

No. 44774-6-II  
Cowlitz Co. Cause No. 12-1-00966-7

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Respondent,

v.

**TAMMERA THURLBY,**

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. ANSWERS TO ASSIGNMENT OF ERROR**

1. The trial court did not violate the Appellant's constitutional right to be present at trial

## **II. STATEMENT OF THE CASE**

The Respondent generally accepts the Appellant's recitation of the facts with the following addition. The appellant knew she had to be present for her jury trial. RP 240. She did not contact her attorney at the time, although she claimed to have contacted the clerk's office. RP 240. She was arrested on the bench warrant from her failure to appear for trial on February 13<sup>th</sup>, 2013, two months after she failed to appear for trial. RP 229. As mitigating factors, she cited her choice not to run or "bite" the officer when confronted about her warrant. RP 229. She plead guilty to bail jumping based on her failure to appear for trial. RP 248-249.

## **III. ARGUMENT**

### **A. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL**

The trial court did not violate the Appellant's right to be present at trial. While the Appellant has a right to be present at trial, under both State and Federal constitutions, that right may be waived. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), *State v. Rice*, 110 Wn.2d 577, 619, 757 P.2d 889 (1988), *cert*

*denied*, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989). A voluntary absence after trial has begun amounts to a waiver of the right to be present at trial. *Rice*, 110 Wn.2d at 619, 757 P.2d 889, citing *Taylor v. United States*, 414 U.S. 17, 19-20, 94 S.Ct. 194, 195-96, 38 L.Ed. 2d 174 (1973). The question of whether someone is voluntarily absent is determined by the totality of the circumstances under three different prongs of inquiry. *State v. Washington*, 34 Wn.App. 410, 413, 661 P.2d 605, *remanded*, 100 Wn.2d 1016, 671 P.2d 230 (1983), *rev'd on other grounds on remand*, 36 Wn.App. 792, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984). The court must first determine whether the circumstances of the defendant's disappearance warrant a finding of voluntary absence, then the court may make a preliminary finding of voluntariness, and finally, the court must afford the defendant an adequate opportunity to explain their absence when they return to custody and before sentence is imposed. *Id.* at 414, 661 P.2d 605. This is precisely what the trial court did in this case.

The trial court conducted extensive research to determine the location of Appellant and gave her attorney ample opportunity to either procure her presence or explain her absence. The trial court found that Appellant was voluntarily absent, then considered the defense requests for either a continuance or mistrial. The court elected to proceed with trial and Appellant was convicted *in absentia*.

When the Appellant was taken into custody and brought before the court for sentencing, the court heard her explanation and then determined that it did not change his determination that her absence of voluntary. RP 239-241.

These facts place the case squarely under *State v. Thomson*, 123 Wn.2d 877, 872 P.2d 1097 (1994). In that case, the defendant “took flight before the trial had begun,” the court “sufficiently inquired into the circumstances of the Defendant’s absence to make a finding of voluntariness,” and then gave the defendant a chance to explain before being sentenced. *Id.* at 884, 872 P.2d 1097. The court found that the trial court in that case did not abuse its discretion in finishing the trial without the defendant. *Id.* These are essentially the same facts as present in this case. The only question upon which the argument could turn would be whether or not the trial court’s initial determination continued to be appropriate after the Appellant’s explanation. The trial court considered her statement about her mother’s medical emergency and found that, though understandable, her absence was the product of a choice she had made and was voluntary. RP 424. There are no facts in the record to contravene the judge’s finding.

The trial court satisfied all three prongs of *Rice* with its inquiry into Appellant’s whereabouts, its consideration of whether her absence was voluntary, and its consideration of her explanation. The

trial court did not abuse its discretion in finishing the jury trial in the Appellant's absence and the verdicts should be affirmed.

#### **IV. CONCLUSION**

The trial court did not abuse its discretion in finishing the trial of the Appellant without her presence. Appellant was absent after trial began and the court's determination that such absence was voluntary was based in fact and a lawful determination. When Appellant was given the opportunity to address her absence at sentencing, she provided no facts sufficient to alter the trial court's initial determination that such absence was voluntary. The convictions should be affirmed.

Respectfully submitted this 14th day of January, 2014.

SUSAN I. BAUR  
Prosecuting Attorney

By:



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Representing Respondent

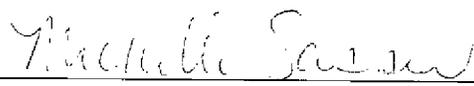
**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 17, 2014.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## January 15, 2014 - 12:55 PM

### Transmittal Letter

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Court of Appeals Case Number: 44774-6

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