

NO. 44774-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

TAMMERA THURLBY,

Appellant.

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

The Honorable Michael H. Evans, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ANSWER TO REQUEST FOR SUPPLEMENTAL BRIEFING

In State v. Cobarruvias, ___ Wn. App. ___, 318 P.3d 784 (2014), the Court of Appeals recognized the requirement that a trial court expressly consider a defendant's explanation for an absence from trial in light of the presumption against a voluntary waiver of the right to be present. Here, the trial court failed to consider the presumption against voluntary waiver of the right to be present at trial when assessing Thurlby's explanation for her absence from court after the first day of trial.

B. SUPPLEMENTAL STATEMENT OF THE CASE

Prior to sentencing, Thurlby was given the opportunity to explain her absence from court after the first day of trial. She 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. 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, and the court should find the absence was voluntary and order a new trial. RP 235. Counsel noted that under case law, the court makes a preliminary determination whether an absence is voluntary and then subsequently affords the defendant an opportunity to explain the absence. It is then up to the court to determine if the absence was voluntary, and cases make generalized statements that the court is to indulge a presumption against waiver of the constitutional right. RP 235.

The prosecutor responded that the defendant's explanation prior to sentencing could not serve as a basis for the court to reconsider its mid-trial voluntariness determination. It was merely an opportunity for the defendant to offer allocution. RP 236.

The court appeared to agree with defense counsel that its mid-trial determination was a preliminary finding as to voluntariness, and it considered Thurlby's explanation for her absence. The court maintained its voluntariness determination, saying that Thurlby's absence from trial was a choice, albeit an understandable one. The court made no mention of the presumption against waiver, however. RP 239-43.

C. ARGUMENT

THE COURT'S FAILURE TO EXPRESSLY CONSIDER THE PRESUMPTION AGAINST WAIVER REQUIRES REMAND FOR A NEW TRIAL.

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).

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 Cobarruvias, the defendant failed to appear on the final day of trial, and, after inquiry into the circumstances of his failure to appear, the court made a preliminary finding that the absence was voluntary. The defendant then provided an explanation for his absence prior to sentencing, moving for a new trial. The court denied the motion after careful consideration, concluding that the absence was voluntary. The Court of Appeals reversed, finding “the trial court erred in not expressly considering the defendant's showing in light of the ‘overarching’ presumption against waiver.” Cobarruvias, 318 P.3d at 788. The Court of Appeals explained,

Here the court needed, but failed, to consider the presumption in its assessment. The presumption requires more than that the court simply listen to the defendant's explanation. It then must consider the absence question anew starting with the presumption against voluntary waiver.

Id. at 789. While the trial court considered the totality of the circumstances, the Court of Appeals could not determine whether it started that analysis with the presumption against voluntary waiver or with its original determination of voluntariness. Because it was unclear whether the trial court applied the appropriate test, it abused its discretion in denying the motion for a new trial. Id. The Court of Appeals reversed the judgment and remanded for trial. Id.

Here, as in Cobarruvias, the trial court failed to expressly consider Thurlby's explanation for her absence in light of the presumption against waiver of her right to be present at trial. In fact, the court started its analysis by noting that it made a preliminary finding of voluntary absence which was thoroughly documented in the record. RP 239. It then went on to discuss the evidence presented in explanation of Thurlby's absence without ever mentioning the presumption against waiver. RP 240-45. Under Cobarruvias, the court's error requires reversal and remand for a new trial.

D. CONCLUSION

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

DATED March 27, 2014.

Respectfully submitted,



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



Catherine E. Glinski
Done in Port Orchard, WA
March 27, 2014