

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Drew Shepherd,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 27, 2023

Court of Appeals Case No.
23A-CR-234

Appeal from the Boone Superior
Court

The Honorable Matthew C.
Kincaid, Judge

Trial Court Cause No.
06D01-1810-F2-2090

Memorandum Decision by Judge Bradford
Judges Riley and Weissmann concur.

Bradford, Judge.

Case Summary

- [1] After Drew Shepherd sold methamphetamine to a confidential informant (“CI”), the State charged him with Level 2 and Level 3 felony dealing in methamphetamine. At a pre-trial conference, the trial court informed Shepherd that it would conduct a jury trial on October 4, 2022, which it anticipated would last three days. Two weeks later, the trial court held a telephonic pre-trial conference during which it moved the start date of Shepherd’s trial to October 5, 2022; however, while Shepherd’s trial counsel was present, Shepherd was not. Shepherd, who had a warrant out for his arrest in another county, failed to appear in court on October 4th and 5th. The trial court proceeded to try Shepherd *in absentia*, over his trial counsel’s objection. The jury found Shepherd guilty of the dealing offenses and the trial court imposed an aggregate twenty-two-year sentence. Shepherd contends that the trial court violated his right to be present at trial. Concluding otherwise, we affirm.

Facts and Procedural History

- [2] During October of 2018, Shepherd sold methamphetamine on two occasions to a CI. On October 26, 2018, the State charged Shepherd with Level 2 and Level 3 felony dealing in methamphetamine and myriad other charges, which the State later dismissed. The State further alleged Shepherd to be a habitual offender.

- [3] On July 28, 2022, the trial court held a change-of-plea hearing, at which Shepherd failed to appear. On September 13, 2022, the trial court conducted a pre-trial conference, which Shepherd attended, and set a jury trial for October 4, 2022. The State informed the trial court and Shepherd that it anticipated that the trial would take three days. Two weeks later, on its own motion, the trial court moved the trial date to October 5, 2022.
- [4] Prior to trial, the State moved to revoke Sheperd's bail, alleging that he had been charged in another county with Level 2 felony dealing in methamphetamine and possession of methamphetamine, possession of a firearm as a serious violent felon, unlawful possession of a legend drug, possession of controlled substances, and possession of marijuana. The trial court held a hearing on this motion, at which it noted that it had discovered on MyCase that Shepherd had had an active warrant in another county that had yet to be served. Shepherd's trial counsel objected to proceeding with trial *in absentia* and indicated that he would likely withdraw due to lack of communication from Shepherd. Shepherd's trial counsel further noted that Shepherd "probably knows he's got [an active warrant] already" and that he "would not be shocked if [Shepherd] did not appear [for trial]" because Shepherd "probably check[s] MyCase as much as anybody[.]" Tr. Vol. II p. 19.
- [5] On October 4, 2022, the originally-scheduled trial start date, Shepherd did not appear. The next day, the jury trial began and Sheperd again did not appear despite his trial counsel's efforts to contact him. The trial court informed the parties that it was prepared to proceed *in absentia*, to which Shepherd's trial

counsel again objected. The trial proceeded without Shepherd and the jury found him guilty of two counts of dealing in methamphetamine as Level 2 and 3 felonies after the trial court had dismissed the habitual-offender allegation. Two weeks later, U.S. Marshals located Shepherd and returned him for sentencing. The trial court sentenced Shepherd to an aggregate twenty-two-year sentence in the Department of Correction.

Discussion and Decision

[6] To start, “a criminal defendant has a right to be present at all stages of the trial.” *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005), *trans. denied*. A defendant, however, may waive this right and be tried *in absentia* if he voluntarily and knowingly waives that right. *Id.* If a defendant fails to appear for trial, the trial court may presume that the defendant knowingly and voluntarily waived his right to be present and try him *in absentia*. *Id.* “The crux of the issue is whether there is sufficient evidence of a knowing and voluntary waiver.” *Walton v. State*, 454 N.E.2d 443, 444 (Ind. Ct. App. 1983). In reviewing a decision to proceed *in absentia*, “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. We review the trial court’s decision to continue in a defendant’s absence for an abuse of discretion. *Taylor v. State*, 178 Ind. App. 650, 653, 383 N.E.2d 1068, 1071 (1978). Notably, while a defendant’s absence from trial implicates his

constitutional rights, “[w]e cannot [...] allow defendants to set the time or circumstances under which they will be tried.” *Walton*, 454 N.E.2d at 444.

[7] Shepherd argues that the trial court denied him his Sixth Amendment and Article 1, Section 13, rights to be present at all stages of trial when the trial court proceeded to try him *in absentia*. In making this argument, Shepherd likens this case to *Diaz v. State*, 775 N.E.2d 1212 (Ind. Ct. App. 2002). In that case, Diaz, who did not understand English, appeared at a pre-trial conference, at which the trial court set his trial date. *Id.* at 1217. When the matter came to trial, Diaz did not appear, and the trial judge, who had not presided at the pre-trial conference, assumed that Diaz knew of the trial date without asking as much of Diaz’s trial counsel. *Id.* The trial court proceeded *in absentia* and found Diaz guilty. *Id.* at 1215. On appeal, we remanded the case to determine whether Diaz had knowingly and voluntarily waived his right to be present because the “record clearly indicate[d] that Diaz did not understand English and [was] silent as to whether he was assisted by an interpreter at the pretrial conference or was otherwise able to understand the proceedings.” *Id.* at 1217. We, however, find Shepherd’s reliance on *Diaz* to be misplaced because the case is easily distinguished from the instant matter.

[8] Instead, we conclude that the record suggests that Shepherd knowingly and voluntarily waived his right to be present at trial; therefore, the trial court did not abuse its discretion in trying him *in absentia*. The record does not suggest that Shepherd, unlike Diaz, had any difficulty in understanding the trial court when it informed him that his trial date was set for October 4, 2022, and when

the parties discussed with the trial court that the trial would last three days. When a defendant knows his trial date, fails to appear, and offers no reasonable explanation for his absence, a trial court is entitled to try the defendant *in absentia*. See *Holtz v. State*, 858 N.E.2d 1059, 1062 (Ind. Ct. App. 2006) (concluding that the trial court did not abuse its discretion in trying a defendant *in absentia* when it had informed the defendant twice of the trial date and the defendant did not explain his absence), *trans. denied*. Here, the trial court had informed Shepherd personally that his trial date would be October 4, 2022, and the State had indicated its belief that trial would last three days. While the trial court shifted the start date back one day, Shepherd failed to appear on October 4th and 5th, despite knowing that trial would take multiple days. In explaining his absence, Shepherd testified that he had been “on drugs.” Tr. Vol. III p. 78. We cannot say that being “on drugs” is a reasonable excuse for a defendant to miss his trial. Tr. Vol. III p. 78.

[9] Further, the record suggests a more likely reason that Shepherd did not appear for his trial: Shepherd, as his trial counsel admitted, “checked MyCase as much as anybody[,]” and therefore likely knew that he had a warrant out for his arrest. Tr. Vol. II p. 19. Shepherd’s trial counsel even testified that he “would not be shocked if [Shepherd] did not appear [for trial].” Tr. Vol. II p. 19. Additionally, Shepherd’s trial counsel testified that he had “made attempts to contact” Shepherd, did not know his whereabouts, and that he had not cooperated in preparing for trial, which tends to show his intent to avoid appearing for trial. Tr. Vol. II p. 25. As a result, the trial court did not abuse its

discretion in concluding that Shepherd had waived his right to be present at trial when he had failed to appear due to his being “on drugs.” Tr. Vol. III p. 78.

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

Riley, J., and Weissmann, J., concur.