FILED
Court of Appeals
Division III
State of Washington
10/16/2019 8:00 AM

No. 36378-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIM ALLEN LOE,

Appellant.

BRIEF OF RESPONDENT

Will M. Ferguson, WSBA 40978
Attorney for Respondent
Special Deputy Prosecuting Attorney
Office of the Stevens County Prosecuting Attorney
215 S. Oak Street, Room #114
Colville, WA 99114
(509) 684-7500
wferguson@stevenscountywa.gov
will.ferguson208@gmail.com
trasmussen@stevenscountywa.gov

I. TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii.

STATEMENT OF THE CASE.....1-4.

STATEMENT OF THE ISSUES.....4-5.

STANDARDS OF REVIEW.....5.

ARGUMENT.....5-14.

1. The Superior Court applied the correct standard and did not abuse its discretion when it found Mr. Loe's absence to be voluntary.....5-14.

CONCLUSION.....14.

II. TABLE OF AUTHORITIES

Washington State Supreme Court Cases:

State v. Garza, 150 Wn.2d 360, 77 P.3d 347 (2003).....5.

State v. Thomson, 123 Wash. 2d 877, 872 P.2d 1097 (1994).....6-8.

State v. Thurlby, 184 Wash.2d 618, 359 P.3d 793 (2015).....6-9.

III. STATEMENT OF THE CASE

Defendant Tim Allen Loe (hereinafter "Mr. Loe"), after demonstrating a pattern of disruption and making excuses for his attempts at absenting himself at his previous hearings, decided to disrupt his jury trial. RP at 7, lines 15-25; 11-14; 18-19; 26-31; 32, lines 12-25; 33, lines 1-23; 34, lines 14-17; 36, lines 5-20; 37, lines 20-23; 38-43; 44, lines 7-25; 46, lines 5-8; 47; 49, lines 8-14; 50, lines 2-8; 56-57; 60-61; 64, lines 9-24; 65, lines 7-18; 66, lines 6-18; 71, lines 3-15; 75, lines 11-24; 76-77.

Prior to jury selection, Mr. Loe's counsel moved to continue the trial, based on Mr. Loe having a prior appointment, as evidenced by a letter from his doctor. RP at 76, lines 16-24. The letter asked that Mr. Loe be excused from court, but did not have a specific date. RP at 76, lines 21-23. The Superior Court denied the motion. RP 77-78. Mr. Loe protested the Superior Court's denial of his motion for a last-minute continuance. RP at 85, lines 19-25; 86, lines 1-5. Mr. Loe demanded a continuance because he had an appointment with a specialist, "with a cardiologist. I have to drive to Spokane…." RP at 77, lines 2-3.

Mr. Loe was charged with assault in the fourth degree and disorderly conduct. RP at 67, lines23-24. The alleged victims of Mr. Loe's criminal activity were Ms. Caroly Taylor, the owner of the property on which Mr. Loe had been squatting, Mr. Carl Gauny and his wife, Mrs. Laurie

Thompson, both friends of Ms. Taylor. RP at 155, lines 22-24. After jury selection, Ms. Carol Taylor testified that she owned the property on which the assault took place. RP at 152-53. Mr. Loe had squatted on the property since around 2011. RP at 152, lines 20-21; 153, lines 21-25. Ms. Taylor testified that she went to the property and took her friends with her. RP at 155.

While at the property, Mr. Loe attacked Ms. Taylor and her two friends. RP at 158, lines 18-20. Mr. Loe physically assaulted Mr. Carl Gauny and his wife, Laurie. RP at 159, lines 4-18. Mr. Gauny, a decorated Army veteran, stepped in to protect his wife, who had been "chest-butted" by Mr. Loe. RP at 167, lines 21-24; 169, lines 6-9. Mr. Loe hit Mr. Gauny twice in the chest, as Mr. Gauny, his wife, and Ms. Taylor were attempting to leave Ms. Taylor's property. RP at 168, lines 21-23; 169 18-25.

The Superior Court allowed for a lunch recess, not long after noon. RP at 170, lines14-17; 171, lines 12-19. After the lunch recess, Mr. Loe immediately disrupted the proceedings. RP at 174, lines 5-20. After being told to take his phone call outside the courtroom, Mr. Loe was sure to proclaim, "I'm leaving the superior courtroom." RP at 174, line 16. The Superior Court and counsel discussed the jury instructions, while Mr. Loe was outside the courtroom. RP at 175, lines 10-13.

After concluding discussion of the jury instructions, the Superior Court noted Mr. Loe's continued absence and inquired as to how counsel for each party would like to proceed. RP at 186-87. The Superior Court even enquired with Mr. Loe's counsel as to what he would like the Superior Court to tell the jury about Mr. Loe's absence. RP at 187, lines 16-24. The Superior Court informed the jury that there would be an hour-long recess to address some issues, particularly Mr. Loe's "medical event." RP at 188, lines 18-25.

After bringing the jury back in and explaining why things were taking so long and excusing the jury for another recess, the Superior Court advised that it would research the issue and directed counsel to do the same. RP at 189, lines 16-24. After a recess to research he issue, the State's attorney requested that the trial proceed and discussed some caselaw on the topic of voluntary absence by a defendant. RP at 190, lines 6-19. The Superior Court inquired as to the applicability of the caselaw. RP at 191-93. The Superior Court entertained information and argument from Mr. Loe's attorney and from the State's attorney, who advised that Mr. Loe, while suffering an apparent medical episode, had "...the wherewithal to go downstairs and file a complaint with the sheriff's department about Dep. Middlesworth [attending trial]." RP at 196, lines 9-16.

The Superior Court decided it did not have sufficient facts to find voluntary or involuntary absence of Mr. Loe, so the Superior Court released the jury for the remainder of the day and recessed. RP at 199-200. The next morning, Mr. Loe did not reappear and the Superior Court inquired of counsel and considered the matter of Mr. Loe's continued absence. RP at 209. The Superior Court confirmed that Mr. Loe was not currently in hospital, nor could his whereabouts be confirmed, other than he was possibly on his way to see a specialist. RP at 207, lines 23-25. Only then did the Superior Court make a preliminary finding of voluntary absence. RP at 211, lines 12-13. The trial proceeded and Mr. Loe's attorney supplied the testimony of an eyewitness. RP at 261, lines 1-5.

The jury unanimously convicted Mr. Loe of assault in the fourth degree and acquitted him of disorderly conduct. RP at 318, lines 17-23; 319-20.

At sentencing, neither Mr. Loe, nor his attorney presented any evidence to reverse the Superior Court's preliminary finding of voluntary absence. RP at 331, lines 12-13.

IV. STATEMENT OF THE ISSUES

I. Did Mr. Loe voluntarily absent himself from the jury trial and then waive his right to be present when he refused to return?

II. Did the Superior Court abuse its discretion when it concluded that Mr. Loe had voluntarily absented himself and had provided no justification or proof as to the necessity of Mr. Loe's refusal to return to trial?

III. May Mr. Loe argue for reversal, based on evidence he filed but apparently did not bring to the attention of the Superior Court?

V. STANDARD OF REVIEW

Mr. Loe's voluntary absence from his trial, is reviewed for abuse of discretion. State v. Thurlby, 184 Wash.2d 618, 624, 359 P.3d 793 (2015); See also State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003).

VI. ARGUMENT

Though Mr. Loe claims four assignments of error, the summary of all four is whether the Superior Court properly exercised its discretion to proceed with the jury trial when a jury had been selected, the State was partially through its case in chief, Mr. Loe had a more-pressing scheduling conflict, and the Superior Court delayed the State's case for the remainder of the first day, to allow Mr. Loe to go to the hospital and to determine whether Mr. Loe's absence was voluntary.

1. Mr. Loe's conviction should stand because he voluntarily absented himself from the trial; the Superior Court did not violate Mr. Loe's right to be present at trial because Mr. Loe chose an appointment over his jury trial.

A defendant's right to be present at his or her own trial is protected by the Sixth Amendment and the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and article I, Section 22 of the Washington State Constitution, but the right is not absolute. State v. Thurlby, 184 Wash.2d 618, 624, 359 P.3d 793 (2015). "Under the voluntary waiver approach, the court only need answer one question: whether the defendant's absence is voluntary." State v. Thomson, 123 Wash. 2d 877, 881, 872 P.2d 1097, 1100 (1994). "A voluntary absence operates as an implied waiver of the right to be present. If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial without further consideration." Id. "Whether a voluntary waiver has occurred is determined by the totality of the circumstances." Id.

"A criminal defendant may waive the right to be present at trial so long as the waiver is knowing and voluntary." State v. Thurlby, 184 Wash.2d at 624. "A waiver of the right to be present may be express or implied. Id. "If a trial has begun in the defendant's presence, a subsequent voluntary absence of the defendant operates as an implied waiver of the right to be present." Id. The "...rules of criminal procedure similarly permit the court to continue with trial despite a defendant's voluntary absence, provided that the defendant was present when the trial commenced." Id.

"[A] trial court need not expressly state the presumption against waiver, nor must it begin its analysis of voluntariness anew when evaluating the third prong of the Thomson analysis. Id. at 628.

> The trial court will indulge a presumption against waiver, but will:
>
> (1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary,
> (2) [make] a preliminary finding of voluntariness (when justified), and
> (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

State v. Thomson, 123 Wash. 2d at 881.

In Thurlby, "the trial court began by inquiring into the circumstances of Thurlby's disappearance. It contacted the local hospital, the local jail, the court's administration, and the clerk's office to no avail. It inquired of both the State and the defense counsel whether they knew of Thurlby's whereabouts." Id. at 626. "Similar to the court in Thomson, the trial court then waited over three hours for law enforcement to locate Thurlby or for Thurlby to contact the trial court or her attorney." Id. "Before making its ruling, the trial court again contacted the local hospital, the trial court's administration, and the clerk's office. It also confirmed with the parties that no one had heard from Thurlby." Id. "The trial court then proceeded to the second step of the *Thomson* analysis and, given the

information available that day, made a preliminary finding that Thurlby was voluntarily absent." Id. "Finally, prior to sentencing, the trial court provided Thurlby with an opportunity to explain her absence and evaluated Thurlby's absence in light of her justification." Id.

"Specifically, Thurlby argues that her mother's unplanned surgery caused her to miss the conclusion of her trial. However, the trial court expressly addressed this claim. The trial court considered Thurlby's statements and found that her decision to be with her mother was a product of choice." Id. at 627. "The trial court reasoned that Thurlby knew her appearance in court was mandatory but failed to contact her attorney or otherwise explain her absence at the time." Id. "While Thurlby's choice was understandable, the trial court concluded that it was still a voluntary decision. Thurlby has not presented facts to contravene the trial court's findings, nor has she demonstrated that the finding was manifestly unreasonable." Id.

Mr. Loe's absence was a product of choice. Mr. Loe had nothing more than a scheduling conflict. Mr. Loe chose to attend his appointment with a doctor, rather than keeping his appointment with the jury. The only time that there was arguably a medical emergency preventing Mr. Loe from attending his trial was on the first day when he called 9-1-1 from the courtroom and still managed to make his way down to the Stevens County

Sheriff's Office and file a complaint against Deputy Middlesworth. But the Superior Court did not recommence testimony after Mr. Loe left on the first day and the Superior Court sent the jury home early that day.

Unlike what Mr. Loe contends in his Opening Brief, the Superior Court did not presume voluntariness. Opening Brief of Appellant at 10. The Superior Court was very restrained and careful in its consideration of Mr. Loe's rights and any plausible explanation for Mr. Loe's absence:

> You're both asking me to make a finding on what seems to me to be very scanty evidence. Would it be -- it would be great if we had something from the doctor explaining to us exactly what's going on, exactly, you know, et cetera, et cetera. We don't have that. And I am painfully aware that there are thirteen people sitting in the room next to us that are even more confused, perhaps, than the court is.

RP at 197, lines 16-22. The Superior Court addressed the Thomson case and distinguished the facts of that case from that of Mr. Loe's case. RP at 197-98. The Superior Court indicated the type of information it was looking for in making a determination:

> It's not normal behavior, I don't think, for somebody to say, "Look, I -- I'm calling the ambulance because I -- I feel so poorly and I did have this cardiac event a week ago, that -- I'm going to (inaudible) the hospital." You know, that's potentially life-threatening, that's -- that's a different deal than, you know, some unexplained reason for not being at court. But it still isn't the same as a letter from the doctor or some credible source indicating, "Here's a medical reason which" -- by which trial would be dangerous to this person's health. I mean, the same manner that we excuse a person from jail because such would be injurious to a person's health, I think we kind of have to have the same thing to say you're excused from trial.

RP at 198, lines 9-23. The Superior Court said that it was simply unprepared to make the finding of voluntary absence, "on the record we have." RP at 199, lines 1-2. The Superior Court's solution was as follows:

> So what I'm going to do is direct that you, Mr. Jones, as an officer of the court, and as his attorney, you confer with him and/or Ms. Britton and if possible his doctors -- Given that's going to take his permission I can't direct anybody to violate HIPAA -- but find out as much as you can. Find out if he's been admitted or if he's not been admitted. If he's admitted for observation or if he's admitted as a patient. If he's admitted for observation then presumptively he'll be available to us at some point. Regardless, do your best to determine whether he can be made available to us. I did check with Judge Reeves, and there's a possibility that the trial that was set for Wednesday, Thursday, Friday might be continued on the state's motion. And if that's true I don't see that we have more than a half day here -- certainly get done in a full day -- And whether that's, you know, Wednesday, Thursday, Friday, those days could be available to us. So, -- before I make a finding about voluntary or involuntary -- making oneself available or -- unavailable -- making oneself unavailable either voluntarily or involuntarily, I'm going to direct that you, Mr. Jones, make that inquiry. We'll be back here at nine o'clock tomorrow, I'll have the jury back here at nine o'clock tomorrow.

RP at 199-200.

> I'm -- If I -- If I hear that he was discharged and he's not here, without something from the doctor, so be it; then we'll probably proceed forward. If I have something more concrete -- I mean, I'm not going to make any, you know, promise about what I'll do, but it probably lends more if he's admitted and doesn't have a -- a discharge date, or an anticipated discharge date, be leaning more toward a mistrial. If he's not going to be available to us I can't hold this jury for -- ever, in the hopes that he's available.
>
> So, -- I guess I'm saying I understand where each of you are coming from. **I don't think I have enough information to make a finding that would allow your case to stand up, if it's tried in absentia,**

> **and/or -- you know, not provide Mr. Loe an opportunity to be here and defend if he's not physically able to do so. I think the court has to get to the bottom of that the best it can.**
>
> So, I'm going to bring the jury out, I'm going to explain to them that we're going to come back tomorrow morning. I'll tell them to be here by 9:00.

RP at 200, lines 2-21 (emphasis added). The Superior Court ended the first day of trial early.

The next morning, the Superior Court had sufficient facts to conclude that Mr. Loe had voluntary absented himself from the remainder of the trial.

> Well, again, the -- the court reviewed several cases -- Of course it reviews the Thompson case. It also -- reviewed the Thurlby case, a Division I case, 184 Wn.App. 918, as well as the Garza case, 150 Wn.App. 360. Consistent with what I observed occurred in the Thurlby case, our administrator checked with Mt. Carmel Hospital, was advised that Mr. Loe was seen in the ER department yesterday but was not admitted, and is not admitted to the hospital today. So I'm not sure where he is, why he's -- not here.

RP at 208, lines 10-19. The Superior Court inquired with the local hospital, counsel for Mr. Loe, and counsel for the State. RP at 209.

> Well, I -- observe that yesterday, when we resumed court I had intended about 1:15 to address instructions, and I think as it turned out we were here about 1:25. And when the court entered the courtroom I observed that Mr. Loe was standing next to his attorney at counsel table, talking on the phone, loudly talking on the phone, and I had directed him to have his conversation outside the courtroom. And -- he made a comment -- I don't remember exactly what, but something like, "Well, I'm having a health issue," something about his health, and off he went. It was only a few minutes later that the -- we were advised that an ambulance had been

> summoned. I do not know whether that ambulance was summoned by Mr. Loe or someone else. But -- we've had to chase down information for Mr. Loe. It hasn't been Mr. Loe offering information about his condition or offering verification of the medical necessity for being absent from court. It's difficult because unquestionably a heart or arrhythmia condition isn't in the nature of a hangnail, or as in Thurlby, perhaps a choice to accompany one's mother. But this is a preliminary determination. And I observe also that throughout the case there at least have been occasions where -- I think back in February 25 of this year, Mr. Loe had -- Well, -- well, he filed numerous declarations within the court file, but filed a declaration he had Grave -- Grave's Disease, ulcerative colitis and autoimmune disorder, low blood sugar, complaining that if he was in court for too long that his low blood sugar could cause mental fatigue, and evidence itself with confusion. And, it was just within the last week or so, as I understand, that there was a complaint about this medical condition. I hear now or read here that it was August 20 of 2018. And, you know, we started trial -- couple weeks later. And he did request a continuance the morning of trial, indicating that he had this appointment on Tuesday. And I denied it, with the belief that, you know, that's -- that's not only a choice but also -- I figure if there was an emergency he would have been immediately in the hospital, number one; and number two, there was no documentation from a provider that there was a -- an emergent medical condition. The fact that Mr. Loe is not in the hospital this morning, not admitted to the hospital, chose to go to the ER yesterday, and has also chosen not to be here this morning or offer any -- verification from his physician, is sufficient for me on a preliminary basis to find that his -- non-appearance today is a voluntary absence, just as it was yesterday afternoon, that the circumstances point to that. I will therefore make that finding of -- that he has chosen to waive his presence here today.

RP 209-11.

For Mr. Loe to claim that the Superior Court abused its discretion and forged ahead, without carefully considering the circumstances, is incorrect. The Superior Court delayed the proceedings for Mr. Loe. The

Superior Court ended the first day early, not only in an attempt to gather more information, but to allow Mr. Loe to resolve his medical issue, if he indeed had one. But by the second day of trial, Mr. Loe did not appear and did not offer any proof of a medical emergency. Instead, Mr. Loe, through his attorney, offered only the same excuse he had at the beginning of trial: he had a conflicting appointment. RP at 207, lines 2-4, 23-25.

Mr. Loe argues in his fourth assignment of error in his opening brief that the Superior Court should have, at the sentencing hearing in October, agreed with Mr. Loe, reversed its prior ruling, and declared a mistrial. Opening Brief of Appellant at 17. Such a contention is patently absurd because Mr. Loe did not provide support for his renewed motion for a mistrial.

As the Superior Court stated at sentencing, "[a]gain, I'll deny [the motion for mistrial] because I didn't have a basis then and I don't have a basis now." RP at 331, lines 19-20. Neither Mr. Loe nor his attorney presented any further evidence or explanation for Mr. Loe's decision to absent himself from trial. Mr. Loe and his witness at trial, Ms. Gina Britton, were offered the opportunity to address the Superior Court and provide any information they deemed appropriate. RP at 334, 336. Mr. Loe claims that "[b]efore sentencing, Mr. Loe had filed documents under seal including further statements from his physician regarding his heart problems."

Opening Brief of Appellant at 17. That may be true, but there is no indication from the record that Mr. Loe or his attorney presented these documents to the Superior Court at *any* time. Mr. Loe apparently did not provide the documents to the Superior Court at sentencing and certainly said nothing at sentencing, when given the opportunity. Simply filing documents does not provide notice to the Superior Court and certainly does not ensure that the Superior Court will see the documents.

Just as Mr. Loe provided no good explanation in September, during his two-day trial, Mr. Loe provided no good explanation thereafter. Mr. Loe's opportunity to explain his absence came at any point in time that he decided to come back to court. Mr. Loe was never held at the hospital for observation, he was never physically prevented from attending trial, and even if he had wanted to attend his appointment, rather than attend the second morning of his trial, he could have come back to court at the conclusion of his appointment. The record is clear; the Superior Court did not abuse its discretion when it found Mr. Loe to have voluntarily absented himself from the remainder of his trial.

VII. CONCLUSION

For the reasons stated above, the State respectfully requests that the Superior Court's exercise of discretion be affirmed.

DATED this 15th day of October, 2019.

Will Ferguson, WSBA 40978
Special Deputy Prosecuting Attorney
Office of the Stevens County Prosecuting Attorney

October 15, 2019 - 5:20 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36378-3
Appellate Court Case Title:	State of Washington v. Tim Allen Loe
Superior Court Case Number:	17-1-00325-0

The following documents have been uploaded:

- 363783_Briefs_20191015171800D3630610_0504.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- oliver@washapp.org
- trasmussen@stevenscountywa.gov
- wapofficemail@washapp.org
- wferguson@stevenscountywa.gov

Comments:

Sender Name: Will Ferguson - Email: will.ferguson208@gmail.com
Address:
4448 SUNBURST LANE
STEVENSVILLE, MT, 59870
Phone: 509-684-7500

Note: The Filing Id is 20191015171800D3630610