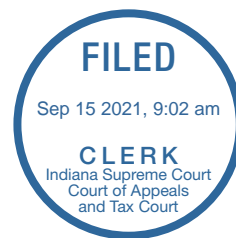


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Tyson H. Gass,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 15, 2021

Court of Appeals Case No.
21A-CR-856

Appeal from the Newton Superior
Court

The Honorable Daniel J. Molter,
Judge

Trial Court Cause No.
56D01-1904-F6-356

Bradford, Chief Judge.

Case Summary

- [1] After being arrested for various drug-related charges, Tyson Gass failed to appear for a number of hearings. Gass was eventually tried *in absentia* after he failed to appear for trial. Following the presentation of evidence, a jury found him guilty of guilty of Level 6 felony unlawful possession of a syringe, Class B misdemeanor possession of marijuana, and Class C misdemeanor possession of paraphernalia. The jury also found that Gass was a habitual offender. On appeal, Gass contends that the trial court abused its discretion in trying him *in absentia*. We affirm.

Facts and Procedural History

- [2] On March 30, 2019, Kentland Police Officer Richard Hughes was dispatched to the Kentland Motel regarding a “verbal fight” between the residents of Unit 20 and Unit 21. Tr. Vol. II p. 36. Officer Hughes knocked on the door to Unit 21.

Finally, [Gass] answered the door by just cracking it a few inches so I could see him. I identified who I was and why I was there. At that time, I was able to smell the odor of marijuana emitting from the room. He had slammed the door and locked it. I knocked a couple more times. He finally opened the door back up. At this time, he was in a towel. We pulled him outside and placed him in handcuffs.

Tr. Vol. II p. 37. Gass was placed under arrest and read his *Miranda*¹ rights. Gass refused to give Officer Hughes consent to search the apartment, stating that “there was no longer any marijuana in his room. He had sold an eighth of an ounce to the neighbor who he had just got into an argument with for \$40.00.” Tr. Vol. II p. 38.

[3] After securing a search warrant, Officer Hughes and the other responding officers searched the apartment, finding

two hypodermic needles; a clear glass pipe; a clear baggie containing a green leafy substance believed to be marijuana; a blue and green glassy colored pipe with black residue on it; a brown wooden box commonly referred to as a dugout with a green leafy substance inside to smoke marijuana; and a clear plastic bag with white residue, which we field tested and it tested positive for methamphetamine. Right outside the room, there was a black suitcase. Inside there we located two bags of white crystal-like substance and it had field tested positive for methamphetamine.

Tr. Vol. II pp. 38–39.

[4] On April 3, 2019, the State charged Gass with Level 6 felony possession of methamphetamine, Level 6 felony unlawful possession of a syringe, Class B misdemeanor possession of marijuana, and Class C misdemeanor possession of paraphernalia. The State also alleged that Gass was a habitual offender. That

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

same day, Gass appeared before the trial court for an initial hearing. Gass was released on bond on April 10, 2019.

[5] Gass appeared at a May 24, 2019 omnibus hearing, at the conclusion of which he was ordered to report to the probation department. On July 11, 2019, the State filed a motion to revoke Gass's bond, asserting that he had failed to report to the probation department as ordered by the trial court. The trial court granted the State's motion, continued the scheduled hearing, ordered Gass to appear before the court for a dispositional hearing on August 16, 2019, and remanded Gass to the custody of the Newton County Sheriff. On July 19, 2019, the trial court reinstated Gass's bond, released him from incarceration, and again ordered him to appear for a dispositional hearing on August 16, 2019.

[6] Following a number of continuances, most, if not all, of which were requested by Gass, the trial court ordered Gass to appear for a hearing on March 6, 2020. Gass failed to appear. The trial court subsequently ordered Gass to appear for a pretrial conference at 8:30 a.m. on June 26, 2020. A bench warrant for Gass's arrest was issued after he failed to appear. Gass came before the court for a pretrial hearing on August 12, 2020, at which time the trial court ordered him to appear for trial at 10:00 a.m. on October 7, 2020.

[7] Gass failed to appear for his scheduled trial on October 7, 2020. His counsel indicated that he had spoken to Gass, who claimed to have fallen ill and sought

treatment at the hospital, earlier that morning and requested a continuance.

The State objected, stating:

I object. It's my understanding that Mr. Gass is ambulatory and was at the courthouse this morning before speaking with [counsel]. I believe he is attempting to avoid appearing at this hearing intentionally and would ask the Court to find that he did have notice of this trial being set today and that the trial will go on *in absentia*.

Tr. Vol. II p. 23 (*italics added*). In denying counsel's request for a continuance, the trial court stated:

He does have notice and you've indicated he's been in touch with you today. However, I'm sure if he's hospitalized or something ... I'm sure he is a reasonably intelligent person and will be notifying counsel through text or otherwise that he is hospitalized and the appropriate medical provider can let us know.[...] We will act accordingly depending on what that is, so there is a possibility this case could be continued at some point or recessed, more than likely, if it's not being continued.

Tr. Vol. II p. 23 (first set of ellipses in original, second set added). The case then proceeded to trial, at the conclusion of which the jury found Gass guilty of unlawful possession of a syringe, possession of marijuana, and possession of paraphernalia.² The jury also found that Gass was a habitual offender.

² The jury found Gass not guilty of the possession of methamphetamine charge.

- [8] Following Gass’s failure to appear for trial, on October 8, 2020, the trial court issued a bench warrant for Gass’s arrest. Gass did not contact or appear before the court at any point between October 8, 2020 and March 17, 2021, when he was brought before the trial court on the bench warrant. Gass did not provide the trial court with an explanation for his failure to appear on October 7, 2020. The trial court remanded Gass into custody and set the matter for sentencing on April 21, 2021.
- [9] On April 4, 2021, Gass’s fiancée sent a letter to the trial court claiming that she had provided a copy of Gass’s hospital records to Gass’s attorney following his discharge from the emergency room on October 7, 2020. The hospital records, which were attached to Gass’s fiancée’s letter, indicated that Gass was seen in the emergency room at 8:39 a.m. on October 7, 2020. According to hospital records, Gass’s chief complaint was that he “need[ed a] Dr. note.” Appellant’s App. Vol. II p. 187. Gass was discharged a short time after arriving at the hospital with no instructions and no medications. The attending physician indicated that Gass’s diagnosis was “court case pending.” Appellant’s App. Vol. II p. 187.
- [10] The matter proceeded to sentencing on April 21, 2021. Following a hearing, the trial court found that Gass had “demonstrated a disdain for the order of law” and imposed an aggregate six-year sentence. Appellant’s App. Vol. II p. 195.

Discussion and Decision

[11] “Both the Federal and Indiana Constitutions afford defendants in a criminal proceeding the right to be present at all stages of their trial.” *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007). However, “[a] defendant may be tried *in absentia* if the trial court determines that the defendant knowingly and voluntarily waived that right.” *Lampkins v. State*, 682 N.E.2d 1268, 1273 (Ind. 1997).

When a defendant fails to appear for trial and fails to notify the trial court or provide it with an explanation of its absence, the trial court may conclude that the defendant’s absence is knowing and voluntary and proceed with trial when there is evidence that the defendant knew of his scheduled trial date.

Holtz v. State, 858 N.E.2d 1059, 1062 (Ind. Ct. App. 2006), *trans. denied*. “The best evidence that a defendant knowingly and voluntarily waived his or her right to be present at trial is the defendant’s presence in court on the date the matter is set for trial.” *Lampkins*, 682 N.E.2d at 1273.

[12] “[A] defendant who has been tried *in absentia* ‘must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver.’” *Brown v. State*, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005) (quoting *Ellis v. State*, 525 N.E.2d 610, 612 (Ind. Ct. App. 1987)), *trans. denied*. However, “[t]his does not require a sua sponte inquiry; rather, the defendant cannot be prevented from offering an explanation.” *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005), *trans. denied*.

[13] We review a trial court’s decision regarding whether to try a defendant *in absentia* for an abuse of discretion. *Calvert v. State*, 14 N.E.3d 818, 821 (Ind. Ct. App. 2014). “A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court or if the court misapplies the law.” *Id.* “As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial.” *Soliz*, 832 N.E.2d at 1029. “[A] defendant’s explanation of his absence is a part of the evidence available to a reviewing court in determining whether it was error to try him *in absentia*.” *Brown*, 839 N.E.2d at 228 (emphasis in original).

[14] In arguing that the trial court abused its discretion in trying him *in absentia*, Gass asserts that he “did not make a knowing, voluntary, or intelligent waiver of his right to be present at trial.” Appellant’s Br. p. 11. Specifically, he claims that “[h]is illness made it impossible for him to attend the trial, but he made a good faith effort to notify his defense attorney and the court of his illness.” Appellant’s Br. p. 11. Gass argues that despite not “feeling very good” and “throwing up” on his way to the courthouse, he talked “to the bailiff downstairs” before going to his attorney’s office. Tr. Vol. II p. 105. He claims that his attorney “told him to go to the hospital and that [his attorney] would have things postponed.” Tr. Vol. II p. 105. Gass had no explanation for why his attorney apparently did not provide the trial court with his medical records from the hospital that morning but claims that he was “diligent in his attempts to notify the court” of his illness. Appellant’s Br. p. 12.

[15] At the beginning of the scheduled trial, Gass's counsel informed the trial court of Gass's alleged illness and requested a continuance. The State objected, noting Gass's numerous prior failures to appear and his seemingly adequate condition to be present for trial when he arrived at the courthouse earlier that morning. The trial court denied the motion to continue but stated that it would take the appropriate steps if Gass provided proof of a valid medical issue. Although Gass claims that his fiancée provided such proof to his counsel, no such proof was provided to the trial court.

[16] The record reveals that Gass was notified of the date and time of his trial. It further reveals that despite having the opportunity to do so, Gass did not explain his absence to the trial court at any point before his fiancée sent a letter to the trial court on April 4, 2021. Although Gass's fiancée claimed that she had provided a copy of Gass's hospital records to Gass's attorney following his discharge from the emergency room on October 7, 2020, nothing in the record indicates that counsel ever received the hospital records, much less attempted to provide the records to the trial court. Gass was given both notice of his trial date and the opportunity to explain his absence, *i.e.*, rebut the initial assumption of waiver of his right to be present at trial.

[17] Furthermore, we agree with the State that, considering the record as a whole, Gass "failed to provide a valid explanation for his absence" that was not contradicted by the record. Appellee's Br. p. 12. Again, the hospital records indicated that (1) Gass was seen in the emergency room at 8:39 a.m. on October 7, 2020, (2) Gass's chief complaint was that he "need[ed a] Dr. note,"

and (3) Gass was discharged a short time after arriving at the hospital with no instructions and no medications. Appellant's App. Vol. II p. 187. The attending physician indicated that Gass's diagnosis was "court case pending." Appellant's App. Vol. II p. 187. The hospital records do not demonstrate that Gass suffered from an ailment that would require him to miss his scheduled trial, but rather support the assertion that Gass was merely attempting to delay his trial. Given the lack of any indication in Gass's hospital records that he was suffering from an ailment requiring him to miss his scheduled trial coupled with his prior failures to appear before the court as ordered, we cannot say that the trial court abused its discretion by finding that Gass's claimed illness was not legitimate but rather demonstrated an attempt by Gass to postpone his trial. The trial court, therefore, did not abuse its discretion by trying Gass *in absentia*. *Calvert*, 14 N.E.3d at 821; *Soliz*, 832 N.E.2d at 1029.

[18] The judgment of the trial court is affirmed.

Robb, J., and Altice, J., concur.