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State v. Kropp Appellant's Reply Brief Dckt. 47713

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. DAVID ALEXANDER KROPP, Defendant-Appellant,	S.Ct. No. 47713 Kootenai CR-2017-13500

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE SCOTT WAYMAN
Presiding Judge

Dennis Benjamin, ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
db@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
ATTORNEY GENERAL
Andrew Wake, Deputy
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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II. INTRODUCTION

The state attempts to justify the court's ruling by referring to actions taken by Mr. Kropp after that ruling was made. There are several logical problems with this line of argument, and it should be rejected by this Court. First, the district court's initial finding that Mr. Kropp was voluntarily absent is reviewed based upon the record as it existed at the time of the ruling. Later events are irrelevant to the correctness of that decision. Moreover, events at trial are often influenced by earlier court rulings. Mr. Kropp might have decided to not appear for the afternoon session of court because he was convinced that the court had already made it impossible for him to receive a fair trial. Finally, even if Mr. Kropp's absence in the afternoon of the trial was voluntary, the court had already committed structural error by continuing the morning session in his involuntary absence.

III. ARGUMENT IN REPLY

A. *The Trial Court Erred by Proceeding with the Trial in Mr. Kropp's Absence.*

The state perplexingly argues that the question of whether Mr. Kropp was voluntarily absent at the time the court denied the motion to continue and proceeded with the trial "has little to do with whether Kropp was voluntarily absent – even assuming, arguendo, that the district court was not initially justified in concluding that [Mr.] Kropp was voluntarily absent[.]" State's Brief, p. 12. The state reasons that Mr. Kropp must have been voluntarily absent when the court denied his first motion to continue because Mr. Kropp never appeared for the trial. That is incorrect because Mr. Kropp could have been – as the evidence shows –

involuntarily absent in the morning, but then decided to not appear for the remainder of the trial because his right to be present had already been violated. He may have concluded that the court was not treating him fairly and that he could not get a fair trial given the court's rash decision to proceed in his absence and that conclusion was why he was absent in the afternoon. It would be unjust to absolve the court of its error when it was the cause of Mr. Kropp's later absence. *See Kentucky v. King*, 563 U.S. 452, 462 (2011) (Fourth Amendment violated when the police unreasonably manufacture or create the exigent circumstances which later purports to justify a warrantless search).

Here, the record shows that defense counsel told the court at 1:17 p.m., that he had received a text message, "Almost there,"[1] two minutes prior and a message, "Eight miles from Coeur d'Alene," ten minutes prior. R 166; T p. 366, ln. 4-9. What the record does not show is what his counsel communicated back to him. It is possible and even probable that counsel informed Mr. Kropp that the trial had not been delayed. In fact, the state asserted that trial counsel had communications with Mr. Kropp in addition to the two text messages. T p. 367, l. 24 – p. 368, 8. Defense counsel did not respond to the state's accusation that he communicated with Mr. Kropp.

That conversation, if it took place, explains why Mr. Kropp would have bothered to continue his drive toward Coeur d'Alene after being towed out of the

[1] There is no evidence that this was a "false claim" as the state asserts. State's Brief, p. 17.

snowbank only to change his destination when he was "almost there." T p. 366, l. 4-5. The fact that he was almost to the courthouse by 1:00 p.m. is evidence that he intended to appear at trial that morning and only changed his mind just before arriving, possibly because he was told that the continuance had been denied and his constitutional right to be present violated.

It is no surprise that events at trial are often influenced by earlier court rulings or additional information gained during the trial day. Mr. Kropp might have decided to not appear for the afternoon session of court because he concluded that the court had already made it impossible for him to receive a fair trial. In that case, Mr. Kropp's later absence from trial would have been the result of the trial court's violation of his right to be present, not evidence of an earlier intent to absent himself from the trial. But even if Mr. Kropp was incorrect about the fairness of the trial, a 1:00 p.m. decision to absent himself does not even suggest that he was voluntarily absent at 9:00 a.m., given the intervening court ruling. Thus, his afternoon absence does not tend to support the trial court's earlier finding of voluntary morning absence.

Defense counsel's statement that Mr. Kropp left in the middle of the trial (T p. 459, l. 12-15), also does not suggest Mr. Kropp was voluntarily absent that morning. To the contrary, it implies Mr. Kropp's morning absence was involuntary. And, Mr. Kropp's statement at sentencing that it was wrong of him to not appear during trial (T p. 492, l. 14) does not show he did not intend to appear that

morning.[2] It is only an acknowledgment that he should have appeared at court as soon as he was able even though the court had violated his constitutional right to be present. But the lack of legal excuse for his afternoon absence does not prove his morning absence was voluntary nor does it excuse the court's earlier error.

The above is why the court's ruling is reviewed based upon the record as it existed at the time of the ruling. Later events are irrelevant to the correctness of that decision. *State v. Elliott*, 126 Idaho 323, 328 (Ct. App. 1994), requires the district court to make sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary and to make a preliminary finding of voluntariness at the time of the absence when justified. *Id.*

Here there was not sufficient evidence to justify a preliminary finding of voluntary absence. See Opening Brief, p. 10-11. The fact that Mr. Kropp did not contact his attorney until 8:52 a.m., only shows that he was running late to court, a common occurrence as every trial court knows. (If he had intended to not show up, there would be no reason for him start toward the court that morning or to contact counsel either at 8:52 a.m. or 1:07 p.m.) Further, the court based its finding of voluntariness based upon irrelevant considerations such as the fact there is bus service in Plummer and that Mr. Kropp "voluntarily" chose to stay in St. Maries. T p. 288, l. 1-5. Finally, the court did not apply the presumption against finding a

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[2] Mr. Kropp's apologetic tone is understandable. It would not have been prudent for him to complain to the court at sentencing that it had erred in denying the motion to continue and had violated his constitutional rights. Likewise, trial counsel would not have taken the court to task for its trial error when he was asking the court to quash the arrest warrant.

waiver required by *Elliott*, 126 Idaho at 328, *adopting State v. Thomson*, 872 P.2d 1097, 1100 (Wash. 1994). *See also State v. Lopez*, 144 Idaho 349, 352 (Ct. App. 2007) ("courts should indulge every reasonable presumption against waiver."). (Mr. Kropp notes that the state never argues that the court applied the legal presumption in its decision-making.)

An independent review of the record shows the court should have granted the motion to continue. Whether Mr. Kropp would have made the same decisions if a continuance had been granted cannot be determined and is not relevant to the correctness of the court's ruling. Just as the discovery of contraband cannot serve as a post-hoc justification for an illegal search, Mr. Kropp's actions after the trial court had already violated his right to be present during trial cannot excuse the court's initial constitutional violation.

B. *Even if Mr. Kropp's Afternoon Absence was Voluntary, the Court had Already Committed Structural Error.*

Even if Mr. Kropp's absence in the afternoon of the trial was voluntary, the court had already committed structural error by continuing the morning session in his involuntary absence.

1. The error was structural.

The state argues that an erroneous trial in absentia is not structural error noting that the United States Supreme Court has concluded that a violation of F.R.Cr.P. 43 "may in some circumstances be harmless error," State's Brief, p. 15, citing *Rogers v. United States,* 422 U.S. 35, 40 (1975). But a technical violation of Rule 43 is not equivalent to the taking of state's evidence during the involuntary

absence of the defendant. In fact, *Rogers* did not involve a trial in absentia. There, the judge answered a jury inquiry without bringing the jury into open court and allowing the defendant to be present while the inquiry was answered. The Supreme Court found that "the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed" was reversible error. 422 U.S. at 39-40. The sole case cited by the *Rogers* Court also involved a district court answering a jury question outside of the defendant's presence. *Id. citing United States v. Schor*, 418 U.S. 26, 29-30 (2nd Cir. 1969). The *Schor* Court noted that there was a "presumption of prejudice" when the trial court communicated with the jury in the absence of defendant and found reversible error in that case. 418 F.2d at 31.

In the absence of controlling authority, Mr. Kropp asked this Court to find that an erroneous trial in absentia is structural error. Opening Brief, p. 14-15. Notwithstanding the state's assertion otherwise (State's Brief, p. 19), Mr. Kropp does argue that his right to be present at trial was violated. Opening Brief, p. 7-11. The violation here is much more serious than the trial errors in handling jury inquiries found to be reversible in *Rogers* and *Schor*. Here, the state presented the testimony of six witnesses: Michelle Dickerson, Larry Bowman, Detective Jeff Thurman, Officer Patrick Finan, and Deputy Kyle Hutchison outside of Mr. Kropp's presence. R 163-167. As previously noted, the right to be present at one's own criminal trial is of undeniable value but the effect of the deprivation of that right defies analysis by harmless-error standards because it affects "the framework within which the trial proceeds, and are not simply an error in the trial process

itself." *State v. Perry*, 150 Idaho at 222, *quoting Fulminante*, 499 U.S. at 309-10.

Thus, the Court should find such error to be structural, vacate the convictions, and remand for a new trial.

2. Alternatively, the state has not shown the error was harmless.

The state has failed to prove the error was harmless beyond a reasonable doubt as required by *State v. Perry*, 150 Idaho 209, 222 (2010). The entirety of its harmless error argument follows:

> Had the district court delayed the beginning of the second day of trial until that afternoon or even the next day, when it was perfectly clear that Kropp was not going to show and was not stuck in a ditch, trial would have continued in his absence and he would be in exactly the position that he is in now.

State's Brief, p. 15-16. But this contention is entirely based upon the unwarranted assumption that Mr. Kropp would not have attended the afternoon session had the court granted the motion to continue. To the contrary, the fact that he did not attend after telling his lawyer that he was only "Eight miles from Coeur d'Alene" and that he was "Almost there" admits of the possibility that trial counsel informed him that the trial had not been delayed and Mr. Kropp decided to not attend the afternoon session because of the trial court's error. Thus, the fact that Mr. Kropp did not appear in the afternoon does not render the court's error harmless because it was the error which was the cause of his afternoon absence. If so, it was doubly prejudicial, not harmless.

Even if the error is not deemed to be structural, the state has not met its burden under *Perry* to prove it was harmless beyond a reasonable doubt.

IV. CONCLUSION

Mr. Kropp asks the Court to vacate the judgment and remand the case for further proceedings.

Respectfully submitted this 24th day of November 2020.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

Attorney General, Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 24th day of November 2020.

/s/Dennis Benjamin
Dennis Benjamin