

NO. 44774-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TAMMERA THURLBY,

Appellant.

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

The Honorable Michael H. Evans, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to be present at trial.

Issue pertaining to assignment of error

Appellant was present for the first day of trial but absent when court reconvened the next day. The court made a preliminary finding that she was voluntarily absent and proceeded with the trial. Prior to sentencing, appellant explained that she had been attending to a medical emergency and that when she called the Clerk's office to ask about a continuance she was informed that felony matters could not be rescheduled. The court maintained its finding that appellant was voluntarily absent and imposed sentence. Where the medical emergency which necessitated appellant's absence was beyond her control so that she was not voluntarily absent, must her convictions be reversed and the case remanded for a new trial?

B. STATEMENT OF THE CASE

1. Procedural History

On August 21, 2012, the Cowlitz County Prosecuting Attorney charged appellant Tammera Thurlby with three counts of delivery of a controlled substance. CP 4-6. The information further alleged that the

transactions occurred within 1000 feet of a school bus route stop. Id. The case proceeded to jury trial before the Honorable Michael Evans, and the jury returned guilty verdicts and affirmative special verdicts. CP 54-59.

Prior to sentencing, the State added a charge of bail jumping, based on Thurlby's absence from court on the second day of trial. CP 60-62. Thurlby entered a guilty plea. CP 63-71. The court imposed concurrent standard range sentences and consecutive sentence enhancements, for a total confinement of 120 months. CP 77. Thurlby filed this timely appeal. CP 85.

## 2. Substantive Facts

Tammera Thurlby was the target of an investigation during which a police informant conducted three controlled buys of methamphetamine at a location chosen by the police. RP 25, 32. Thurlby was charged with three counts of delivery of a controlled substance within 1000 feet of a school bus route stop. CP 7-8. Trial commenced on December 11, 2012, and Thurlby was present in court. When court recessed for the day, Thurlby was told to return a few minutes before 9:00 the next morning. RP 103.

Thurlby was not present when court reconvened the following day. RP 104. Defense counsel informed the court that he did not have a telephone number for Thurlby and had no way to contact her. RP 104. He

explained that she did not have good transportation and usually rode a bicycle to court, and he suggested that inclement weather that morning could be responsible for her delay. RP 104-05. Counsel asked the court to wait a few more minutes before issuing a bench warrant, and the court agreed. RP 105-06. When Thurlby had not shown up by 9:36, however, the court issued a warrant for her arrest. RP 108.

At 10:00, the court noted that it had called the local medical centers and did not find Thurlby listed as a patient. It had checked with court administration and the Clerk's office and found that no one had received a call from Thurlby. It also found that she had not been booked into the Cowlitz County Jail. RP 110.

The State argued that the court should adjourn until 1:30 and then proceed with trial whether Thurlby was present or not. RP 111. Defense counsel agreed that, if the court found Thurlby was voluntarily absent, it had discretion to proceed without her. He noted, however, that the court was required to indulge a presumption against the waiver of Thurlby's right to be present, and he argued that there was not a sufficient showing that her absence was voluntary. RP 112. Counsel objected to proceeding without Thurlby. RP 113.

The court recessed until 1:30, to allow time to gather more information. RP 113. When court reconvened, the prosecutor reported

that law enforcement had not located Thurlby. Defense counsel reported that he had had no contact from her. RP 114. The judge reported that he had again checked with the medical centers and did not find Thurlby on a patient list, and he had checked with court administration and the Clerk's office and found that she had not left any messages. RP 114.

The State moved to proceed in Thurlby's absence. RP 115. Defense counsel moved for a mistrial, or if the court was inclined to proceed, to grant a continuance, arguing that the State would not be prejudiced by a further delay. RP 116-17. The court noted that Thurlby had been present at all pretrial hearings and for the first day of trial. She had notice that she was to return the next day, but she had not appeared and no one had heard from her. RP 118. The court made a preliminary finding that her absence was voluntary, because there was no showing of good cause for her absence. RP 120. The court then considered the burden on the State if a mistrial were granted, noting that the majority of the evidence had been presented and a new trial would require witnesses to return to court. RP 120-21. The court denied the motion for mistrial or continuance and granted the State's motion to proceed in Thurlby's absence. RP 121.

The trial continued, and the jury returned guilty verdicts. RP 217-18. Prior to sentencing on March 21, 2013, Thurlby was given the

opportunity to explain her absence. She apologized for not showing up for the second day of trial and explained that her mother had needed emergency surgery for a serious medical condition, and she was at the hospital with her mother. RP 227-28. She had called the Clerk's office to see if a new trial date could be set, but she was told that felony matters could not be rescheduled. She was not able to explain her situation to anyone. RP 228. By the time she was able to speak with defense counsel, trial had already proceeded in her absence. RP 228. Knowing her mother was in poor health, Thurlby had asked defense counsel prior to the trial whether it was possible to postpone the proceedings. RP 228. But the surgery for which she missed court was an emergency procedure, not one that was planned beforehand. RP 241-42. Thurlby's mother informed the court that Thurlby is her only child and was there to help during her surgery. RP 231-33.

Defense counsel argued that Thurlby's mother's failing health and emergency surgery during trial facilitated Thurlby's absence. Indulging in the presumption against waiver of her constitutional right, the court should find the absence was not voluntary, set aside the verdicts, and order a new trial. RP 235.

The court denied the motion for a new trial. The judge stated that his decision relied heavily on the fact that Thurlby knew the surgery was

scheduled prior to trial. RP 241. Defense counsel then clarified that Thurlby had wanted to postpone the trial prior to the readiness hearing because she knew her mother was in poor health, but the surgery was not preplanned; it was emergency surgery that occurred in the midst of trial. RP 241-42. The court accepted that clarification but maintained its ruling, stating that Thurlby was ordered to be present at trial and her absence was a choice, albeit an understandable one. RP 242-43.

C. ARGUMENT

THURLBY'S CONSTITUTIONAL RIGHT TO BE PRESENT  
AT TRIAL WAS VIOLATED.

A criminal defendant has a right to be present at trial, derived from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994) (citing United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985)). The Washington constitution also guarantees a defendant the right to appear and defend in person. Wash. Const. art. 1, § 22 (amend. 10). A constitutional right may be waived only by a knowing and voluntary act of the defendant. Thomson, 123 Wn.2d at 880. Courts have interpreted a voluntary absence after trial has begun as a waiver of the right to be

present. Thomson, 123 Wn.2d at 880; State v. Rice, 110 Wn.2d 577, 619, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989).

If the court finds a waiver of the right to be present after trial has begun, the court has discretion to continue the trial in the defendant's absence. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); CrR 3.4(b) (a defendant's voluntary absence after trial has commenced in his or her presence does not prevent the court from continuing the trial). The court is not required to proceed without the defendant, but when the totality of the circumstances suggests the defendant is voluntarily absent, the court may exercise its discretion to proceed. Thomson, 123 Wn.2d at 881, 883.

In determining whether a voluntary waiver has occurred, the court must

- (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.

Thomson, 123 Wn.2d at 881 (quoting State v. Washington, 34 Wn. App. 410, 414, 661 P.2d 605 (1983)). In making this determination, the court

must indulge every reasonable presumption against a waiver of the right to be present. Garza, 150 Wn.2d at 367; Thomson, 123 Wn.2d at 881. “The presumption against waiver must be the overarching principle throughout the inquiry. Otherwise, the right to be present is not safeguarded....” Garza, 150 Wn.2d at 368.

In Garza, the defendant had called his attorney to say he was on his way but would be late. The trial court reasonably could have presumed that something out of the defendant’s control was delaying him and waited a reasonable time for the defendant to arrive. Instead, the court allowed five minutes and then proceeded in the defendant’s absence. The Supreme Court held that the trial court abused its discretion in making a determination of voluntary absence without reference to the presumption against waiver. Garza, 150 Wn.2d at 369.

Unlike the court in Garza, the court below recessed and attempted to locate Thurlby or gather information about her absence, to no avail. Even if the court’s preliminary finding of voluntariness was supportable, once Thurlby provided an explanation, that finding was no longer reasonable. As the court noted, Thurlby had been present at all pretrial hearings and for the first day of trial, despite her lack of reliable transportation. These circumstances supported a reasonable presumption that something out of Thurlby’s control was preventing her from being

present on the second day of trial. Her explanation prior to sentencing confirmed that belief.

During the middle of trial Thurlby's mother, who suffered from a serious medical condition, required emergency surgery. As the only available family member, Thurlby was at the hospital with her mother during the procedure. She had made an effort to inform the court about the situation and request a continuance, but she was told by the Clerk's office that felony matters could not be rescheduled. See Garza 150 Wn.2d at 371 (where defendant is prevented from returning to court due to incarceration, evidence that defendant made reasonable efforts to contact the court to explain absence requires court to retract preliminary finding of voluntariness) (citing State v. Atherton, 106 Wn. App. 783, 24 P.3d 1123 (2001)). Circumstances beyond Thurlby's control resulted in her absence during trial, and therefore she did not voluntarily waive her right to be present. The judgment and sentence should be set aside and the case remanded for a new trial.

D. CONCLUSION

For the reasons set forth above, this Court should reverse Thurlby's convictions for delivery of a controlled substance and remand for a new trial.

DATED September 18, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski". The signature is written in a cursive style with a long horizontal flourish at the end.

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CATHERINE E. GLINSKI  
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Certification of Service by Mail

Today I mailed a copy of the Brief of Appellant in *State v.*

*Tammera Thurlby*, Cause No. 44774-6-II as follows:

Tammera Thurlby DOC# 364978  
Washington Corrections Center for Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98332-8300

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
September 18, 2013

**GLINSKI LAW OFFICE**

**September 18, 2013 - 11:01 AM**

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