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STATE OF WASHINGTON
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SUPREME COURT NO. 96663-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KEITH A. DAVIS,

Respondent,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Gregory Canova, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUES

1. Did the Court of Appeals correctly conclude respondent was involuntarily removed for misconduct but incorrectly conclude the trial court did not need to consider less restrictive means before completely removing him from the trial? Yes.

2. Did the Court of Appeals correctly conclude respondent – a pro se defendant – was denied his right to representation when the trial court involuntarily removed him due to misconduct and continued the trial with an empty defense table, denying respondent the opportunity to cross-examine key State witnesses? Yes.

B. SUPPLEMENTAL STATEMENT OF THE CASE

On May 19, 2014, the King County prosecutor charged appellant Keith Davis with two counts of possession of a stolen vehicle and one count of possession of cocaine. CP 1-10. On February 6, 2015, Davis moved to proceed pro se. RP 6-11. He asked for stand-by counsel. RP 10. The presiding judge told Davis he could file a motion, but he informed Davis that he would not grant it, and it was unlikely any other judge in King County would do so. RP 10-11.

After a colloquy, the court found Davis was knowingly and voluntarily waiving his right to appointed counsel and electing to represent himself. RP 11; CP 22-23. Davis signed a waiver, which enumerates the

potential consequences of electing self-representation. CP 23. However, it did not notify Davis that he would have to proceed without any representation or a defense if removed from trial due to disruptive conduct. CP 23. This also was not addressed in the colloquy. RP 6-11.

Davis worked to represent himself but ran into difficulties due to his incarceration, so he continued to ask that stand-by counsel be appointed. RP 16-17, 20, 25-29, 44, 69-71; CP 37-40, 44-48, 51-58, 70. Davis repeatedly set forth in detail the substance of his arguments, pointing to the technical hardships and medical limitations¹ he faced in trying to put forth a case while incarcerated. Id. He was repeatedly denied his request for stand-by counsel. RP 11,17-18, 25-27, 30-31, 44-45, 54-55, 72, 186-87, 198, 231. At one point, Davis was told that the current practice in King County was that pro se defendants like him would not be provided stand-by counsel because it raised ethical issues and was not constitutionally necessary. RP 17-18.

On February 27, 2017, the parties appeared for trial, and Davis sought a continuance. RP 204. After this was denied, Davis stated that he

¹ Throughout the course of the case, Davis suffered from several serious medical conditions. He had active multiple sclerosis, a ruptured hernia, and a significantly obstructed bowel. RP 230-34. He was dealing with significant chronic pain. RP 234. By the time of trial, even his wheelchair was needing to be upgraded due to the deterioration of his health. RP 232. Jail health officials confirmed Davis required many accommodations, he was seeing several providers at Harborview, and he had been approved for a new wheelchair (although the paperwork was causing delay). RP 288.

wanted stand-by counsel or he would not participate in trial. RP 205-06.

The next day Davis appeared at trial and represented himself in the 3.5 hearing. RP 243. After the 3.5 hearing, Davis informed the trial court he was unable to represent himself because the trial process and courtroom environment was aggravating his medical conditions and pain level. RP 371-75. The trial court denied his motion for a continuance and his effort to withdraw as counsel. RP 373, 375. Davis screamed he wanted a new judge. RP 376, 379. The trial court warned Davis if he continued to be disruptive, he would be removed to observe the court proceedings elsewhere. RP 380-82. Davis truculently stated he did not care if the judge held the trial without him. RP 380-82.

Davis returned the next court day to represent himself without stand-by counsel. 2RP 3-194. However, things broke down in the afternoon when Davis returned to his table after taking a bathroom break to find that all water had been removed.² 2RP 199. The trial judge said she had removed it because he was requesting to use the bathroom too much. 2RP 199. Davis said that he needed water because one side effect

² Davis was told before trial he would have access to water. He was experiencing uncontrollable digestive problems that required him to intake water which caused the need for frequent bathroom breaks in order not to soil himself. RP 155-57, 162, 230-31. Because he was in a wheelchair and wore a diaper, he needed to go somewhere with accommodation to be able to take care of himself, which was time consuming. 2RP 156-57. Before trial, the parties agreed to take hourly bathroom breaks and for Davis to signal if he needed one sooner than that. RP 155.

of his medication was dehydration and without regular water, he became extremely constipated. 2RP 199-200. Davis emphasized his need for water by screaming and pounding his fist on the table. 2RP 200.

The trial court noted it was 3:10 in the afternoon and informed Davis he was done with water for the day. 2RP 200-01. It explained Davis had drank twice as much water as the day before and had to go to the bathroom twice as often. 2RP 201. Davis complained that he would dehydrate and end up with more of a bowel obstruction. RP 202.

The jury was brought into the courtroom, but Davis continued to argue as the prosecutor attempted to examine an officer. 2RP 202-05. The trial court removed the jury. RP 205. As they were walking out, Davis yelled, "You can hold your trial without me. How's that?" 2RP 205. The trial court said: "I'm going to do that." 2RP 205. It started to give Davis one more chance to collect himself, but he said he was done playing the court's game and being a gentleman and polite. 2RP 206. The trial court found Davis was "voluntarily absenting" himself from the proceedings.³ 2RP 206.

³ In its Motion for Discretionary review, the State claims Davis attempted to physically leave the courtroom. MDR at 6. Neither the oral record nor the findings of fact support this claim. RP 206-07; CP 140-42. Moreover, the State fails to reconcile this new claim with its previous statement of facts and explicit recognition that "...a defendant in custody who refuses to participate cannot simply walk out on his own accord. It was necessary, as a practical matter, for Judge Spector to ... have him removed." Brief of Respondent (BOR) at 26-27, 35.

Before Davis was removed, the trial court made an oral record to support removal. RP 207-08. She found Davis was manipulating the trial by drinking a lot of water and then having to take excessive bathroom breaks and that this was disrupting and delaying the trial. 2RP 207. During the ruling, Davis yelled and swore at the court. 2RP 208. Noting his conduct, the trial court ruled Davis had voluntarily absented himself “under State v. Garza.” 2RP 208. She then ordered Davis removed from the proceedings without first considering any other options that might permit him to observe.⁴ 2RP 208; CP 142.

With an empty defense table, the prosecutor finished her direct examination of the police officer who testified to finding crack cocaine in Davis’ possession. 2RP 209-19. There was no cross examination of this officer. 2RP 220. Davis was not present during the direct examination of another officer. 2RP 220-35. This officer testified about the traffic stop, Davis’ arrest, and Davis’ statements about how he came to possess the car. 2RP 220-29. He also identified the car Davis was driving as stolen. Id. Again, there was no cross examination. RP 235.

⁴ The trial court subsequently entered written findings. These findings established Davis was in fact removed for misconduct. They focused entirely on Davis’ disruptive conduct. Although the trial court suggested Davis was voluntarily absenting himself by misconduct, the findings do not discuss the elements of voluntary absence under Garza. CP 140-43. The trial court’s written findings are attached an Appendix.

The next day after his removal, Davis was brought back to the courtroom. 2RP 241. The trial court warned Davis if he did not follow her orders he would be “removed” like he was the day before. 2RP 243-44. Davis remained and completed the trial, with the jury finding him guilty as charged. CP 81-83.

On appeal, Davis asserted his right to be present was violated when the trial court completely removed him from the trial without first considering less restrictive means. Brief of Appellant (BOA) at 20-25. In discussing this, Davis explained that although the trial court called his removal a voluntary absence, the record established that it had in fact involuntarily removed him for misconduct. The Court of Appeals agreed that Davis was removed, but it concluded the trial court was not obligated to consider less restrictive alternatives to complete removal. State v. Davis, 6 Wn.App.2d 43, 54-57, 429 P.3d 534 (2018).

Davis also asserted that he, as a pro se defendant, was wrongly denied his right to representation when the trial court completely removed him from the trial and proceeded with an empty defense table, thereby denying him his right to cross examine witnesses. BOA at 25-30. The Court of Appeals agreed, reversing two convictions. Davis, 6 Wn.App.2d at 57-63.

C. SUPPLEMENTAL ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT INVOLUNTARILY REMOVED DAVIS FROM TRIAL WITHOUT FIRST CONSIDERING WHETHER THERE WERE LESS RESTRICTIVE MEANS.

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial. U.S. Const. amends. V, VI, and XIV; Wash. Const. Article I, section 22. The right to be present is not absolute, however. State v. Chapple, 145 Wn. 2d 310, 318, 36 P.3d 1025 (2001). A criminal defendant may waive the right to be present at trial by (1) express waiver, (2) voluntarily absence after the trial has begun, or (3) engaging in obstreperous conduct after the court has warned such conduct will result in involuntary removal. State v. Thurlby, 184 Wn. 2d 618, 624, 359 P.3d 793 (2015); State v. Garza, 150 Wn.2d 350, 367, 77 P.3d 347 (2003); Chapple, 145 Wn.2d at 318-26.

The State has asked this Court to give guidance as to what circumstances constitute a valid waiver of a pro se defendant's right to be present at trial and the correct standard of review. Motion for Discretionary Review (MDR) 1. To answer these questions, it is necessary to distinguish between the different types of waivers, determine which legal standard applies in this case, and then determine whether the trial court findings of fact demonstrate that legal standard was met.

As shown below, the record here establishes Davis did not expressly waive his right to be present, nor was he voluntarily absent. It shows the trial court involuntarily removed Davis for misconduct. It also establishes that the trial court erred in doing so before considering less restrictive means.

(i) Davis Did Not Expressly Waive His Right To Be Present.

The State has suggested that Davis expressly waived his right to be present. BOR at 31-36; MDR at 15-17. As shown below, the record does not support this.

A defendant may expressly waive his right to be present at trial. See, Campbell v. Wood, 18 F.3d 662, 673 (9th Cir. 1994) (holding defendant expressly waived his right to be present); State v. Fort, 190 Wn. App. 202, 212, 226, 360 P.3d 820 (2015) (same). An express waiver is an “intentional relinquishment or abandonment of a known right or privilege.” Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. Id.

An express waiver is not ordinarily found when, in the middle of an angry tirade, a defendant truculently yells that he wants to leave. This is because it is difficult to find that person is making an intelligent and

knowing choice when he or she is in the middle of a tirade. Instead, such statements are generally treated an act of misconduct not an express waiver. Compare, e.g., Chapple 145 Wn.2d at 314-15 (recognizing defendant’s rant that he wanted to leave was part of his misconduct rather than a knowing and intelligent express waiver); State v. Eddy, 68 A.3d 1089, 1096-97 (2013) (holding there was a voluntary express waived when defendant calmly asked to leave, and the court followed up with an appropriate colloquy).⁵

The State suggests the trial court found Davis “expressly waived” his right to be present. BOR at 31-36; MDR at 15-17. It points to Davis’ rants about wanting to leave the trial, claiming these to constitute an “express waiver” or a “voluntary departure.” Id. However, the trial court never found Davis’ statements constituted an express waiver. CP 140-43.

The trial court was in the best position to assess whether Davis’ rants were an express waiver of his right to be present or were instead an act of misconduct. Yet, its findings do not point to a single statement by Davis as the reason for his removal. Instead, the trial court focused solely on Davis’ misconduct, which it characterized as a “tirade.” CP 140-43;

⁵ This is not to say that a removal for misconduct cannot ripen into an express waiver. For example, express waiver may be properly found where a defendant is removed for misconduct, brought back to court and offered the chance to return, and then knowingly and intelligently affirms he no longer wants to be present at trial. However, that did not happen here. CP 140-43; RP 244-52.

RP 207-08. The trial court's findings simply do not support the State's claim that Davis expressly waived his right to be present or voluntarily departed. CP 140-143.

(ii) Davis Did Not Impliedly Waive His Right To Be Present Through Voluntary Absence But Was Instead Involuntarily Removed For Misconduct.**Error! Bookmark not defined.**

There are two ways in which a criminal defendant may be found to have impliedly waived his right to counsel – voluntary absence or removal for misconduct after appropriate warnings. As shown below, these two types of waiver are mutually exclusive. A defendant who is present in the courtroom cannot be said to be voluntarily absent, and a defendant who is absent cannot be removed from the courtroom for misconduct. Yet, the trial court ostensibly found both types of waiver here. As shown below, however, it was impossible for Davis to have impliedly waived his right to be present through voluntary absence because he was not absent.⁶

Turning first to implied waiver through voluntary absence, the trial court must satisfy a three-step process before concluding a defendant has impliedly waived his right to be present through absence:

⁶ Review is de novo because this Court is reviewing whether the trial court applied the proper legal standard. U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, ___ U.S. ___, 138 S.Ct. 960, 965, 200 L. Ed. 2d 218 (2018) (explaining a trial court's determination of the legal standard to be applied is a legal conclusion that is reviewed "without the slightest deference")

- (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.

Garza, 150 Wn.2d at 367. Under this process, the trial court only need answer one question before finding an implied waiver: whether the defendant's absence from the courtroom is voluntary? State v. Thomson, 123 Wn. 2d 877, 881, 872 P.2d 1097 (1994). This legal standard is triggered by the defendant's absence. Id.

A defendant who is present in the courtroom may also be found to impliedly waive his right to be present but under a different legal standard. Chapple, 145 Wn.2d at 318-26. In Chappel, this Court set forth a four-step process for courts to follow before concluding a defendant has waived his right to be present through misconduct:

1. Determine whether the defendant was warned that his conduct would result in removal,
2. Consider the severity of the defendant's conduct,
3. Consider whether there are less severe alternatives for dealing with the defendant's disruptive behavior, and
4. allow the defendant to reclaim his right to be present upon assurances that his conduct will improve.

Chapple, 145 Wn. 2d at 320; see also, Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060, 25 L. Ed. 2d 353 (1970). In contrast to Garza, Chapple applies when the defendant is present in court.

As a matter of law, a defendant cannot simultaneously waive his right to be present through voluntary absence and courtroom misconduct. See, State v. DeWeese, 117 Wn.2d 369, 381, 816 P.2d 1, 7 (1991) (holding right to be present may be lost by “either the defendant voluntarily absenting himself from proceedings or the removal of the defendant from the courtroom”). “Absence” is defined as “not present at a usual or expected place : MISSING.”⁷ When a defendant is present in the courtroom, he is not missing. Moreover, when a defendant is missing from the courtroom, he is not engaging in courtroom misconduct. Thus, Chapple and Garza represent two mutually exclusive legal standards.⁸

Here, the trial court reached two inconsistent legal conclusions: (1) Davis impliedly waived his right to be present due to misconduct, and (2) Davis impliedly waived his right to be present through voluntary absence.

⁷ <https://www.merriam-webster.com/dictionary/absence> (last accessed 5-25-19)

⁸ However, a removal for misconduct can ripen into a voluntary absence if a defendant refuses to come back into the court room after being removed. See, Deweese, 117 Wn.2d at 373-74, 381 (showing just such circumstances).

CP 140, 142; RP 207-08. Thus, as a threshold matter, the Court of Appeals had to decide which legal standard properly applied.⁹

The record establishes Davis was present in the courtroom. Thus, it was legally impossible for the trial court to conclude he impliedly waived his right to be present though voluntary absence. Indeed, the trial court's findings seem to implicitly recognize this. The findings of facts track the Chapple factors closely, pointing to Davis' misconduct (CP141 – FoFs 3-7), it's warning to Davis (CP 142 – FoF 8); Davis' continued misconduct (CP 142 – FoF 9), the trial court's removal of Davis (FoF 10); and Davis' reclaiming of his right (FoF 16). CP 141-42. By contrast, the trial court made no attempt to address the Garza factors in its findings.¹⁰

Id. As such, the Court of Appeals properly concluded the Chapple legal standard applied because Davis was removed for misconduct.

⁹ Davis did not assign error to the trial court's oral ruling under Garza (BOA at 1), instead reading the courts written findings as establishing waiver through misconduct and addressing this in the context of his broader constitutional issue. BOA at 17-18, 20. Davis asks this Court to excuse this technical violation of the rules on the grounds that the nature of his challenge to the trial court's oral ruling was clear and discussed in the briefing Id. Moreover, justice is served by reviewing the error since it involves an error of constitutional dimension, the parties have briefed it extensively, and the Court of Appeals considered it. RAP 1.2; Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979); State v. Olson, 74 Wn. App. 126, 128, 872 P.2d 64, 66 (1994).

¹⁰ FoF 11 refers to "voluntary absence." However, this is merely a finding of historical fact that acknowledges the court's prior oral ruling: "The trial court ordered the trial continue in [Davis'] absence finding he had voluntarily absented himself." CP 142. It does not identify this as a legal conclusion.

In sum, as a matter of law, Davis could not have waived his right to be present through voluntary absence because he was present in the courtroom at the time of the implied waiver. Hence, to the extent the trial court found a voluntary absence under Garza, it applied the wrong legal standard. Instead, the trial court involuntarily removed Davis for misconduct. Thus, the only question that remains is whether the trial court was required to consider less restrictive alternatives before removing Davis.

(iii) The Trial Court Erred When It Completely Removed Davis Form The Trial Without Considering Less Restrictive Alternatives.

The record shows the trial court made no effort to consider less restrictive alternatives before it removed Davis completely from his trial. RP 206-08. As shown below, this was an abuse of discretion.

This Court has cautioned a defendant's complete removal from trial should be a last resort. Chapple, 145 Wn.2d at 323-24. Yet, the Court of Appeals concluded "there is only a preference, as opposed to a requirement, for trial courts to use the least severe means." Davis, 6 Wn.App.2d at 57. Hence, clarification is needed as to whether trial court must consider – on the record – whether there are less restrictive means of controlling a disruptive defendant before ordering his complete removal.

There are good policy reasons for requiring the trial court to consider on the record whether there are less restrictive alternatives. First, this approach is consistent with due process concepts requiring that before a person's fundamental right may be restricted, there must be a compelling government interest and no less restrictive means available. See, State v. Warren, 165 Wn. 2d 17, 35, 195 P.3d 940, 948 (2008) (applying strict scrutiny as to a court order prohibiting contact with children). Constitutional rights must be jealously guarded, particularly so in criminal trials. Thus, why complete removal must be a last resort. Chapple, 145 Wn.2d at 323-24.

Second, on-the-record consideration will ensure trial courts have thoroughly looked into whether a viable alternative to complete removal is available. There are often alternative methods that maybe used to allow a trial court to manage a defendant's truculent behavior but still enable him to observe the trial, such as video monitors, restraining the defendant, audio access, etc. If complete removal can only happen as a last resort, reviewing courts must be able to identify why the trial court did not use a less restrictive means. An adequate record is therefore necessary to assess whether the trial court properly exercised its discretion.

Finally, as discussed further below, when the defendant is pro se, exploring less restrictive alternatives takes on a particular significance.

Complete removal in this context not only impacts the rights of the defendant, but it also causes a breakdown in the adversarial process.

In sum, Davis was completely removed from a critical stage of his trial due to misconduct, but the trial court did not first consider whether there was an alternative means. As such, there is nothing the record that shows why the trial court could not permit him to observe the trial from some other location – an available means that the trial specifically referred to when it warned him about his conduct earlier in the proceeding. As such, the trial court erred when it completely removed Davis without first making a record as to why less restrictive alternatives could not be used.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED DAVIS WAS DENIED HIS RIGHT TO REPRESENTATION WHEN THE TRIAL COURT REMOVED HIM FROM TRIAL.

The second constitutional question raised by Davis on appeal was whether a pro se defendant is denied his constitutional right to representation when he is involuntarily removed from the courtroom and the defense table is left empty. BOA at 25-30; RBOA at 12-16. This question raises complex constitutional issues because it implicates three related but distinct constitutional rights: (1) the right to be present at trial; (2) the right to self-representation; and (3) the right to representation. United States v. Mack, 362 F.3d at 601 (9th Cir. 2004). Here, the Court of

Appeals properly concluded Davis was denied his Sixth Amendment right to representation when the trial court removed him and left him without any representation. Davis, 6 Wn.App.2d at 58-63.

A pro se defendant does not automatically forfeit his right to representation when he is removed for misconduct. Davis, 532 F.3d 132, 143-45 (2008); Mack, 362 F.3d at 600-03.¹¹ This is because the integrity of the trial process is at stake, and defendant cannot be allowed to manipulate judicial integrity by acting out.

An empty defense table generally means the State's evidence will not be tested through a healthy adversarial process, resulting in a potentially unreliable and seemingly unfair outcome. Id. As such, even where a pro se defendant is contemptuous, the trial court commits structural error when it removes the defendant and thereby prevents cross-examination of State witnesses. Id. Consequently, when a trial court finds itself forced to remove an obstreperous pro se defendant from the courtroom, it must find an alternative means of effectuating representation – even if this means continuing the trial and/or appointing counsel. Id.;

¹¹ See also, Commonwealth v. Tejada, 188 A.3d 1288, 1299-1300 (PA 2018); State v. Lacey, 364 Or. 171, 185-88 (2018); People v. Ramos, 5 Cal. App. 5th 897, 907, 210 Cal. Rptr. 3d 242, 250 (Ct. App. 2016); State v. Menefee, 268 Or. App. 154, 186 (2014); Eddy, 68 A.3d at 1107; People v. Cohn, 160 P.3d 336 (Colo.Ct.App. 2007); People v. Carroll, 140 Cal. App. 3d 135, 141, 189 Cal. Rptr. 327, 331 (1983); Saunders v. State, 721 S.W.2d 359, 363 (Tex.Ct.App.1986).

see also, Davis, 6 Wn.App.2d at 62, n. 7 (collecting cases that discuss various alternative means for effectuating representation).

This is not to say a pro se defendant may not expressly waive his right to all representation or make a strategic choice to leave the defense table absent. In such cases, the adversarial process has not broken down because the empty defense table is actually the product of the defendant's self-representation.¹² Thus, as unwise it may be to leave a defense table empty, the trial court must respect the pro se defendant's autonomous choices in how to present his defense. Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 2540, 45 L. Ed. 2d 562 (1975).

Additionally, one court has held that a pro se defendant may implicitly waive his right to representation through misconduct, and in such circumstances an empty defense table is acceptable. Lacey, 364 Or. at 185-86. Lacey holds that an obstreperous pro se defendant may impliedly waive his right to all representation through misconduct but only if he has been explicitly warned that his continued misconduct (1) will result in removal **and** (2) will result in an empty defense table. Id.

¹² See, Clark v. Perez, 510 F.3d 382 (2d Cir. 2008) (finding no error where pro se defendants chose voluntary absence as part of a political protest defense); Eddy, 68 A.3d at 1096-97 (affirming where pro se defendant strategically chose to leave an empty defense table to not prejudice the jury against himself); but see, Thomas v. Carroll, 581 F.3d 118, 124 n. 3 (3d Cir.2009) (suggesting trial court is constitutionally required to appoint counsel to represent a pro se defendant who voluntarily decides to leave the defense table empty due to the structural problems).

Without such warnings, it may not be reasonably said a pro se defendant is exercising his right to self-representation when he gets himself removed and leaves an empty defense table. Compare, Id. 176, 186-87 (finding no constitutional violation where defendant received requisite warning); with, Menefee, 268 Or. App. at 162-68 (reversing conviction for structural error where no warnings that removal would result in an empty defense table).

The record shows Davis did not choose to leave an empty defense table as part of a political protest defense. He was involuntarily removed for misconduct without first receiving an explicit warning that the defense table would be left empty. CP 23, 140-43; RP 199-207. Consequently, it cannot be reasonably said that – as an act of self-representation – Davis decided to provoke his removal via misconduct so that it would leave the defense table empty. 2RP 209-35. Hence, the Court of Appeals correctly determined Davis’ Sixth Amendment right to representation was violated when the trial court continued proceedings with an empty defense table and he was denied fundamental trial protections such as the right to cross-examination. Davis, 6 Wn.App.2d at 62-63. As such, Davis respectfully asks this Court to affirm that decision.

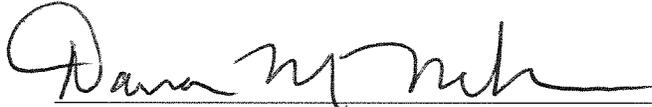
D. CONCLUSION

For the reasons stated above, Davis asks this court to (1) affirm the Court of Appeals' conclusion that Davis was involuntarily removed for misconduct, (2) reverse the Court of Appeals decision that the trial court did not abuse its discretion when it ordered Davis' complete removal without first considering less restrictive means, and (3) affirm the Court Appeals decision that Davis was denied his right to representation.

DATED this 7th day of June, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Dana Nelson", written over a horizontal line.

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Attorneys for Appellant

APPENDIX A

FILED
KING COUNTY WASHINGTON

MAY 26 2017

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KEITH ADAIR DAVIS,

Defendant.

No. 14-1-00794-5 SEA

) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
) REGARDING DEFENDANT
) VOLUNTARILY ABSENTING
) HIMSELF FROM TRIAL DUE TO HIS
) DISRUPTIVE BEHAVIOR
)

A jury trial was held before Honorable Judge Julie Spector on February 28, 2017 through March 9, 2017. On March 7, 2017, the defendant was removed from the courtroom due to his behavior and the trial proceeded despite his absence. The Court made the following findings of fact and conclusions of law:

1. At the outset of the trial, the defendant had requested to have frequent bathroom breaks due to his medical condition. The Court informed him that he would be able to take necessary bathroom breaks as needed. The defendant was also provided with a full water pitcher and paper cups.
2. As the trial commenced, the defendant would frequently announce his need to use the bathroom. This would typically occur every hour. At that time, the defendant appeared to be drinking a normal amount of water.

FINDINGS REGARDING TRIAL IN ABSENCE
DUE TO DEFENDANT'S BEHAVIOR

ORIGINAL

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140 192

- 1 3. On March 7, 2017, the defendant increased his water intake dramatically. He
2 consumed multiple pitchers of water during the morning session. The defendant
3 would then frequently announce his urgent need to use the bathroom. This started to
4 occur every 20 minutes instead of every hour. This would also occur at critical parts
5 during witnesses' testimony.
- 6 4. When the afternoon session began on March 7, 2017, the defendant asked for more
7 water. The prosecutor provided him with the additional pitcher of water that was on
8 the prosecutor's side of the table. Shortly thereafter, the defendant again loudly
9 announced his urgent need to use the restroom. The jury was brought back into the
10 jury room and the jail officers took the defendant to the restroom.
- 11 5. When the defendant returned, the Court informed the defendant that he would not be
12 provided any more water, as he had already had a substantial amount and there was
13 only one witness remaining for the day.
- 14 6. Further, the Court informed the defendant that taking restroom breaks every 20
15 minutes was causing a substantial delay to the trial and that because there was only
16 one witness remaining, trial would be done for the day very soon and the defendant
17 would be able to return to the jail and have all the water he would like.
- 18 7. The defendant began an explosive tirade of expletives, pounding on the table with his
19 fists, and yelling at an extremely loud volume. While yelling at top volume, the
20 defendant accused the Court of violating the 8th Amendment and that he needed water
21 due to his medical condition. He also repeatedly used curse words and at one point
22 screamed, "F**k you, Spector!" to the Court.

- 1 8. The Court warned him that if he was going to continue to raise his voice and curse at
2 the Court, then he would be removed from the courtroom.
- 3 9. The defendant continued to interrupt the Court, yell at the top of his lungs, curse, and
4 pound the table. The volume was such that the Court was unable to speak over him.
5 The volume was also so loud that the jury undoubtedly heard the defendant's tirade.
6 Further, the courtroom across the hall (which was in session in a murder trial) was
7 forced to recess because the parties were unable to hear their own witness due to the
8 defendant's volume.
- 9 10. The Court then ordered the jail officers to remove him from the courtroom. The
10 officers did so. The defendant continued to yell at top volume as the officers escorted
11 him out of the courtroom and down the hallway.
- 12 11. The Court ordered the trial to continue in his absence finding that he had voluntarily
13 absented himself. The prosecutor finished up the witness's testimony and the Court
14 recessed for the afternoon.
- 15 12. The defendant was brought down for trial the next morning and the Court warned him
16 about his behavior. The Court informed him that if he continued to behave that way,
17 he would again be removed from the courtroom and trial would proceed in his
18 absence.
- 19 13. The Court found that the defendant deliberately doubled his water intake. The Court
20 pointed out that his bathroom urgency increased from every hour to every 20 minutes.
21 The Court pointed out that in the beginning days of the trial, the defendant did not
22 drink nearly as much water and did not have nearly as many bathroom breaks.
23
24

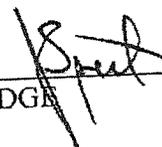
1 14. The Court also found that when the defendant would announce he needed a bathroom
2 break, this interruption would always occur either during a critical part of a witness's
3 testimony or when it was his time to cross examine a witness.

4 15. The Court found that the defendant intentionally did this to delay the proceedings and
5 that this was a tactical decision by the defendant. The Court found that the defendant
6 had done everything he could to delay the trial.

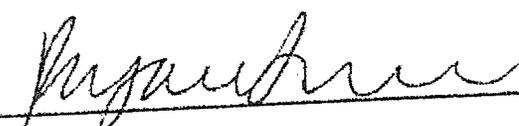
7 16. The Court also pointed out that the defendant's behavior was one of the worst
8 exchanges the Court had seen. The Court again warned him that he had one more
9 opportunity to participate in his own trial and there would be no more disruptions.
10 The defendant stated he understood and did not have any further behavior issues of
11 significance. Trial was able to proceed in the defendant's presence.

12
13 In addition to the above written findings and conclusions, the Court incorporates by
14 reference its oral findings and conclusions regarding all materials herein.

15 Signed this 26 day of ^{May} ~~April~~ 2017.

16
17 
18 JUDGE

19
20 Presented by:

21 
22

23 Rhyan C. Anderson, WSBA# 46974
Deputy Prosecuting Attorney

24 FINDINGS REGARDING TRIAL IN ABSENTIA
DUE TO DEFENDANT'S BEHAVIOR- 4

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June 07, 2019 - 1:53 PM

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