

[Cite as *State v. Jones*, 2005-Ohio-397.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84570

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
RONALD JONES	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION:

February 3, 2005

CHARACTER OF PROCEEDING:

Criminal appeal from
Common Pleas Court
Case No. CR-445226

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
MARK SCHNEIDER, Assistant
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

For Defendant-Appellant:

PATRICIA J. SMITH
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendant-appellant Ronald Jones ("appellant") appeals

from the trial court's continuance of his trial and argues that trial counsel was ineffective. For the reasons stated below, we affirm.

{¶ 2} The facts presented at trial establish that on October 15, 2003, appellant and an individual known as "Mack" arrived at the victim's apartment in order to purchase drugs.¹ Upon entering the apartment, Mack inquired as to the price of a half-pound bag of marijuana. After realizing he did not have enough money to pay for the drugs, Mack pulled a firearm from his coat, pointed it at the victim's head, and stated that he was just going to take it. The victim attempted to knock the weapon away but it discharged, striking him in the side. The victim was then ordered to the ground, and appellant watched over him with the firearm while Mack searched the apartment. Appellant and Mack then fled the scene.

{¶ 3} On December 3, 2003, appellant was indicted on one count of aggravated robbery, in violation of R.C. 2911.01, two counts of felonious assault, in violation of R.C. 2903.11, and one count of having a weapon under disability. Counts one, two, and three carried with them one- and three-year firearm specifications, respectively. On December 29, 2003, appellant pled not guilty. On March 8, 2004, trial commenced on the aggravated robbery and

¹The victim had a history of selling marijuana from his apartment. He had known appellant since 2002 and had sold marijuana to him in the past. The victim knew Mack as a friend of appellant and as someone who had accompanied appellant during prior marijuana transactions.

felonious assault counts. Count four, having a weapon under disability, was bifurcated to the bench.

{¶ 4} On March 9, 2004, appellant failed to appear at trial. The court, having allowed counsel opportunities to contact appellant, conducted appellant's trial in his absence. On March 10, 2004, appellant was found guilty of all counts.

{¶ 5} On March 19, 2004, the state and appellant reached an agreement wherein appellant would cooperate against a co-defendant and the state would recommend an eight-year term of incarceration. The court accepted the agreed upon sentence and sentenced appellant to eight years.

{¶ 6} It is from his conviction that appellant advances two assignments of error for our review. We elect to review the assignments together.

I.

{¶ 7} In his assignments of error, appellant argues that "the trial court erred by continuing trial with the appellant in absentia without granting a short continuance to determine the reason for his absence from his trial," and that "trial counsel was ineffective for failing to request a reasonable continuance when the appellant did not appear during his trial." We disagree.

{¶ 8} Crim.R. 43(A) requires that a defendant be present at every stage of the trial. However, Crim.R. 43(A) also states that a defendant's right to be present may be waived by his own actions.

See, also, *State v. Van Erwin* (March 11, 1976), Cuyahoga App. No. 34641. Further, it is well established that a defendant's right to be present at trial is not absolute. *State v. White* (1998), 82 Ohio St.3d 16.

{¶ 9} Appellant relies on *Crosby v. United States* (1993), 506 S.Ct. 748, which held that "the language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial." *Id.* at 753. The case sub judice is clearly distinguishable because appellant was present on the first day of trial and at the verdict.

{¶ 10} Despite this, appellant argues that the trial court abused its discretion by failing to inquire as to why appellant missed the trial and by not granting a short continuance to determine the reason for his absence. Our review of the record indicates that the trial court did not abuse its discretion.²

{¶ 11} Upon learning of appellant's failure to appear, the court allowed counsel an opportunity to locate appellant. Unlike the circumstances in *State v. Kirtland* (1984), 18 Ohio App.3d 1, where the appeals court found persuasive the fact that defendant's counsel made no effort to reach appellant or otherwise determine

²"An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Clark* (1994), 71 Ohio St.3d 466.

the cause of his absence, the trial court in this case inquired of counsel, "**** have you tried to contact him?" Counsel responded,

"I have, your Honor. For the record when we broke yesterday I expressed to [appellant] that he needed to be here at quarter to 2:00. He was present when you indicated I think to everyone, maybe on the record, that we would reconvene at two o'clock today. He's not here.

I've checked several times. It's now 2:30, slightly after 2:30. He's still not here. Judge, there is one phone number I can try again right now if the court would permit just to see if he's on the way?"³

{¶ 12} After all attempts to find appellant failed, the court concluded that appellant waived his right to be present.

{¶ 13} The court properly considered the following: that trial had begun the day before, the jury was empaneled, appellant had been advised repeatedly of the time trial was to resume, attempts were made to contact him,⁴ and appellant had not attempted to contact any party in the case. The court, and more importantly the

³Also, the court noted that counsel was never contacted by defendant. Counsel explained to the court, "There are no messages whatsoever either at my office or otherwise, Judge, from [appellant]."

⁴Further, trial was set to resume at 2:00 p.m. Had trial been set for early morning, the trial court could have considered prolonging trial until the afternoon. Here, however, there is nothing in the record or otherwise to suggest appellant was unclear as to the time of trial. Additionally, we find appellant's excuses of falling ill and/or he had to care for his newborn child unsubstantiated, either medically or otherwise.

jury, need not delay when a defendant clearly waives his right to be present. We find the court did not abuse its discretion.

{¶ 14} In order to establish ineffective assistance of counsel, appellant must show that 1) the attorney's performance was seriously deficient, and 2) such deficiencies must have prejudiced the defense to such an extent that the results of the trial are unreliable. *Strickland v. Washington* (1984), 466 U.S. 668. Appellant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 15} In the case sub judice, counsel immediately informed the court of appellant's absence and detailed the numerous attempts to reach him. We find that appellant has failed to show a reasonable probability that the outcome of trial would have been different given the strength of the state's case. Therefore, any potential error is harmless.

{¶ 16} Appellant's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this

judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

ANN DYKE, P.J., and

CHRISTINE T. McMONAGLE, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).