

2013 IL App (2d) 120214-U
No. 2-12-0214
Order filed November 8, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 81-CF-272
)	
EPIGMENIO MELECIO,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶1 *Held:* (1) Having been tried and sentenced in absentia under section 115-4.1(a) of the Code of Criminal Procedure, and having appeared and moved for a new trial under section 115-4.1(e), defendant was entitled to a hearing on that motion, and we remanded for that hearing; the trial court's finding that the trial had been proper under (a) did not have *res judicata* effect on the different issue under (e); (2) defendant was entitled to 1,160 days of sentencing credit, and we modified the mittimus accordingly.

¶2 Defendant, Epigmenio Melecio, appeals from an order denying his request for a hearing and to vacate his conviction of murder (Ill. Rev. Stat. 1981, ch. 38 ¶ 9-1) under section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1(e) (West 2010)). Defendant was

convicted *in absentia* and contends that he is entitled to a hearing on whether his absence at trial and sentencing was without his fault and due to circumstances beyond his control. The State contends that the issue is *res judicata*. We reverse and remand for a hearing. We also modify the mittimus to reflect required sentencing credit.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged in March 1981. The record on appeal is missing some of the transcripts from the original proceedings, and the transcripts that are available are silent on if or when he was admonished of the consequences of any failure to appear. However, transcripts from the preliminary hearing and a March 31, 1981, bond hearing show that he was not admonished on those dates. On June 12, 1981, defendant was released on bond and, by September 1981, he stopped appearing in court. His bond was then forfeited.

¶ 5 The State moved for trial *in absentia*, and defendant's counsel moved to dismiss, arguing that defendant was not competent to stand trial and that the State failed to show that defendant was willfully avoiding trial. The trial court's docket sheet states that, on June 1, 1982, the State's motion was heard and granted.

¶ 6 At a hearing on July 26, 1982, defendant's counsel informed the court that defendant was in Mexico receiving psychiatric treatment. Counsel argued that, in order to hold a trial *in absentia*, the State was required to show that defendant was willfully avoiding trial. The trial court denied defendant's motion to dismiss and set a date for trial.

¶ 7 On September 22, 1982, a jury found defendant guilty *in absentia*. Defendant's counsel moved to vacate the verdict, arguing that the State failed to prove that defendant willfully avoided trial. Counsel argued that defendant was not competent and did not have the capacity to form a

willful intent to avoid trial. The court found that the State had met its burden of showing that defendant was willfully avoiding trial. The court noted that defendant was aware of his trial date, he was in Mexico, and the State had told the court that it unsuccessfully attempted to have him extradited. Thus, the court denied the motion. It then sentenced defendant to 35 years' incarceration. Two appeals were filed, but were later dismissed.

¶ 8 In April 2010, defendant appeared and moved to vacate the verdict and sentence, arguing that he was never advised that he could be tried and sentenced in his absence. He also sought an evidentiary hearing under section 115-4.1(e) on whether his absence at trial was without his fault and due to circumstances beyond his control, which he contended was different from the initial showing that he was willfully absent. The State contended that the matter had already been litigated and that it had filed a motion to try defendant *in absentia*, that such a motion would be heard with evidence presented, and that the record showed that a hearing was held, although a transcript of the hearing was not available. The State further noted that defendant's counsel had repeatedly argued throughout the proceedings that defendant was not willfully absent, including arguing the matter in a motion to dismiss and in a posttrial motion.

¶ 9 Later, after unsuccessful attempts to locate all of the missing transcripts, the State provided a bystander's report from Charles Prorok, who stated that he was in court for a bond hearing as an assistant State's Attorney on May 28, 1981. To the best of his recollection, the court admonished defendant that he could be tried in his absence if he were released on bond and failed to appear.

¶ 10 The trial court denied the motion, holding that the issues had "to some extent" already been litigated. The court stated that, while it might have authority to hold a hearing under section 115-

4.1(e), it declined to do so, and that it would conduct a hearing if the appellate court directed it to do so.

¶ 11 The parties agreed that defendant was entitled to 1,160 days' credit for time spent in custody. The State was to prepare an amended mittimus, but it does not appear in the record. Defendant appeals.¹

¶ 12

II. ANALYSIS

¶ 13

A. Right to a Hearing Under Section 115-4.1(e)

¶ 14 Defendant contends that the court erred when it denied his request for an evidentiary hearing under section 115-4.1(e) to determine whether his absence at trial was not his fault and was the result of circumstances beyond his control. He does not argue that the court failed to admonish him that he could be tried *in absentia*. The State contends that the matter is *res judicata*.

¶ 15 A criminal defendant has a constitutional right to be present at all stages of trial and to confront all witnesses against him. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *People v. Smith*, 188 Ill. 2d 335, 340 (1999). “Trials conducted in the absence of a defendant are not favored, and courts are reluctant to permit a trial to proceed in a defendant’s absence.” *Smith*, 188 Ill. 2d at 340. “However, it is well established that ‘[i]t is not only defendant’s right to be present, but it is also [defendant’s] duty, especially where [defendant] has been released on bail.’ ” *Id.* (quoting *People v. Steenbergen*, 31 Ill. 2d 615, 618 (1964)). “A defendant waives the right to be present when the defendant voluntarily absents himself or herself from trial.” *Id.* at 341. “This rule is grounded

¹Various jurisdictional issues were previously raised. We initially dismissed the appeal for lack of jurisdiction. However, on May 6, 2013, the supreme court entered a supervisory order directing that the appeal be reinstated.

in the rationale that to allow a defendant to stop trial proceedings by his or her voluntary absence would allow a defendant to profit from his or her own misconduct.” *Id.* “A trial court’s decision to proceed with a trial *in absentia* will not be reversed unless the trial court abused its discretion.” *Id.*

¶ 16 Section 115-4.1(a) of the Code provides:

“When a defendant after arrest and an initial court appearance for a non-capital felony, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that the defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant.” 725 ILCS 5/115-4.1(a) (West 2010).

¶ 17 Section 115-4.1(a) sets forth the circumstances in which a trial *in absentia* may initially be conducted. *Smith*, 88 Ill. 2d at 341. “In enacting section 115-4.1(a), the ‘legislature’s intention was to provide for a trial *in absentia*, within constitutional limits, if a defendant willfully and without justification absented himself from trial.’ ” *Id.* (quoting *People v. Maya*, 105 Ill. 2d 281, 285 (1985)).

¶ 18 Section 115-4.1(e) of the Code provides:

“When a defendant who in his absence has been *** 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.” 725 ILCS 5/115-4.1(e) (West 2010).

¶ 19 Accordingly, under section 115-4.1(e) of the Code, a defendant who was tried *in absentia* may obtain a new trial if he “ ‘can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control.’ ” *People v. Laster*, 328 Ill. App. 3d 391, 395 (2002) (quoting 725 ILCS 5/115-4.1(e) (West 2000)). “This provision is part of the statutory scheme enacted to afford due process to persons tried *in absentia*.” *Id.* The provision “operates as a safeguard to prevent trials *in absentia* in those instances where a defendant, through no fault of his or her own, is prevented from appearing in court due to circumstances beyond the defendant’s control.” *Smith*, 188 Ill. 2d at 342. Willful absence under subsection (a) is a prerequisite for trial *in absentia*. If a defendant then establishes the requirements of subsection (e), the trial court must grant the defendant a new trial and/or a new sentencing hearing. See *id.*

¶ 20 A defendant’s right to a hearing under subsection (e) after being convicted and sentenced *in absentia* is clear. In *People v. Brown*, 121 Ill. App. 3d 776, 778-79 (1984), *abrogated on other grounds*, *People v. Partee*, 125 Ill. 2d 24 (1988), we rejected an argument that, because of overwhelming evidence presented before trial that the defendant was willfully absent, he was not entitled to a hearing under subsection (e). We observed that subsection (e) clearly requires that where a defendant appears before the court he “must” be granted relief if he can establish a valid excuse. *Id.* at 779. Thus, “[a] hearing on the defendant’s request ‘must’ be held.” *Id.* We concluded that the word “must” is mandatory and that a defendant is entitled to present evidence and personally participate in a hearing. *Id.* As a result, since the defendant had never personally participated in a hearing to present his version of why he was absent, he was entitled to do so. *Id.*; see also *People v. Cobian*, 2012 IL App (1st) 980535, ¶ 21 (holding that a subsection (e) hearing is statutorily required). However, it has been suggested that the doctrine of *res judicata* or collateral

estoppel may apply to preclude relitigation of issues decided in absentia. See *Partee*, 125 Ill. 2d at 36-37; *People v. Dupree*, 339 Ill. App. 3d 512, 524 (2003) (Gordon, J., specially concurring). Here, the State asserts *res judicata*.

¶ 21 “The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the parties or their privies on the same cause of action.” *People v. Carroccia*, 352 Ill. App. 3d 1114, 1123 (2004). In order for *res judicata* to apply, three requirements must be satisfied: (1) there must be a final judgment on the merits rendered by a court of competent jurisdiction; (2) there must be an identity of cause of action; and (3) there must be an identity of parties or their privies. *Id.*

¶ 22 Here, as in *Brown*, the trial court has not decided whether, under subsection (e), defendant’s failure to appear in court was without his fault and due to circumstances beyond his control. The State contends that the matter has already been litigated and points to defendant’s posttrial motion challenging the trial court’s decision to try him *in absentia*. But the State does not separate the determinations in subsection (a) from those in subsection (e) and ignores that the matter is a two-step process. Defendant’s posttrial motion attacked only the previous determination under subsection (a) that the State had sufficiently shown that defendant was willfully absent. Defendant had not yet appeared in court to trigger application of subsection (e), which clearly states that it applies “[w]hen a defendant who in his absence has been *** both convicted and sentenced appears before the court.” 725 ILCS 5/115-4.1(e) (West 2010). Thus, the posttrial motion did not, and could not, raise the same issue that defendant now seeks to raise. Accordingly, *res judicata* does not apply. Under *Brown*, defendant is entitled to a hearing under subsection (e).

¶ 23 B. Credit for Time Spent in Custody

¶ 24 Defendant next contends that he is entitled to 1,160 days of credit for time spent in custody. A defendant is entitled to credit against his prison term for each day or part of a day spent in jail prior to the imposition of sentence. 730 ILCS 5/5-4.5-100(b) (West 2010). “Because sentence credit for time served is mandatory, a claim of error in the calculation of that credit cannot be waived.” *People v. Whitmore*, 313 Ill. App. 3d 117, 121 (2000).

¶ 25 Here, the record reflects that defendant is entitled to the credit, and the State agrees. Accordingly, we modify the mittimus to reflect the credit.

¶ 26 III. CONCLUSION

¶ 27 We modify the mittimus to reflect the sentencing credit. Defendant is also entitled to a hearing under section 115-4.1(e). Accordingly, the order of the circuit court of Winnebago county is reversed and the cause remanded for further proceedings.

¶ 28 Judgment modified; order reversed; cause remanded.