

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KEVIN FRIEDENSTAB,
Appellant.

No. 2 CA-CR 2016-0306
Filed April 19, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20131395001
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

STATE v. FRIEDENSTAB
Decision of the Court

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

ESPINOSA, Judge:

¶1 After a jury trial *in absentia* in July 2014, Kevin Friedenstab was convicted of five counts of possession of a narcotic drug for sale and five counts of possession of drug paraphernalia. Following his arrest, Friedenstab was sentenced in August 2014 to concurrent prison terms, the longer of which is 11.5 years. On appeal, he argues the trial court erred in conducting the trial in his absence. Finding no error, we affirm.

¶2 At his May 2013 initial appearance, Friedenstab was advised of his next court date and admonished that “his[] failure to appear for trial could result in the trial proceeding in his[] absence.” He was similarly advised at his January 24, 2014 change-of-plea/status conference, at which he also was informed of the trial date; the trial court again confirmed the trial date in his presence at a January 31, 2014 case management conference. At a July 3, 2014 status conference, defense counsel informed the court he was unable to locate Friedenstab, and explained that his client’s telephones had been “disconnected” and he had no current address for him. Counsel asked the court to vacate the trial, permit him to withdraw, and issue an arrest warrant for Friedenstab. The court denied defense counsel’s motion to withdraw and to vacate the trial, and the trial proceeded in Friedenstab’s absence on July 8. Following his arrest, he was sentenced as described above and this appeal followed.¹

¹Friedenstab sought and was granted relief to file a delayed notice of appeal. *See* Ariz. R. Crim. P. 32.1(f).

STATE v. FRIEDENSTAB
Decision of the Court

¶3 Generally, a court may infer a defendant's absence is voluntary if he "had 1) personal notice of the time of the proceeding, 2) his right to be present at it, and 3) a warning that the proceeding would go forward in his absence." *State v. Tudgay*, 128 Ariz. 1, 2, 623 P.2d 360, 361 (1981); *see also* Ariz. R. Crim. P. 9.1. Friedenstab argues the evidence did not support the trial court's decision to conduct the trial in absentia, asserting the record "establishes [he] had received permission from the court on a number of occasions to waive his presence for various hearings," and that he would "[s]ubsequently . . . appear in court when required." He also contends the record shows his "competency was at issue at least during part of the progress of this case."

¶4 We initially note that several of the citations to the record provided in the opening brief do not support Friedenstab's claims. Only two of the listed citations show that the trial court waived his presence, despite his representation that this had occurred "on a number of occasions," and notably, several of the citations relate to Friedenstab's codefendant, and not to him. Additionally, *none* of his citations for the proposition that his competency had been at issue relate to him; rather, all of them relate solely to his codefendant.²

¶5 Moreover, as discussed above, the trial court advised Friedenstab of the trial date and that his trial could proceed without him, yet he failed to appear at trial or to maintain contact with the court or with his counsel. *See State v. Bishop*, 139 Ariz. 567, 571, 679 P.2d 1054, 1058 (1984) (out-of-custody defendant required to maintain contact with court or counsel); *see also State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996) (although defendant lacked actual notice of trial dates, absence voluntary when court had admonished defendant of consequences of absence, defendant failed to appear at pretrial conference, and

²In any future cases, we admonish appellate counsel to check carefully all citations to the record in order to avoid making inaccurate or misleading representations to this court.

STATE v. FRIEDENSTAB
Decision of the Court

defendant failed to maintain contact with counsel). We thus find unavailing Friedenstab's essentially unsupported claim that he "obey[ed] the trial court's orders to appear in court as directed" and that his absence was not voluntary. We further note that Friedenstab does not dispute, much less address, the fact that he was advised of the trial date and the consequences should he fail to appear at trial. He likewise does not explain or support his assertion that his competency was at issue during the proceedings. Because Friedenstab does not explain how his arguments support his claim that the court improperly conducted his trial in absentia, they are waived. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived for insufficient argument).

¶6 Furthermore, we flatly reject Friedenstab's assertion that defense counsel was somehow at fault for failing to "provide the court with any indication as [to] how [Friedenstab] could be reached in order to secure his presence at trial." If counsel had known how to contact his client, he presumably would not be advising the trial court he did not know that very thing. In any event, it was Friedenstab's responsibility to maintain contact with his attorney and the court. *See Bishop*, 139 Ariz. at 571, 679 P.2d at 1058. Additionally, at sentencing, Friedenstab apologized to the court for missing his trial and acknowledged, "I was scared, terrified to come to court." Friedenstab's statement appears to support the court's finding that his absence was, in fact, voluntary.

¶7 For all of these reasons, Friedenstab's convictions and sentences are affirmed.