

RENDERED: JULY 5, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000234-MR

RONALD BELL

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
ACTION NO. 09-CR-00069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: Ronald Bell appeals from the Washington Circuit Court's January 12, 2012 order requiring him to make restitution for his crime in the amount of \$60,000.00. At issue is whether the circuit court erred by holding the restitution hearing in Bell's absence. We find no error and affirm.

Bell was indicted on two counts of theft by failure to make required disposition of property over \$10,000.00. The charges stemmed from his failure to complete the construction of a house he had contracted to build for Edna Robinson.

Pursuant to an agreement with the Commonwealth, Bell entered a plea of guilty to two amended misdemeanor charges of theft. The circuit court imposed a sentence, in accordance with the Commonwealth's recommendation, of twelve months, probated for twenty-four months, on the condition that Bell pay restitution.

A restitution hearing was scheduled for January 12, 2012. Before the hearing started, defense counsel informed the circuit court that Bell was not present. At the circuit court's request, defense counsel tried telephoning Bell; Bell did not answer. A short recess was held after which the circuit court noted that the parties had previously agreed on the date for the hearing. Defense counsel agreed that Bell knew he should be present, and she requested a continuance. The circuit court denied the request and the hearing proceeded.

Edna Robinson and her son Michael testified for the Commonwealth. At the close of the hearing, the circuit court noted that the total price for the construction of the house was \$204,000.00. The circuit court found that Bell had completed sixty percent of the project, which amounted to \$122,000.00 worth of work. The circuit court subtracted this amount from the total amount of \$182,000.00 that Bell had received from Edna Robinson to arrive at a restitution amount of \$60,000.00.

This amount reflected the difference between the money Bell had received and the value of the work he had actually completed. This appeal followed.

Kentucky Rules of Criminal Procedure (RCr) 8.28(4) provides that “in prosecutions for misdemeanors . . . the court may permit arraignment, plea, trial and imposition of sentence in the defendant’s absence.” Bell nonetheless argues that his due process rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Section 11 of the Kentucky Constitution, were violated when the restitution hearing was held in his absence. In support, Bell points to the bedrock principle that a defendant has the right to be present at every critical stage of the trial. *See Price v. Commonwealth*, 31 S.W.3d 885, 892 (Ky. 2000). He contends that the hearing was a critical stage in the proceedings because failure to pay restitution can lead to probation revocation and jail time.

Assuming for the sake of argument that the restitution hearing was a critical stage in the proceedings, it is well-established that the right to be present can be waived, even by an absent defendant.

Even “[t]he most basic rights of criminal defendants are . . . subject to waiver.” Although it would be preferable that the waiver come directly from the defendant, himself, there is no constitutional requirement to that effect. Unlike RCr 9.26, which requires that waiver of the right to trial by jury be in writing, there is no rule or statute specifying the proper method for waiving the right to be present at every critical stage of the trial.

Fugate v. Commonwealth, 62 S.W.3d 15, 19 (Ky. 2001) (internal citations omitted).

When, as in this case, the defendant is absent without explanation, he has the burden to show his absence was not intentional and, therefore, not waived. *Burns v. Commonwealth*, 655 S.W.2d 497, 499 (Ky. App. 1983).

If . . . the Commonwealth proves that the defendant had knowledge of the trial date, and did not appear, we think an inference may be indulged that the absence was intentional, knowing and voluntary, particularly where the defendant is one with previous acquaintanceship with court procedure as a defendant on criminal prosecutions. The inference rests on probabilities growing out of normal human experience, and its use is justified by the practicalities of availability of direct proof. In normal circumstances the reason for the defendant's nonappearance, and the circumstances of it, will be peculiarly within the defendant's knowledge. Therefore, we think it is fair to give him the burden of going forward with the proof, after the Commonwealth has shown that he had knowledge of the date of the trial and did not appear.

McKinney v. Commonwealth, 474 S.W.2d 384, 386-87 (Ky. 1971).

The analysis in *Burns, supra*, is illustrative. In that case, the defendant noted the wrong date for his trial, had tried unsuccessfully to call his attorney, and then arrived at court shortly after the trial had been concluded in his absence. *Burns*, 655 S.W.2d at 499. Burns' attorney testified that in her opinion Burns had truly been mistaken as to the trial date as evidenced by his attendance at all times including while court was still in session the day of trial. *Id.*

Unlike the defendant in *Burns*, Bell failed to meet his burden of proving that his absence was involuntary. The Commonwealth established Bell knew of the hearing date, yet did not appear. The parties had previously agreed on the date and

time of the restitution hearing. Bell's attorney acknowledged that Bell was aware of the date of the hearing and knew that he should be present, but she explained that she did not know why he failed to attend. She stated she was willing for a bench warrant to be issued. Significantly, Bell made no effort to contact the circuit court or to file a post-trial motion to explain the reason for his absence. Bell utterly failed to offer any justification for his absence, and the circuit court properly inferred that he had waived his right to be present.

Bell further contends that his absence impeded the fairness of the proceeding because: (i) there was testimony only from Edna Robinson and her adult son, Michael; (ii) there were gaps (which he does not specify) in the evidence regarding a supplemental contract; and (iii) the Commonwealth did not provide defense counsel with an itemized list of expenses.

A circuit court's determination of the amount of restitution is reviewed for an abuse of discretion. *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky. App. 2003). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999). "The due-process clauses of the federal constitution require that sentences not be imposed on the basis of material misinformation, and that facts relied on by the sentencing court 'have some minimal indicium of reliability beyond mere allegation.'" *Fields*, 123 S.W.3d at 917 (footnotes omitted).

The initial contract and supplemental contract between Edna and Bell were entered into evidence as exhibits. Both contracts contained highly-detailed descriptions of the work Bell had agreed to perform. The Robinsons testified at length regarding the work that remained unfinished. Their testimony was specific and convincing, and constituted more than sufficient evidence to support the circuit court's restitution award of \$60,000.00. The circuit court did not abuse its discretion in arriving at this amount of restitution.

Accordingly, we affirm the circuit court's order of restitution.

ALL CONCUR.

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