

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

DANIEL LEE HART,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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)
) **NOT FOR PUBLICATION**
)
)

) **Case No. RE-2019-19**
)
)

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

JUL 30 2020

**JOHN D. HADDEN
CLERK**

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Daniel Lee Hart appeals from the revocation of his suspended sentence in Ottawa County District Court Case No. CF-2009-80. On December 15, 2009, Appellant entered a negotiated guilty plea to Endeavoring to Manufacture a Controlled Dangerous Substance (63 O.S.2001, § 2-408) After Former Conviction of a Felony (21 O.S.2011, § 51.1). He was sentenced to a term of imprisonment for twenty years with twelve years suspended. On August 21, 2017, the State filed an application to revoke the suspended portion of the sentence alleging drug use and that Appellant failed to report to his probation officer (in Oklahoma and

Kansas), failed to register as a drug offender as required by Kansas law, failed to pay supervision fees, and failed to obtain his GED as directed.

On May 11, 2018, Appellant stipulated to the allegations contained in the motion. Sentencing was delayed for approximately four months and Appellant was released from the custody of the Ottawa County jail so that he could undergo drug treatment. Sentencing was held on September 19, 2018. Appellant failed to appear. The suspended portion of the sentence was revoked in full.

ANALYSIS

In his first proposition of error, Appellant contends that revoking his sentence in his absence violated his right to due process. We agree. The “opportunity to be heard in person and to present witnesses and documentary evidence” are among the “‘minimum requirements of due process’” afforded to parolees. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). Elsewhere, we have recognized that “a defendant has a due process right to be present where his presence ‘bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend.’” *Lockett v. State*, 2002 OK CR 30, ¶ 9, 53 P.3d

418, 423, (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934)).

More recently, we held that a defendant has a constitutional right to be present at a hearing on a motion to withdraw a guilty plea:

Our primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. These issues focus on the defendant's knowledge and volition. Often, it is the defendant who offers crucial testimony on these matters. Thus, his or her absence from the evidentiary hearing held on the motion to withdraw plea would tend to thwart a fair and just determination of these issues. Even when the defendant does not testify, his or her familiarity with the circumstances would greatly benefit defense counsel and, therefore, his or her presence is likely critical to the fairness of the proceedings. Accordingly, we find that a defendant has a due process right to be present at the evidentiary hearing held on his or her motion to withdraw plea.

Dunn v. State, 2018 OK CR 35, ¶ 9, 434 P.3d 1, 3 (internal citations omitted).

The same is true here where the court made it clear that if Appellant failed to appear at sentencing the reason for the failure would be important to the outcome of the case. The record does not support the State's assertion that the failure was willful and it is just as likely the failure was outside Appellant's control. Under these facts, we find that Appellant's presence at the hearing bore a relation,

reasonably substantial, to his opportunity to defend and that it was error to proceed in his absence. Such errors are subject to harmless error review. *See e.g., Van White v. State*, 1999 OK CR 10, ¶¶ 32-34, 990 P.2d 253, 265 (finding absence from portion of competency proceeding harmless). However, under the present circumstances, we are unable to conclude beyond a reasonable doubt that Appellant's absence did not contribute to the outcome. The error is, therefore, not harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (to be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

DECISION

The order of the district court of Ottawa County revoking Appellant's suspended judgment and sentence in Case No. CF-2009-80 is **REVERSED** and the matter is **REMANDED** to the district court for a proper hearing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY
THE HONORABLE WILLIAM CULVER, SPECIAL JUDGE**

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OPINION BY: ROWLAND, J.:

LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur in Results
LUMPKIN, J.: Dissent
HUDSON, J.: Concur

KUEHN, V.P.J., CONCURRING IN RESULT:

In correctly deciding to remand the case, the Majority unnecessarily strays into the weeds of this case considering and then determining the reason for the Appellant's failure to appear.¹ The Majority finds that Appellant's failure to appear at the sentencing was pivotal to his right to be present, and reviews the record to analyze the reasoning for his failure to appear. However, the record is unclear and underdeveloped as to the reason; most likely because the judge did not believe he needed a reason in order to proceed without the Appellant present.

This Court need not decipher why the Appellant was absent, as a defendant has the right to be present at a sentencing hearing unless they waive that right. Appellant did not waive his right to be present in this case. The only thing he waived was the judge's grace in determining the length of his revoked sentence. "[A] defendant has a due process right to be present where his presence 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his

¹ The dissenting opinion does as well, but believes the record does not prove an involuntary absence.

opportunity to defend.” *Lockett v. State*, 2002 OK CR 30, ¶ 9, 53 P.3d 418, 423, (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934)). The error is his absence from the sentencing hearing, not that his presence may or may not have contributed to the outcome of sentencing.

As Appellant’s sentence was uncertain, the outcome of the proceeding was uncertain. Appellant had the right to be present at the sentencing hearing to explain his absence, circumstances regarding his treatment or lack thereof, and anything else the judge might consider about the Appellant’s behavior in between the revocation hearing and the sentencing hearing, including his willful or non-willful failure to appear. The judge, by allowing Appellant to argue for mitigation (allowing him to pass sentencing and go to drug treatment), cannot then proceed to sentence the Appellant without an *opportunity* to argue for mitigation. When a defendant absconds, the judge can, and should, sign a warrant for his or her arrest. Once arrested, the defendant can then be brought before the judge to be sentenced. In the end, if the judge determines that the Appellant disobeyed the rules of probation graciously extended to him, the judge may rightfully revoke him in full, partially revoke his sentence

or continue sentencing for more treatment. I would find error and reverse for a sentencing hearing.

LUMPKIN, JUDGE: DISSENTING

I dissent to the reversal and remand of this case. In addressing the first proposition, the Court finds Appellant's absence from the sentencing hearing affected his ability to defend against the trial court's sentencing decision and that his absence was not voluntary. I find no due process violation based upon Appellant's absence from the sentencing hearing.

Appellant is not challenging anything that occurred at his revocation hearing in Proposition I. He was present with counsel and with the opportunity to be heard and present witnesses or other evidence. Thus, the due process requirements of *Scarpelli* were met. Appellant elected to stipulate to the application to revoke, thereby waiving his right to present any evidence. The trial court continued the sentencing on the application in order to allow Appellant to obtain drug treatment and advised Appellant that he must present at the sentencing hearing. Appellant failed to appear at the sentencing hearing and the trial court sentenced him *in absentia*.

Appellant received due process at his revocation hearing as required by *Scarpelli*. No precedent precludes sentencing a defendant

on a revocation application when he voluntarily absents himself from the proceedings. In fact, we hold that criminal jury trials can continue once begun, despite the defendant's absence, when he voluntarily absents himself from those proceedings. *Love v. State*, 1984 OK CR 40, ¶¶ 5-6, 675 P.2d 466, 467-68; *Sonnier v. State*, 1979 OK CR 70, ¶ 6, 597 P.2d 771, 773. The record in this case does not support a finding that Appellant's absence was involuntary.

Appellant made no claim that he was taken into custody by Kansas authorities at the conclusion of the revocation hearing. He only told the court he went to Kansas. Appellant made no attempt to contact his attorney so the attorney could advise the court. Moreover, it is uncontroverted that Appellant was not absent from the sentencing hearing because he was undergoing drug treatment which was the only reason for delaying sentencing in the first place. This Court will not presume error based upon a silent record. *Chambers v. State*, 1988 OK CR 255, ¶ 6, 764 P.2d 536, 537 (Court will not assume error from silent record); *Hill v. State*, 1987 OK CR 230, ¶ 3, 745 P.2d 410, 411 (error will not be presumed from silent record). Given this record, *i.e.*, that Appellant was not in

drug treatment during his absence from Oklahoma, it is impossible to imagine how Appellant's presence at sentencing could have borne a reasonably substantial relation to his ability to defend against revocation in full of his suspended sentence. In the revocation of a suspended sentence the guilt and sentence have already been determined. The execution of the sentence given has been suspended. Appellant had already stipulated to violating rules and to the revocation of the sentence. Absconding and failure to appear at sentencing are certainly not qualified as any mitigating factors for the judge to consider. Revocation in full was a given under these circumstances. Reversal and remand is unwarranted based upon the instant facts.