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2015 IL App (3d) 140040-U

Order filed November 17, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-14-0040
)	Circuit No. 12-CF-617
THOMAS WISDOM,)	
)	The Honorable
Defendant-Appellant.)	Stephen Kouri,
)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court failed to conduct an evidentiary hearing pursuant to defendant's motion for a new trial asserting his absence from his trial was due to circumstances beyond his control, the trial court's order denying defendant's motion is vacated and the trial court is instructed to hold an evidentiary hearing on said allegations.

¶ 2 The State charged defendant, Thomas Wisdom, by indictment with burglary (720 ILCS 5/19-1(a) (West 2014)). After appearing and then failing to return to court for his jury trial, the

court proceeded with a trial *in absentia*. The circuit court of Peoria County entered a jury verdict of guilty. Defendant was later found and sentenced to six years' imprisonment and assessed various fines and fees purportedly in accord with his criminal proceedings. He appeals the conviction and the fines and fees assessments. We reverse and remand with direction.

¶ 3

FACTS

¶ 4

On June 19, 2012, Thomas Wisdom was charged by indictment with burglary (720 ILCS 5/19-1(a) (West 2014)). It was alleged that on June 10, 2012, both Wisdom and William Morris knowingly and without authority entered a railroad car belonging to TP & R in Peoria, intending to commit a theft. After his arrest, Wisdom was admonished regarding a trial *in absentia* and released on bond.

¶ 5

Wisdom's jury trial began on July 29, 2013. Officers John Mobeck and Dave Logan from the Bartonville and Peoria police departments, respectively, were the State's first two witnesses. They testified to the facts leading up to Wisdom's arrest.

¶ 6

On June 10, 2012, the officers were dispatched to the railroad tracks just north of I-474 near Adams Street and Sanitation Road in Peoria. There had been a report that someone was stealing scrap metal from a train car. When Officer Mobeck arrived at the scene, he stated he witnessed Wisdom standing in a train car and throwing items out of the train. He and another officer confronted Wisdom, but Wisdom ran. Officer Logan then stopped Wisdom, however, he again ran.

¶ 7

While pursuing Wisdom, Officer Mobeck and the other officer came upon a second individual – later identified as Morris – running away in a different direction. They were able to apprehend Morris.

¶ 8 Officer Logan with approximately 10 other officers and a K-9 officer pursued and arrested Wisdom just north of Adams Street. They then searched the scene and found a homemade two-wheel dolly, multiple duffle bags, bolt cutters, pliers, and scrap metal.

¶ 9 After the officers testified, the court took an approximately fifteen-minute recess. When it reconvened, Wisdom was not present. Defense counsel explained that Wisdom had taken a cigarette break and had not returned, but that he had left various personal items at counsel's table. The court then took a five-minute recess. When it reconvened, Wisdom remained absent. Defense counsel stated that Wisdom's friends had come back into court and said they could not find him. The court allowed a statement from a spectator, an associate of Wisdom's, who stated that Wisdom was not answering his phone. The court decided to move forward with trial despite Wisdom's absence and defense counsel's request for a continuance and claims of prejudice. Pursuant to defense counsel's request, the court gave the jury a neutral explanation for Wisdom's absence.

¶ 10 The State called its final two witnesses, Julie Evans and Morris. Evans, a terminal manager at Tazewell and Peoria Railroad, testified that neither Wisdom nor Morris had permission or authority to be on her employer's property or to remove items from the trains located there.

¶ 11 Morris testified that he and Wisdom had met for the first time only a few days before June 10, 2012, at a local bar and discussed their mutual money issues. He stated that Wisdom asked and he consented to go to the train cars on June 10, to "do some scrap work," to obtain metal to sell. He then described the events of the day in question.

¶ 12 Wisdom arrived the next day at Morris' house. They walked several miles from his house to the train cars with a makeshift wheel barrow, bags, and other equipment. He stated that at

times he and Wisdom were in the same train car collecting metal and throwing it off of the train cars but that Wisdom had also gone off to other train cars alone. Morris described the police arrival and his fleeing. He stated he fled because he knew they were not supposed to be there or to take things. He testified that he discovered later that the metal in the train cars belonged to companies that were transporting it for scrap. Morris acknowledged that he had an agreement with the State to testify against Wisdom in exchange for 30 days in jail and 30 months' probation for his role in the alleged burglary.

¶ 13 The defense rested without presenting any evidence. Wisdom never appeared for the remainder of his trial. Though defense counsel argued in his closing statement that there may have been other reasons Wisdom was at the train cars and why he may have run, the jury found Wisdom guilty of burglary on July 30, 2013. The court revoked his bond and issued a warrant for his arrest. Wisdom's sentencing hearing was set for September 5.

¶ 14 On August 29, defense counsel moved for a judgment notwithstanding the verdict or, alternatively, a new trial arguing Wisdom was not proven guilty beyond a reasonable doubt. On September 5, the trial court continued the sentencing hearing and defense counsel's motion to October 18 because defendant's presentence report had not been ordered and completed.

¶ 15 Wisdom was arrested on September 12 and appeared in court via video on September 19. He acknowledged his absence at his trial and offered a brief explanation. He stated that he was "threatened by the witnesses" and that he "had people at [his] house threatening [his] family." The court informed Wisdom that his sentencing hearing would be October 18.

¶ 16 On September 30, Wisdom filed two *pro se* motions for a new trial. He argued, *inter alia*, that section 115-4.1 of the Illinois Code of Criminal Procedure of 1963 (Code) was not complied with concerning his absence from trial. (725 ILCS 5/115-4.1 (West 2014)) He claimed that when

the court took the fifteen-minute recess during his trial, Morris confronted him. Wisdom alleged that Morris told him that he had friends at Wisdom's home and if Wisdom did not get home by 10:30 a.m., they would hurt his family. Wisdom further asserted that he had affidavits from two witnesses also willing to testify to these allegations and that he was confident the video cameras outside the courthouse would show the interaction with Morris. Wisdom insisted that it was not his fault that he missed the remainder of his trial and that he did not willingly waive his constitutional right to be present at his trial.

¶ 17 On the same day, Wisdom made other *pro se* filings that repeated his allegations and requests concerning his absence from trial. They sought relief by way of a hearing on the matter and, subsequently, a new trial.

¶ 18 The record is not clear with regard to whether the State was provided notice of these *pro se* filings with the county clerk. However, at the hearing on October 18 when the State's motion to continue the hearing was granted, the trial court rescheduled the hearing for November 1 and stated that it would have a hearing on Wisdom's post-trial motions at that time prior to moving on, if at all, to the sentencing hearing. The State did not object to the discussion of the filed *pro se* motions or note any lack of awareness.

¶ 19 On November 1, the court conducted a hearing for Wisdom's post-trial motions. Defense counsel adopted Wisdom's *pro se* arguments concerning his trial *in absentia*. Counsel emphasized that Wisdom said he had been threatened and left the trial under compulsion. The court denied the motions.

¶ 20 Wisdom was sentenced to six years' imprisonment and three years' mandatory supervised released. The order provided that Wisdom was to receive credit for time served from June 11, 2012, to October 1, 2012, and from September 12, 2013, to "transport." Nothing was

said in the sentencing order about monetary assessments for Wisdom's criminal processing and proceedings. A separate order issued the same day provided that “a judgment be entered against the defendant for cost” and for a \$250 DNA fee “if not done.”

¶ 21 The clerk filed Wisdom's notice of appeal on January 14, 2014. The office of the State Appellate Defender was appointed the same day.

¶ 22 On February 26, 2014, this court allowed an agreed motion to treat the notice of appeal as timely filed.

¶ 23 The record contains a cost payment sheet certified by the clerk of the circuit court of March 13, 2014. The sheet itemizes monetary assessments that total \$1,605. Each assessment is listed by name. No legal authority is listed for the assessments. There is no mention of a \$5 per diem credit against any fines and the sheet is not signed by the trial judge.

¶ 24 ANALYSIS

¶ 25 Wisdom presents two arguments here on appeal. He first argues that the trial court erred in denying his motion for a new trial without first conducting an evidentiary hearing as required under section 115-4.1(e) of the Code. (725 ILCS 5/115-4.1(e) (West 2014)) He asserts that the hearing on his post-trial motions was insufficient to comply with the statutory requirement of conducting an evidentiary hearing when a court conducts a trial *in absentia* and the defendant is arguing his absence from the trial was coerced.

¶ 26 The State counters that the trial court’s decision to conduct the trial *in absentia* and its decision to deny Wisdom’s motions were proper. It asserts that Wisdom failed to prove that the trial court’s decision to continue with the trial in his absence was not harmless error as he was not back within the two-day statutory period. The State further asserts that the trial court properly denied Wisdom’s post-trial motions as it is within the sound discretion of the trial court to decide

whether the allegations proffered by the defendant for being absent from the trial are sufficient to warrant a new trial. It argues that the trial court was not required to believe Wisdom's allegations and thus ruled appropriately.

¶ 27 A court's compliance with statutory procedures is a question of law that this court reviews *de novo*. *People v. Barber*, 381 Ill. App. 3d 558, 559 (2008). The Code specifically outlines the trial court's procedure for handling cases where the defendant fails to appear at or had previously appeared but failed to return to his trial. Regarding the case at hand, the Code provides that "[i]f trial had previously commenced in the presence of the defendant and the defendant willfully absents himself for two successive court days, the court shall proceed to trial." 725 ILCS 5/115-4.1(a) (West 2014). However, it is within the sound discretion of the trial court, based upon the facts and circumstances before it, to determine whether the trial should proceed in a defendant's absence after a *prima facie* case of willful avoidance is established. *People v. Smith*, 188 Ill. 2d 335, 346 (1999). If an abuse of discretion is found, a trial court's immediate resumption of the trial in defendant's absence is considered harmless error if the defendant still failed to return to court within the statutorily allowed two days. *People v. Castro*, 114 Ill. App. 3d 984, 990 (1983).

¶ 28 Wisdom does not challenge the trial court's decision to immediately proceed with his trial in his absence. He not only failed to appear within those two statutorily allotted days, but also, as noted by the trial court, he "never surfaced for weeks." His argument focuses on what procedural steps are required of the parties and the court pursuant to section 115-4.1(e) of the Code when a defendant asserts his absence from trial was due to a circumstance beyond his control.

¶ 29 A court's compliance with statutory procedures is a question of law that this court reviews *de novo*. *People v. Barber*, 381 Ill. App. 3d 558, 559 (2008). When attempting to

understand the requirements of a statute, we first look to its plain language, which provides us with the "best indication of the legislature's intent." *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill. 2d 546, 556 (1999). If the statutory language is clear, it must be given effect without utilizing other tools of interpretation. *Id.*

¶ 30 Section 115-4.1(e) of the Code states, in pertinent part, that:

"(e) When a defendant who in his absence has been either convicted or sentenced or both convicted and sentenced appears before the court, he must be granted a new trial or new sentencing hearing if the defendant can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control. A hearing with notice to the State's Attorney on the defendant's request for a new trial or a new sentencing hearing must be held before any such request may be granted. At any such hearing both the defendant and the State *may present evidence.*" (emphasis added) 725 ILCS 5/115-4.1(e) (West 2014).

¶ 31 The plain language of the statute states that an evidentiary hearing – that is, a hearing on a defendant's request for a new trial or new sentencing hearing where both defendant and the State may present evidence in support of their positions – must be conducted.

¶ 32 In the case at hand, on September 30, 2013, Wisdom filed with the court *pro se* motions alleging, *inter alia*, that his absence from trial was not willful but coerced. He asserted that he had affidavits from various witnesses who were also willing to testify that his absence from trial was coerced and that the video recording outside the courthouse would show the coercive communication. Such an allegation, if proven, would be compelling evidence that his failure to appear was without his fault and due to circumstances beyond his control. His participation at his trial could yield evidence that could weigh against a finding of guilt of burglary.

¶ 33 At the hearing on October 18 where the State sought and was granted a continuance, the court also discussed Wisdom's motions. It spoke directly about the allegations he had made in his *pro se* motions and informed Wisdom it would hear the motions on November 1, prior to the sentencing hearing, if there was still to be one. The court, however, did not state that the proceeding would be one where Wisdom would be able to present his evidence.

¶ 34 And, in fact, all that occurred at the motions hearing was Wisdom's defense counsel's adoption of Wisdom's *pro se* motions and counsel's repeated assertions that Wisdom stated he was absent from trial due to circumstances beyond his control. He failed to submit the affidavits to the court in support of the motions. Moreover, credibility regarding such affidavits is "dependent not only upon the willingness of a witness to tell the truth, but also, his or her ability to observe, recall and relate his or her knowledge of a fact or event." *People v. Molstad*, 112 Ill. App. 3d 819, 823 (1984).

¶ 35 An evidentiary hearing on Wisdom's motion for a new trial allowing for just such testimony is necessary and statutorily required. He did not have such a hearing. Therefore, we vacate the trial court's order denying Wisdom's motion for new trial.

¶ 36 We address Wisdom's second argument on appeal for the purpose of providing instructions in the event a new trial is not granted after the evidentiary hearing. Wisdom's second argument on appeal is that remand for proper calculation of his fines and fees is required. He asserts that there is no order from the trial court enumerating proper assessments and his current assessments were imposed by the clerk months after sentencing without the parties' input. He further identified five separate alleged errors in the circuit clerk's imposition of the monetary assessments.

