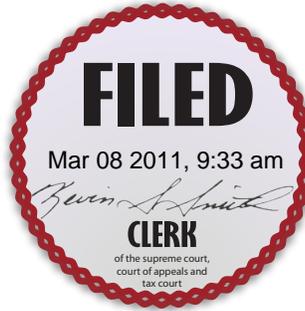


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

VINCENT DEMUS,)
)
Appellant-Defendant,)
)
vs.) No. 66A03-1008-CR-442
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE PULASKI SUPERIOR COURT
The Honorable Patrick Blankenship, Judge
Cause No. 66D01-0911-FD-82

March 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Vincent Demus appeals his convictions for Class D felony possession of marijuana, Class D felony resisting law enforcement, Class B misdemeanor reckless driving, and Class C misdemeanor operating a vehicle with a controlled substance in his body. Demus contends that he was deprived of his right to be present at trial under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution when he was removed from the courtroom during jury selection, preliminary instructions, and opening statements. We conclude that Demus waived his right to be present because of his disruptive behavior and failure to heed the trial court's warnings. We therefore affirm.

Facts and Procedural History

In November 2009, Demus was arrested after leading police on a chase in Pulaski County. The State charged him with Class D felony possession of marijuana, Class D felony resisting law enforcement, Class B misdemeanor reckless driving, Class C misdemeanor operating a vehicle with a controlled substance in his body, and five traffic infractions.

Before his jury trial, Demus filed multiple requests with the trial court. In January 2010, he filed a letter with the court requesting the removal of his court-appointed attorney, which was denied. At a pretrial conference in March 2010, Demus requested a new attorney and a bond reduction. The court denied both requests. About a week before trial, Demus filed two letters with the court requesting a continuance and bond

reduction so that he could hire his own attorney. He filed a similar letter two days later. The court did not respond to those *pro se* requests.

Demus's jury trial was held in May 2010. The trial transcript begins with the court making a record that it had just denied Demus a continuance because it believed that he would disrupt the proceedings regardless of whether the continuance was granted.

Demus interrupted the court multiple times:

THE COURT	Please all be seated. Mr. Demus sit down. Mr. Demus I asked you to sit down. I'm not going to ask you twice. All right.
V DEMUS	Are you denying my request for a continuance?
THE COURT	Mr. Demus, would you be qui[et] for one second please?
V DEMUS	You going to deny my request for a continuance?
THE COURT	Kate are we on the record?
COURT REPORTER	Yes.
THE COURT	Okay. This is 66D01-0911-FD-00082. State of Indiana versus Vincent Demus. Present in the Court is the Defendant.
V DEMUS	Defendant asks for a continuance.
THE COURT	Vincent Demus with counsel, Richard Ballard. State is represented by.
V DEMUS	Fire counsel, Richard Ballard. Defendant is able and wants to get his own counsel.
THE COURT	State is represented by.
V DEMUS	Defendant wants to get a continuance to get his own counsel.
THE COURT	Chief Deputy Prosecuting Attorney, Blair Todd and we were scheduled for and ready for a jury trial. The jury has been assembled and at this particular juncture, however, they have been separated on a restroom break for the purposes for the Court to make a record. Prior to coming in the Court was advised by Defendant's counsel that Defendant wished to make his personal request for a continuance. The Court along with both the State and defense counsel met with the Defendant outside the presence of the juror[s] wherein the Defendant requested his Constitutional Right to a continuance, actually his Constitutional

Right to his first of three Constitutional continuances. The Court denied that. Wherein the Defendant became I guess in the Court's view disruptive even though we weren't on the record. Present at that conversation not only counsel for both State and Defendant and the Court but I believe jailer, sir, what's your name?

JAILER
THE COURT

Officer Hewitt, jailer Hewitt sir.
Jailer Hewitt was present I believe through all of that and was at least cognizant and witnessed the conversation and if need be could obviously testify to the disruptive nature of the Defendant. The Court during that meeting tried to explain to the Defendant that everyone is ready for the trial, State and.

V DEMUS
THE COURT
V DEMUS
THE COURT

But the Defendant is not ready for trial.
And defense counsel are ready for the trial.
No they're not.
Not the first time the Defendant in these proceedings has been disruptive and belligerent. The Court had.

V DEMUS
THE COURT

And you force this attorney on me that's no good.
The Court had conversation with counsel and counsel if I misspeak he[re] please let me know; had conversation with counsel wherein it was of the Court's opinion that Mr. Demus because of his attitude throughout this whole proceeding, not just today but previous hearings, whether we grant him a continuance now or grant him what he believes are his constitutional rights to three continuances, it really isn't the point because he will be disruptive at any juncture when it comes to the jury trial. So we have a choice of granting.

V DEMUS
THE COURT

I want my rights.
Of granting a continuance only to go through this circus.

V DEMUS
THE COURT

I want my continuance first to get my own attorney.
In the future or have the jury trial today like it was set. It's the opinion of the Court we have the jury trial today and whatever happens in terms of Appeals if there are going to be any Appeals they're going to happen whether we have the trial today or not. So that was the conversation that we had outside the record and I'm just now relaying that for the record so that if need be everybody can have [an] idea what transpired outside the courtroom. Was all of that accurate? I know I didn't get into specific conversations but was

	the theme of that accurate and the idea that we are going to trial today accurate?
DEP PROS	Yes your Honor.
R BALLARD	Yes sir.
V DEMUS	No we're not.
THE COURT	Mr. Demus.
V DEMUS	The defense is not ready for trial.

Tr. p. 6-9. The trial court then warned Demus that he would be removed from the courtroom if he continued to be disruptive:

THE COURT	I'm going to explain one more thing to you and give you one more.
BAILIFF	Judge.
V DEMUS	This lawyer is fired. I'm firing you. I want my own attorney.
THE COURT	I'm going to say one more thing Mr. Demus and if I don't get the level of cooperation from you then the Court will have to make a decision as to what to do at that point. We're going to bring the jury in. We're going to have a jury trial. If you are disruptive, the first outburst from you, that is not prompted by your attorney asking you a question or the Court asking you a question or the State asking you a question, the first outburst I will suspend the trial, I will remove you from the courtroom and then we will proceed with this trial without you present in the courtroom. Now I understand that you want to fire your attorney. The problem with that is that the Court appointed Mr. Ballard to you. Without Mr. Ballard then you would be going to trial today with no attorney. And then the problem with that is.
V DEMUS	Who.
THE COURT	You are in no means competent to represent yourself.
V DEMUS	Might as well have no attorney.
THE COURT	Now do you understand what I mean by having you removed if you have an outburst? Yes or no, do you understand?
V DEMUS	I don't understand nothing you're talking about.
THE COURT	You don't understand anything?
V DEMUS	No.
THE COURT	If you have any verbal outburst, if you slam your hand down on the table, if you shoot, if you make any noise

above a whisper, I will have you physically removed from the courtroom and then we will proceed with the trial without you present in the courtroom. Do you understand that?

V DEMUS

Move me now.

THE COURT

Okay. You're requesting not to be here for the trial?

V DEMUS

If that's what you want to know, no I'm not.

THE COURT

Do you want to be here for it?

V DEMUS

I want a continuance. That's what I asked for.

THE COURT

You're not going to get a continuance so let's stop saying that.

Id. at 9-11. Demus claimed that his court-appointed attorney was not looking out for his best interests and that he needed a continuance to hire his own attorney:

V DEMUS

I want my own, I want to choose my own lawyer. You're not going give me, you're not going to let me, you want the lawyer that you want. I'm not free to have my own attorney?

THE COURT

You were but you were unable to afford your own attorney.

V DEMUS

I am once I get my continuance. I am. Once I get my continuance. To get me a continuance so I can get my own attorney.

THE COURT

You've had plenty of time to hire your own attorney if you were going to do so.

V DEMUS

I was on sentence from another, from another charge and I couldn't do it.

THE COURT

Are you still serving that sentence?

V DEMUS

You wouldn't lower my bond.

THE COURT

Are you still serving that sentence?

V DEMUS

Today's the last day.

THE COURT

So you're not able to afford an attorney then?

V DEMUS

Not today.

THE COURT

Well, that's, it's been set for today sir.

V DEMUS

Yeah, this lawyer set it for today and he can't win. He know he can't win. And what he go and set me a trial for that he know that he won't win. He's not going to try to. He's not going to try to get my freedom I don't want a lawyer like that, that don't want me, that don't have my best interest.

THE COURT

Well I've known Mr. Ballard.

V DEMUS

No.

THE COURT for a long time and I've never known Mr. Ballard for a long time and I've known Mr. Ballard.

V DEMUS Well you know him, he's good for you, when you get a charge, you use him for yourself man but get him off of me.

THE COURT All right. When I get a charge I will use Mr. Ballard because I know Mr. Ballard does try. I know Mr. Ballard to be a very competent lawyer.

V DEMUS Well he's not helping me that's what I'm concerned about, my best interest, not yours sir.

THE COURT You know, from my position up here, the only person that's not helping you is you. Instead of being cooperative.

V DEMUS Well, I, I can't.

THE COURT Instead of being cooperative.

V DEMUS I can see. I'm confused.

THE COURT You're abusive and obstructive. Now that doesn't play into your interest whatsoever.

V DEMUS I'm saying thank you for Mr. Ballard sir but no thank you. I'd like to choose my own attorney. I'm able to do it. Please. Thank you.

Id. at 11-13. The court then cautioned Demus about his disruptiveness and decided to bring the jurors in:

THE COURT One last time, are you going to be disruptive or?

V DEMUS I'm not disruptive.

THE COURT Okay. So you're going to sit there quietly?

V DEMUS I'm going to speak for my rights. I'm not going to be disruptive.

THE COURT You may speak for your rights when you are asked to speak but if you're not asked to speak then you will not, is that correct?

V DEMUS You're not right.

THE COURT I may not be. That's not the point. The point is, is that, are you going to be disruptive or not?

V DEMUS I'm speaking up for my rights thank you because I feel I have a right, I'm speaking up on them.

THE COURT All right. Gentlemen, why don't you stick around for a while little bit because I may need you. Abbey bring the jury in and we'll see how far we get before we have to stop and remove Mr. Demus if he's going to be

disruptive. Mr. Demus, please don't test me. I'm having a good day and I don't want to be tested.

V DEMUS Man you do what you got to do. You do what you gotta do you know. Sir what you trying to do railroad me man.

Id. at 13-14. After the jurors settled and the court began speaking, Demus interrupted:

THE COURT Everybody has their cell phones off? Okay. Thank you. If you have not turned off your cell phones, please do that at this time. All right, this is 66D01-0911-FD-00082, State of Indiana versus Vincent Demus. Present is the Defendant, in person and by counsel, Richard Ballard. Also present is State by Chief Deputy Prosecuting Attorney, Blair Todd. And we're s[e]t for a jury trial today.

V DEMUS He's railroading me today. I want a continuance. I have the right for a continuance as Defendant to obtain my own counsel.

Id. at 14-15. The court again warned Demus about his disruptive behavior, but when Demus continued to interrupt, the court removed him from the courtroom:

THE COURT Okay Mr. Demus, this is the last warning I'm going to give you. I'm going to ask, until you're called as a witness, you refrain from any verbal or physical outbursts during these proceedings. When you're called.

V DEMUS Are you going to give me a.

THE COURT When you're called as a witness you may say anything that you wish but until you're called as a witness you must be just like everyone else in this courtroom and you're not permitted to talk unless the Court asks you a question or one of the attorneys ask you a question, just like everybody else in this courtroom, there's only three people entitled in this courtroom to talk unless they're called as a witness; myself, your counsel, defense counsel and the State's counsel. Those are the only three people that should be talking without me saying, please answer the question. Now I'm going to.

V DEMUS My father God above.

THE COURT Now I'm going to start with the jury instructions sir and if you interrupt me one time then you know what will happen. Thank you. Good morning.

V DEMUS That's why the guy wants a continuance. Father above.

THE COURT At this time we're going to take a brief recess all right. So if I could just ask the jury to step out, all the prospective jurors to please step out at this time.
(jurors dismissed from the courtroom)

V DEMUS Father God, defense requests a continuance to get his own attorney. His attorney that would defend the defendant that's what the defendant wants. Defendant wants a continuance.

THE COURT Mr. Demus please. Everybody's been patient so far. I'm just asking for a little patience from you. Mr. Demus please.

V DEMUS Please have a defense.

THE COURT All right, Kate are we on record?

V DEMUS To get my own attorney.

THE COURT All right. I realize that Mr. Demus that you are unhappy and I suppose I could let this go on all day long and let it get exasperated to a point where it becomes very disruptive and explosive. I'm choosing not to do that. I'm choosing to end the disruption that you've caused at this point and time.

V DEMUS I want my rights.

THE COURT Now whether that disruption at this point in time raises to a level that you should be removed or not, I don't know, because frankly this is the first time that anybody's been this disruptive during a jury trial in my court. But I'm not going to let this infect or taint the jury any more than it may have already. I can probably still correct it with an instruction but.

V DEMUS Defendant asks for a continuance

THE COURT But I'm going to stop it now so at this point in time I'm going to have

V DEMUS Defendant asks for a continuance to get his own attorney.

THE COURT I'm going to have you removed from the courtroom and the jury trial will proceed without you present in the court. If you are going to be called as a witness, then we will bring you back to testify at that time. I will bring you back for final instructions and we'll bring you back for the verdict. But at this time we are

going to, the Court is going to have you removed from the courtroom. So gentlemen, would you please take Mr. Demus back to his cell?

V DEMUS

You railroading me your honor. My mother's going to get your back. He's going to get you back. You going to pay for this. Make him pay father. Father God is going to make you pay for this. Our Father above I know you love us all man but you wrong your Honor. You're wrong.

Id. at 15-18. Demus remained in his cell through jury selection. Before preliminary instructions, the trial court asked defense counsel whether Demus would moderate his conduct so that he could be present at the trial:

THE COURT

And does he have any change in his attitude or whether he wants to be here today?

R BALLARD

Your Honor, no. He still wants a continuance. I asked, I told him that you requested me to speak with him and see if he wanted to be here for the State's case in chief to hear the evidence against him. He asked me if I'd filed any motions on his behalf. I said, no I had not. He [s]aid, at that point, he said he did not want to speak with me any longer.

Id. at 84-85. Demus remained in his cell through preliminary instructions and opening statements. He was brought back into the courtroom for the State's case in chief until after defense counsel's closing argument, when Demus refused to sit down and remain quiet. The trial court excused the jury and then removed Demus from the courtroom until the reading of the verdict. The jury found Demus guilty as charged. The trial court later sentenced him to twenty-four months in the Pulaski County Jail.

Demus now appeals.

Discussion and Decision

Demus contends that he was deprived of his right to be present at trial under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution when he was removed from the courtroom during jury selection, preliminary instructions, and opening statements.

A criminal defendant's right to be present at his trial is protected by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 13 of the Indiana Constitution. *Campbell v. State*, 732 N.E.2d 197, 204 (Ind. Ct. App. 2000). However, a defendant's right to be present under either the United States or Indiana Constitutions may be waived if such waiver is knowing and voluntary. *Id.* The United States Supreme Court has held that a defendant's disruptive behavior can constitute a waiver of his Sixth Amendment right to be present at trial:

[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Illinois v. Allen, 397 U.S. 337, 343 (1970). This Court has held that an identical waiver rule is also applicable to our state constitutional right to be present at trial. *Campbell*, 732 N.E.2d at 205.

As the transcript clearly shows, Demus persistently interrupted the proceedings. The trial court was extraordinarily patient with Demus and gave him multiple warnings that he would be removed from the courtroom if he continued his disruptive behavior. Demus, however, ignored these warnings.

Demus nonetheless argues, “In Indiana, the removal of the defendant from his own jury trial has been upheld, but only in cases where the defendant’s outrageous conduct was coupled with his express desire to leave the courtroom.” Appellant’s Br. p. 6. We disagree. In *Campbell*, the defendant was twice removed from the courtroom. 732 N.E.2d at 204. On the first day of trial, the defendant “engag[ed] in a disrespectful, profanity-laced tirade” before saying that he wanted to leave the trial. *Id.* This Court found that the trial court’s removal of the defendant at this juncture was the result of an express waiver of his right to be present. *Id.* at 205. Just before closing arguments on the second day of trial, the defendant was removed after yet another disruptive outburst. *Id.* Although the defendant did not give an express waiver of his right to be present, this Court concluded that the defendant’s conduct constituted a knowing and voluntary waiver of that right. *Id.* at 205-06.

Here, the trial court made every effort to allow Demus to remain in the courtroom. After jury selection, it asked defense counsel whether Demus would change his behavior so that he could be present at trial. *See Allen*, 397 U.S. at 343 (“Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.”). Defense counsel responded that Demus still insisted on a continuance and refused to speak with him. Demus remained out of the courtroom through preliminary instructions and opening statements. In light of Demus’s disruptive behavior and the trial court’s warnings, we conclude that Demus waived his right to be present. His removal from the courtroom during jury selection, preliminary instructions,

and opening statements therefore did not deprive him of his right to be present at trial under the federal or state constitutions.

Affirmed.

BAKER, J., and BARNES, J., concur.