

NO. 71949-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FIKRU KELIFA,

Appellant.

2015 FEB 26 PM 2:56

COURT OF APPEALS DIV I  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY CANOVA

**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. Both the state and federal constitutions guarantee the right to a public trial. In State v. Sykes, \_\_\_ Wn.2d \_\_\_, 339 P.3d 972, 973 (2014), the Washington Supreme Court applied the “experience and logic” test, and recently held that adult drug court staffings are not presumptively open to the public under article I, section 10 of the Washington Constitution. Given the court’s holding in Sykes, should this Court reject Kelifa’s claim that the closed staffing conducted in his case violated the right to a public trial?

2. A defendant has a right to be present to defend himself against criminal charges under the state and federal constitutions. Here, Kelifa petitioned to have his criminal case transferred to Drug Diversion Court and as part of the process, agreed to waive his right to be present at off-the-record staffing discussions among the court, defense counsel, the prosecutor, and treatment staff. Despite being warned that committing a new criminal law offense might result in termination, Kelifa reoffended and the court conducted a staffing without him present. No evidence was presented, and no decisions were made at the staffing. Is Kelifa precluded from seeking review? If not, does the

record demonstrate that Kelifa did not have a constitutional right to be present for the staffing?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Fikru Kelifa with one count of Burglary in the Second Degree. CP 1. Kelifa successfully petitioned to have his case transferred into the King County Drug Diversion Court (DDC). CP 8-13; RP 12.<sup>1</sup> Nearly a year later, Kelifa admitted to committing a new crime, and the State moved to terminate him from DDC. CP 14-24; RP 92-93. The court terminated Kelifa and found him guilty at a stipulated trial of second-degree burglary. CP 61; RP 188. The court imposed a prison-based Drug Offender Sentencing Alternative. CP 82-90; RP 201.

**2. SUBSTANTIVE FACTS**

On November 16, 2012, Kelifa stole over \$1,000 worth of merchandise from the Banana Republic store at Bellevue Square. CP 3-6. A loss prevention officer recognized Kelifa as a high impact shoplifting offender, and someone who had been previously trespassed from the store. CP 3. Kelifa was apprehended outside the store with 20 stolen items. CP 4. He admitted to stealing the

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<sup>1</sup> The Verbatim Report of Proceedings consists of one consecutively paginated volume designated as RP.

items in order to resell them. Id. Based on these facts, the State charged Kelifa with Burglary in the Second Degree. CP 1.

Kelifa transferred his case into DDC.<sup>2</sup> CP 8-13. In exchange for the benefit of having his case dismissed upon graduation from DDC, Kelifa agreed to give up his trial rights<sup>3</sup> and seek drug treatment. CP 8-13; RP 10-11. As part of the process, Kelifa reviewed and signed the DDC Waiver and Agreement, which provided that:

**As Part of the Drug Court Protocol, the judge will meet regularly with a group consisting of my attorney, the prosecutor and treatment staff to discuss my case. I will not be present during these meetings, they will not be recorded, and they will not be open to the public. The judge will not make any decisions at these meetings and will give me the opportunity to provide input at a subsequent hearing before making a decision in my case. I agree to this procedure and ask the Court to proceed without me in these meetings.**

CP 13 (emphasis in original). Additionally, the agreement warned Kelifa that committing a new crime could lead to termination from DDC. CP 10. Kelifa signed below the final paragraph of the agreement, attesting that he had reviewed and discussed the

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<sup>2</sup> Kelifa had previously participated in DDC, and successfully graduated from the program in 2007. RP 83.

<sup>3</sup> These rights included Kelifa's right to a speedy and public trial by an impartial jury, the right to remain silent, the right to testify, the right to hear and question the witnesses who testified against him, and the right to have witnesses testify for him. CP 9.

agreement with his counsel, that he understood it, and that he “knowingly” waived his rights. CP 13.

Kelifa succeeded in DDC for nearly a year until he reoffended by returning to Bellevue Square and stealing \$800 worth of merchandise from the North Face store. RP 83-84; CP 14-21. Given this new criminal allegation, Kelifa's DDC case was set for “staffing” with the court, Kelifa's attorney, the prosecutor, and treatment staff on March 5, 2014. RP 72, 75. The court explained that at the staffing, they would discuss the “next steps” for Kelifa, which could include termination or restarting the program. RP 75. The court further explained that the parties would share their recommendations at the staffing, and that Kelifa would have the chance to review the staffing recommendation with his counsel, and address the court the next day. RP 75-76. Kelifa did not object to the staffing taking place, or that he would not be present.

The day after the staffing, Kelifa and his counsel appeared for a review hearing in open court. Kelifa's counsel advised the court that she had apprised Kelifa of the “discussions in staffing,” and that he was “aware of the recommendations.” RP 79. Kelifa apologized for his actions and explained that they were motivated by his recent and previously undisclosed gambling addiction.

RP 79-83. The court advised Kelifa that the State intended to file a petition to terminate him from DDC, and that the court had not yet decided whether termination was appropriate. RP 84.

At the April 11, 2014 termination hearing, Kelifa agreed to having committed the new crime, and asked to restart DDC. RP 92-93, 182. He presented testimony from a mental health expert who diagnosed him as suffering from a “moderate to severe” gambling disorder, and testimony from his sister and himself corroborating his gambling problem. RP 94-95, 99. The State argued that Kelifa should be terminated from DDC based on the similarity between the crimes, and his lengthy criminal history, which included five felony theft convictions and 22 misdemeanor theft convictions. CP 14-24; RP 173-74. The court agreed, ruling that there was an insufficient nexus between Kelifa’s gambling disorder and criminal conduct, and that DDC was not a “gambling addiction court,” but a “drug court designed to deal with substance abuse addiction issues.” RP 184-85, 188.

**C. ARGUMENT**

**1. KELIFA'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.**

Kelifa argues that the staffing, or closed team meeting, held prior to his termination violated his right to a public trial. Kelifa's claim fails in light of the Washington Supreme Court's recent decision in State v. Sykes, \_\_\_ Wn.2d \_\_\_, 339 P.3d 972, 973 (2014), holding that adult drug court staffings are not presumptively open to the public under article I, section 10 of the Washington Constitution.<sup>4</sup> The Sykes court recognized that adult drug courts are "philosophically, functionally, and intentionally different from ordinary criminal courts," and are therefore not subject to article I, section 10's presumption of openness. Id. at 974. Applying the "experience and logic" test, the court reasoned that neither prong favored presumptively open staffings. Id. at 975-77. Given the state supreme court's holding in Sykes, this Court should deny Kelifa's claim.

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<sup>4</sup> In his briefing, Kelifa references both the state and federal constitutional provisions that guarantee a criminal defendant's right to a public trial, but his argument focuses almost entirely on article I, section 10, and applying the "experience and logic" test. Given this, the Sykes decision appears to definitively resolve Kelifa's claim.

**2. KELIFA'S RIGHT TO BE PRESENT WAS NOT VIOLATED.**

Kelifa argues that the DDC violated his right to be present by conducting a staffing in his absence to determine the “next steps” in his case after he committed a new crime. Kelifa is incorrect. By explicitly agreeing and asking the court to conduct the staffing without him present, Kelifa is precluded from seeking review. Even if this Court addresses the claim on its merits, the claim fails because Kelifa had no constitutional right to be present for the staffing. In any event, any violation of Kelifa’s right to be present was harmless.

**a. Kelifa Is Precluded From Seeking Review.**

For the first time on appeal, Kelifa claims that the staffing procedure violated his right to be present, even though he acquiesced in and specifically requested that staffings occur without him present. Any error was either invited or waived. This Court should exercise its discretion not to address Kelifa’s claim.

A defendant who invites error – even constitutional error – may not claim on appeal that the error requires a new trial.<sup>5</sup> State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (counsel may not request an instruction and then challenge the instruction on appeal). Under the invited error doctrine, “a party who sets up an error at trial cannot claim that very action as error on appeal.” State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). The rationale behind the doctrine is to prevent parties from misleading trial courts and thereby receiving a windfall. Id. In determining whether the invited error doctrine precluded a defendant’s claim on review, courts have considered whether a defendant affirmatively assented to the error, materially contributed to it, or benefited from it. Id. at 154.

Here, Kelifa agreed to, and more importantly, requested that the staffings occur without him present. The last paragraph of the DDC Waiver and Agreement provided – in bold print – that the court, Kelifa’s counsel, prosecutor, and treatment staff would meet

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<sup>5</sup> Consequently, Kelifa argues incorrectly that he may seek first-time review based on manifest constitutional error because he invited the error of which he now complains. See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (rejecting defendant’s constitutional error claim because the defendant invited the error); State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979) (“Even where constitutional issues are involved, invited error precludes judicial review.”).

regularly without him present, off the record, and in a closed setting, to discuss his case. CP 13. The agreement limited the staffings to discussions only, specifying that the DDC judge would not make any decisions at the staffings, and would provide Kelifa with an opportunity to address the court prior to making a decision. Id. Kelifa's signature immediately followed the final sentences of the agreement, declaring **"I agree to this procedure and ask the Court to proceed without me in these meetings."** CP 13 (emphasis in original).

Kelifa's briefing on this issue makes no mention of the last paragraph of the agreement he signed, or his explicit request that the court conduct staffings in his absence. Having agreed to and asked the court to conduct staffings without him present, Kelifa invited any error. Kelifa should not receive the windfall of having his conviction reversed for having the court do his bidding. Momah, 167 Wn.2d 140 at 153.

Even if the alleged error was not invited, it was waived. The requirements for a valid waiver depend on the circumstances of each case, including the nature of the constitutional right at issue and the defendant's experience and capabilities. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). Courts have held that a

waiver of the right to be present can be implied from conduct, or inferred from silence. See State v. Thomson, 123 Wn.2d 877, 881, 884, 872 P.2d 1097 (1994) (criminal defendant's voluntary absence from trial constituted an implied waiver of the right to be present); United States v. Gagnon, 470 U.S. 522, 529, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (criminal defendant's failure to invoke his right to be present at a conference he knew was taking place in chambers constitutes a valid waiver of that right).

Here, Kelifa's waiver was neither implied by conduct, or inferred by silence. Kelifa expressly waived his right to be present at the staffings by signing a document that provided in bold print, that he "**agree[d]**" to the staffings being conducted without him present. CP 13 (emphasis in original). Kelifa signed this document after reviewing it with counsel, and having his questions answered. See CP 13 (agreement providing, "My lawyer and I have reviewed and discussed all of the above paragraphs . . . I understand them all and do hereby knowingly give up these rights and enter into these agreements with the State."); RP 9 (Kelifa stating that he carefully reviewed the DDC waiver and agreement with his attorney, and that she answered his questions); RP 11 (defense counsel indicating that she has reviewed the agreement with Kelifa

and answered his questions, and that she believes that “he understands the decision he’s making” and that it is “fully informed”).

The trial court specifically found that Kelifa entered into the agreement “knowingly, intelligently, and voluntarily with a full understanding of the important rights” that he was giving up by opting into DDC. RP 11-12. Given this record, the Court should find that Kelifa waived his right to be present at the staffing, and cannot obtain review.

**b. Kelifa Had No Constitutional Right To Be Present For Staffings.**

Even if Kelifa has stated a claim warranting review, he had no constitutional right to be present for the staffing. Both the state and federal constitutions guarantee a defendant’s right to be present to defend himself against criminal charges.<sup>6</sup> U.S. Const. amend. VI, XIV; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); Wash. Const. art. I, §§ 3, 22; State v. Rice, 110 Wn.2d 577, 616-17, 757 P.2d 889 (1988) (applying Stincer).

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<sup>6</sup> Although Kelifa references the Washington Constitution in his briefing on this issue, he does not argue that the state constitution provides broader or different protection than the federal constitution in this context.

“The core of the constitutional right to be present is the right to be present when evidence is being presented.” In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Beyond that, the defendant has a right to be present whenever his presence has a reasonably substantial relationship to his opportunity to defend against the charge. Id. The right is not guaranteed when the defendant’s presence would be useless, but is limited to those times when a fair hearing would be thwarted by the defendant’s absence, and those critical stages where the defendant’s presence would contribute to the fairness of the proceedings. Stincer, 482 U.S. at 745. Whether a defendant’s constitutional right to be present has been violated is a question of law that is reviewed *de novo*. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

In general, a defendant does not have a right to be present during in-chambers or bench conferences where the matter does not require the resolution of disputed facts. Lord, 123 Wn.2d at 306. The discussion of how best to respond to Kelifa’s new criminal law violation had nothing to do with the resolution of

disputed facts, nor did it have anything to do with the presentation of evidence.

Prior to the March 5, 2014 staffing, Kelifa admitted to DDC case management staff that he had been arrested and detained for shoplifting. RP 84. At the February 25, 2014 hearing, Kelifa told the court that he had been charged, and the court explained that it had reviewed the probable cause statement and concluded that there were sufficient facts to arrest and charge Kelifa. RP 72, 74-75. The fact that Kelifa had been arrested and charged with a new criminal offense was never in dispute.<sup>7</sup>

Further, it does not appear that any evidence was presented at the March 5, 2014 staffing. The record is clear before and after the staffing that it was intended to address only the “next steps” for Kelifa, and to provide an opportunity for DDC team members to share their different “recommendations.” See RP 75 (court explaining the purpose of the upcoming staffing), 79-80 (post-staffing defense counsel requesting that Kelifa remain in DDC), 84 (court explaining the State’s intent to terminate Kelifa). Given that no evidence was presented, and that Kelifa’s new criminal law

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<sup>7</sup> Kelifa ultimately admitted to having committed the new crime at the termination hearing. RP 92-93.

allegation was undisputed, Kelifa had no constitutional right to be present at the staffing.

Although Kelifa contends that the “next steps” discussion at the staffing necessarily involved the resolution of facts, he fails to point to a single fact that was in dispute, or resolved at the staffing. Additionally, Kelifa argues that the staffing was “equivalent to a stage of a trial” because staffings are a regular and well-established part of DDC. Appellant’s Opening Br. at 20. Kelifa provides no authority to support this claim, or any further reasoning to explain why the frequency or established nature of a proceeding would elevate it to a critical stage of the proceedings requiring the defendant’s presence.

Kelifa did not have a constitutional right to be present at a proceeding where no evidence was presented, no facts were disputed, and no decisions were made. See Stincer, 482 U.S. at 745 (recognizing a defendant’s right to be present is not guaranteed when his “presence would be useless, or the benefit but a shadow”) (citation omitted); Lord, 123 Wn.2d at 306 (a defendant does not have a right to be present during in-chambers conferences involving legal matters that do not require the resolution of facts).

**c. Any Violation Of Kelifa's Right To Be Present Was Harmless.**

Even if Kelifa had a constitutional right to be present at the staffing, any error was harmless. A violation of the right to be present is analyzed under the constitutional harmless error standard. Rushen v. Spain, 464 U.S. 114, 121, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); In re Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998). Under this standard, the State bears the burden of showing the error was harmless beyond a reasonable doubt, meaning that “any reasonable jury would have reached the same result in the absence of the error.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Here, any violation of Kelifa's right to be present at the staffing was harmless because the same result – setting Kelifa's case for a termination hearing – would have occurred regardless of whether Kelifa was present. As part of his entry into DDC, Kelifa signed an agreement warning him that if he reoffended, he could be terminated. CP 10. When Kelifa addressed the court about his new criminal law allegation, the court advised him that his case would be set for staffing and that termination might result. RP 75. Following the staffing, the court scheduled a termination hearing

because the State indicated its intent to file a petition for termination. RP 84. The court told Kelifa that the State had the right to file a petition for termination, and that it had “indicated without any question” that such a petition would be filed. RP 84. Thus, Kelifa’s presence at the staffing would not have impacted the State’s ultimate right to file a petition to terminate.

Further, it is highly unlikely that Kelifa’s presence at the staffing would have dissuaded the State from seeking his termination given the similarity of the new criminal law violation (returning to Bellevue Square and shoplifting \$800 worth of merchandise), and Kelifa’s lengthy criminal history of more than 25 felony and misdemeanor theft convictions.

Yet, even if there was a *de minimis* violation of Kelifa’s right to be present, the error was harmless beyond a reasonable doubt for another reason. Following the staffing, the trial court gave defense counsel an opportunity to consult with Kelifa about the staffing recommendations, to file briefing in opposition to termination, to present lay and expert testimony about Kelifa’s gambling addiction, and to provide oral argument that Kelifa should restart DDC. Thus, to the extent that Kelifa’s “presence” was

required at the staffing, the goals served by such presence were served.

**D. CONCLUSION**

For the foregoing reasons, the Court should affirm Kelifa's conviction.

DATED this 26<sup>th</sup> day of February, 2015.

Respectfully submitted,

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