P.2d 1132, 1134 (App. 1999). However, the defendant carries the burden to show that his absence was involuntary. *State v. Davis*, 108 Ariz. 335, 336, 498 P.2d 202, 203 (1972); *Hall*, 136 Ariz. at 222, 665 P.2d at 104.

¶11 The record indicates that defendant received proper notice under Rule 9.1. He was warned five times between November 11, 2009, and April 12, 2010, that if he failed to appear his trial could go ahead without him. That defendant had notice of the proceedings and his right to be present is evident from his attendance at jury voir dire. Consequently, the burden was on defendant to show that his absence was involuntary and that he did not waive his right to be present.

¶12 Defendant relies on *Garcia-Contreras* to argue that his waiver was not voluntary because he "did not have true freedom of choice." In *Garcia-Contreras*, the Arizona Supreme Court held that it was structural error to require the defendant to choose between attending trial in prison attire or absenting himself from the proceedings. 191 Ariz. at 149, ¶¶ 20-22, 953 P.2d at 541. The court reasoned that "[v]oluntary choice presupposes meaningful alternatives," and that *Garcia-Contreras* was without meaningful alternatives because he did not want to appear before the jury in prison clothes. *Id.* at 147, ¶¶ 10-11, 953 P.2d at 539. Nevertheless, the court noted that the mere prospect of appearing in prison attire did not automatically render the

decision "involuntary." *Id.* at ¶ 10. The court warned that "[w]e should be wary of accuseds who attempt to 'frustrate the process of justice' by purposely arriving at the courthouse without civilian clothing." *Id.* at ¶ 13 (citation omitted). Neither party suggested that Garcia-Contreras' lack of civilian clothing was either planned or purposeful. *Id.*

¶13 Defendant asserts that he similarly did not have true freedom of choice because he was forced to choose between "going to the emergency room or coming to court." We do not agree that defendant has demonstrated that he did not have freedom of choice in this situation.

¶14 Here, there was an ongoing dispute concerning the actual state of defendant's health and whether he was as ill as he alleged. Defendant had repeatedly tried to continue the trial and had been warned that no further continuances would be granted. After defendant failed to appear on the second day of trial, the court ordered a short recess, but then resumed the trial because of scheduling conflicts and until more evidence was presented on the state of defendant's health. Defense counsel presented a fax from the hospital showing only that defendant had arrived at the emergency room at 11:00 a.m. The record contains no explanation as to why defendant waited until 11:00 a.m. the following day to enter the hospital if he was so terribly ill during jury voir dire. Further, as discussed, the

record reflects defendant was later discharged the same day and that no cause could be found for his pain. Defendant failed to appear for his trial thereafter.

¶15 When life-threatening emergencies occur they must be dealt with in the appropriate manner. In no way do we want to discourage defendants from taking care of their emergency health conditions. However, anyone can check into a hospital emergency room complaining of any number of possible ailments. Defendant had the burden to substantiate his claim of illness and explain how that illness prevented him from attending his trial proceedings. As the superior court basically found, he altogether failed to provide verification of his ailment or that he could not be at trial. The fax from the hospital evidenced that he had visited the emergency room, but did not prove that defendant's medical condition prevented him from attending trial. Rather than offer that evidence the next day, defendant again failed to appear, and his lawyer cited a long-scheduled PET examination as the reason for his absence. No explanation was given for why that examination could not have been rescheduled to accommodate the trial. After the trial court continued the conclusion of trial to the following Monday, defendant again failed to appear, this time without any explanation.

¶16 On this record, the trial court did not abuse its discretion in finding that defendant voluntarily absented himself from his trial.

CONCLUSION

¶17 For the foregoing reasons, we affirm.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
DIANE M. JOHNSEN, Judge