

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 03-11,319  
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:   
vs. : CRIMINAL DIVISION  
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:   
TERRANCE BAINES, :   
Defendant/Appellant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's judgment of sentence dated July 19, 2004 and docketed July 20, 2004. The relevant facts follow.

On August 22, 2003, the Williamsport police arrested Appellant and charged him with burglary, criminal trespass, theft by unlawful taking, receiving stolen property, possession of drug paraphernalia, simple assault and terroristic threats. The district justice held for court all the charges except possession of drug paraphernalia. On March 8, 2004, Appellant was released on bail.

On March 22, 2004, Appellant appeared for call of the list and stated he wished to have a non-jury trial. The Honorable Dudley Anderson scheduled this case for a non-jury trial on March 26, 2004 before the Honorable Clinton Smith, Senior Judge. The Commonwealth and all of its witnesses appeared for the non-jury trial and were prepared to proceed. Appellant appeared and demanded a jury trial. Judge Smith continued the case.

On April 16, 2004, the Honorable Nancy Butts held a jury selection in this case. Appellant was present with his counsel. It was stated in open court that the trial in this

case would be held on April 26, 2004.

Appellant failed to appear for trial on April 26, 2004. He did not telephone or in any way contact counsel or the court. The court proceeded to trial without Appellant being present. The jury found Appellant guilty of all the charges. The court issued a bench warrant for Appellant's arrest.

Nearly two months later, Appellant was picked up on the bench warrant in Philadelphia County. On or about June 24, 2004, the Lycoming County Sheriff transported the Appellant back to Lycoming County and committed him to the County Prison.

The court held a bench warrant hearing on June 25, 2004. At the hearing, Appellant claimed he had a family emergency, i.e., his cousin died. Appellant made statements at the hearing that this family emergency occurred a few days after jury selection. Appellant did not provide the name of his cousin, the date his cousin died or the date of the funeral. Appellant never did anything to inquire about the trial or to make his counsel aware of his situation. Appellant claimed he remained in Philadelphia, because he was helping his aunt get some things together after her son's death. He also claimed he intended to come back to Williamsport right before his birthday (June 26). Appellant, through counsel, indicated he planned to try to get a new trial.

The court did not find Appellant's explanations convincing. Its interpretation of the events was that Appellant just didn't want to appear for trial. The Court raised bail. The Court also noted that although it did not believe Appellant had a very good issue to set aside the verdict, he could raise the issue in a motion and it could be further advocated at that point.

On July 19, 2004, the court held a sentencing hearing. The court sentenced

Appellant to a minimum of 5 ½ years and a maximum of 12 years incarceration in a state correctional institution and a consecutive, one year of probation.

On July 26, 2004, Appellant's counsel filed a motion for a new trial. In the motion Appellant asserted he did not know when the court was going to hold his trial and that his absence from the trial was with good cause, namely a death in his family caused his absence. The court scheduled the motion to be heard on September 27, 2004. Appellant appeared for the hearing but, despite being given the opportunity to present testimony, Appellant declined to testify in support of his motion. The court denied the motion, finding Appellant waived the issues raised in his motion by failing to testify.

On October 12, 2004, Appellant filed a timely notice of appeal. The sole issue raised on appeal is whether the trial court improperly conducted the trial without Appellant being present.

A person accused of a crime has a right to be present at every stage of a criminal trial. It is a right, however, which may be waived expressly, or implicitly by a defendant's actions. Commonwealth v. Wilson, 551 Pa. 593, 598, 712 A.2d 735, 737 (Pa. 1998); Commonwealth v. Sullens, 533 Pa. 99, 102, 619 A.2d 1349, 1351 (Pa. 1992). This principle is also set forth in Pa.R.Crim.P. 602(A), which provides:

The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict and imposition of sentence.

Pa.R.Crim.P. 602(A)(emphasis added). The Pennsylvania Supreme Court has made it clear that this rule applies not only when the defendant absconds during trial but also when the defendant is absent without cause at the time his trial is scheduled to begin. Commonwealth

v. Sullens, 533 Pa. 99, 619 A.2d 1349 (Pa. 1992). The Pennsylvania Supreme Court also has stated that a defendant owes the court an affirmative duty to advise it if he will be absent. Commonwealth v. Wilson, 551 Pa. 593, 600, 712 A.2d 735, 738 (Pa. 1998). When a defendant is absent without an explanation to either his lawyer or the court, his absence may be regarded as without cause. Id.

Here, Appellant was present during jury selection, where his trial date was announced in open court. He failed to appear for trial on April 26, 2004. When he was picked up on a bench warrant nearly two months later, Appellant claimed he did not know the date of his trial and contended he had a family emergency. Appellant acknowledged at his bench warrant hearing that he never notified his attorney or the court of his alleged family emergency. Appellant never gave enough details regarding his cousin's death, such as the date of his death and funeral, for the court to be able to determine what affect, if any, this alleged emergency would have had on his ability to attend trial on April 26, 2004. When given the opportunity to testify in support of his motion for a new trial, the appellant refused to take the stand. In light of this refusal, the court found the appellant waived the issues raised in his motion.

Even assuming for the sake of argument that Appellant did not waive this issue, the court did not find Appellant's claims credible. Defense counsel acknowledged on the record at the bench warrant hearing that Judge Butts announced the trial date during jury selection. N.T., June 25, 2004, at p.6.<sup>1</sup> Moreover, based on all the facts of this case, including the continuance because Appellant decided to withdraw his waiver of a jury trial

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<sup>1</sup> Although neither party requested a transcript of the jury selection, it would confirm defense counsel's statement.

on the day his non-jury trial was to commence and the length of Appellant's absence after jury selection without contacting the court or defense counsel, the court did not believe the defendant had a family emergency. Instead, the court found Appellant just did not want to appear for trial and he was doing his own scheduling for the case. N.T., June 25, 2004 at pp. 8, 9. To grant Appellant a new trial under these circumstances would be unfair to the Commonwealth's witnesses, who already have appeared for trial twice, and would allow an appellant who hasn't provided any factual details to support his claims to wreck havoc on the scheduling of his trial.

DATE: \_\_\_\_\_

By The Court,

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Kenneth D. Brown, P. J.

cc: William Simmers, Esquire (ADA)  
Jason Poplaski, Esquire (APD)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)  
Superior Court (original & 1)