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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC J. HICKS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 07A01-0809-CR-423

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-9903-FD-69

May 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bifurcated jury trial, conducted in his absence, Eric Hicks was convicted of operating a vehicle while intoxicated, a Class A misdemeanor, and operating a vehicle after being adjudged an habitual traffic offender, a Class D felony. Hicks appeals his convictions raising two issues, which we restate as: 1) whether the trial court abused its discretion when it admitted evidence of Hicks's blood test results; and 2) whether the trial court erred when it denied Hicks's motion to set aside his conviction. Concluding the trial court did not abuse its discretion in admitting the blood test results and that Hicks knowingly and voluntarily waived his right to be present at his trial, we affirm.

Facts and Procedural History

On February 27, 1999, Hicks, while driving a red pick-up truck on State Road 46 in Brown County, Indiana, swerved across the centerline and drove off of the right side of the road. The truck struck a utility pole and rolled side-over-side down a ravine. Jimmy Logsdon was travelling on State Road 46 toward Hicks in the opposite direction and witnessed the accident. Logsdon, who had pulled to the side of the road to avoid being struck by Hicks, exited his vehicle and rushed to assist the occupants of the truck. As he approached the truck, Logsdon noticed beer cans scattered along the path the truck had followed down the ravine. Logsdon next saw Hicks, who had been ejected from the truck, sitting on the ground. Logsdon proceeded to the truck where Laura Duncum, the owner of the truck, was trapped by her seatbelt in the passenger seat. As he approached the truck, Logsdon noticed the strong smell of alcohol and saw beer cans both inside and

outside of the truck. Logsdon helped free Duncum from the seatbelt and pulled her out of the truck. Logsdon testified that after being pulled from the truck, Duncum paced back and forth and said, "I can't believe he wrecked my fucking truck." Transcript at 149. After helping Duncum, Logsdon returned to Hicks, who was still sitting on the ground. Logsdon testified that he could smell a strong odor of alcohol on Hicks and his speech was slurred as though he was intoxicated.

Hicks and Duncum were transported to the emergency room at Columbus Regional Hospital. There, emergency room staff collected several blood samples from Hicks. An emergency room physician ordered several laboratory tests, including testing Hicks's blood for the presence of alcohol or drugs. The test determined that Hicks's blood alcohol content was .222.

On March 3, 1999, the State charged Hicks with operating a vehicle while intoxicated, a Class A misdemeanor, and operating a vehicle after being adjudged an habitual traffic offender, a Class D felony. After Hicks failed to appear for his initial trial date on May 17, 2000, the trial court issued a warrant for his arrest. Hicks was not located until May 5, 2007, because he had been living out of the state. On May 5, 2008, the trial court held its final pre-trial hearing, at which Hicks appeared, and set the date of trial for May 21, 2008. On May 21, 2008, Hicks again failed to appear for trial and the trial court proceeded to try the case in his absence over his counsel's objection. In a bifurcated trial, the jury first found Hicks guilty of operating while intoxicated and second found him guilty of operating after being adjudged an habitual offender. On June

12, 2008, Hicks filed a motion to set aside the judgment of conviction, and the trial court held a hearing on the motion on August 4, 2008.

At the August 4, 2008 hearing, Hicks testified that he was homeless and his sister had paid for him to stay in a hotel prior to his trial. Hicks had arranged for his sister to pick him up at the hotel and drive him to his trial. However, Hicks ran out of money several days before his trial and could no longer afford to stay at the hotel. Therefore, Hicks decided to walk to his sister's house, which was apparently a very long distance. On May 19, 2008, while passing through Whiteland, Indiana, Hicks decided to lie down in a convenience store parking lot. When a police officer arrived, Hicks informed the officer that he was homeless and wished to be taken to jail so he would have a place to sleep. Although the officer offered to drive Hicks to a truck stop, coffee shop, or homeless shelter, Hicks refused these offers and threatened to cause a lot of trouble if he was not taken to jail. Therefore, the officer arrested Hicks on a disorderly conduct charge. Hicks was released from jail on the afternoon of May 21st, the first day of his trial. While in jail, Hicks made no attempt to contact his attorney, the trial court, or his sister regarding his inability to attend his trial.

Following the hearing on Hicks's motion to set aside the judgment of conviction, the trial court found that Hicks voluntarily failed to appear for his trial and denied the motion.¹ Hicks now appeals.

Discussion and Decision

I. Admission of Blood Test Evidence

¹ Hicks stipulated to the knowing element of the waiver of his constitutional right to be present at his own trial based upon his presence at the final pre-trial hearing when the trial court set the trial date.

The admission or exclusion of evidence is within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. Marshall v. State, 893 N.E.2d 1170, 1174 (Ind. Ct. App. 2008). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. We will reverse only when a manifest abuse of discretion denies the defendant a fair trial. Id.

Hicks first argues that the State failed to lay a sufficient foundation for the admission of his blood test results, specifically, because the State failed to establish that the requirements of Indiana Code section 9-30-6-6 were met. That section provides:

(a) A physician or a person trained in obtaining bodily substance samples acting under the direction of or under a protocol prepared by a physician, who:

(1) obtains a blood, urine, or other bodily substance sample from a person, regardless of whether the sample is taken for diagnostic purposes or at the request of a law enforcement officer under this section; or

(2) performs a chemical test on blood, urine, or other bodily substance obtained from a person;

shall deliver the sample or disclose the results of the test to a law enforcement officer who requests the sample or results as part of a criminal investigation. Samples and test results shall be provided to a law enforcement officer even if the person has not consented to or otherwise authorized their release.

Ind. Code § 9-30-6-6(a). “[T]his section applies when a sample has already been obtained. It allows a police officer to obtain the sample or the results from the analysis of a sample that has already been collected when the results are needed as part of a criminal investigation.” State v. Eichhorst, 879 N.E.2d 1144, 1148 (Ind. Ct. App. 2008), trans. denied.

Hicks presented no evidence that the investigating officer asked hospital officials to collect a sample, obtained a search warrant requiring the collection of a blood sample, or requested a sample or the results from the analysis of a sample that had already been collected. Rather, the emergency room physician ordered a series of chemical tests, including a toxicology analysis, and the State later subpoenaed the test results contained in Hicks's medical file. Indiana Code section 9-30-6-6(a) does not apply in this context. Id.; Burp v. State, 612 N.E.2d 169, 173 (Ind. Ct. App. 1993).

Indiana Code section 9-30-6-6(c) allows for the admission of blood samples, test results, and testimony at trial in accordance with the applicable rules of evidence. The State subpoenaed the test results as a part of Hicks's medical records, and the trial court admitted the results under the business records exception to the hearsay rule. See Ind. Evidence Rule 803(6). Trustworthiness and necessity are the parents of the business record exception. Burp, 612 N.E.2d at 171. Reliability in the records is found in the "regularity and continuity of the record-keeping process and in the commercial world's daily reliance upon the entries." Id. at 171-72 (quotation omitted). Therefore, to obtain admission of the medical records pursuant to the business records exception, the State needed only to call "an individual with a functional understanding of the record-keeping process of the [hospital] with respect to the [blood test results], to authenticate the [records]." Id. at 172.

The State presented the testimony of Nancy Weinburg, the laboratory manager at Columbus Regional Hospital, who testified regarding the process of verifying the identity

of the patient, collecting the sample, using Betadine² to prep the collection area, securely transferring the sample to the laboratory, the laboratory analysis, and the chain of custody form. Weinburg identified and interpreted the results of the toxicology analysis done on Hicks's blood using the test result records subpoenaed by the State. Her testimony is sufficient to lay the foundation for the admission of the test results under the business records exception.

However, Hicks also challenges the admission of Weinburg's testimony because she did not personally oversee the collection of the sample or the laboratory testing, and because she could not identify the individual who collected the sample.³ We addressed this argument in Payne v. State, 658 N.E.2d 635, 645 (Ind. Ct. App. 1995), where we stated "[T]he sponsor of an exhibit offered under [the business records] exception need not have personally made it, filed it, or had firsthand knowledge of the transaction represented by it." In addition,

a sponsoring witness is not required to testify that he knew that the person who entered the information on the documents had personal knowledge of the events recorded. Rather, records kept in the usual course of business are presumed to have been placed there by those who have a duty to so record and have personal knowledge of the transaction represented by the entry, unless there is a showing to the contrary.

Id. As manager of the hospital's laboratory, Weinburg is certainly qualified to testify regarding the record-keeping process for laboratory samples and results despite the fact that she could not offer first-hand accounts of the collection of the sample or testing.

² Weinburg testified that Betadine, rather than an alcohol-based product, is used to sterilize the area prior to collection of blood for blood alcohol level testing because an alcohol-based product could possibly affect the test result.

³ The chain of custody form for Hicks's blood sample lists only an employee ID number for the person who collected the sample.

Hicks presented no evidence, other than speculation, of any irregularities regarding the chain of custody form or the blood test results. Therefore, the blood test results are admissible under the business records exception.

Indiana Code section 9-30-6-6(i) also requires the blood sample to be taken in “a medically accepted manner.”

[I]n the case of routine medical tests and in the absence of evidence showing a substantial irregularity in the procedure, the qualification of the witness as an expert and the foundation for the business record exception provides presumptive evidence of the accuracy and truthfulness of the entry and suffices, for purposes of admissibility, to establish that the sample was taken in a medically accepted manner.

Burp, 612 N.E.2d at 173. The State questioned Weinburg regarding her qualifications, education, and position as manager of the hospital’s laboratory, and, as discussed above, she laid an adequate foundation for the admission of the test results under the business record exception. Therefore, a presumption arises that the sample was collected in a medically accepted manner. Hicks provided no evidence to the contrary. At that point, the question of the reliability of the test results became a matter of weight for the trier of fact to determine. Id. at 172-73. Therefore, because Indiana Code section 9-30-6-6(a) does not apply under these circumstances, the test results comply with Indiana Code section 9-30-6-6(c), and the test results are admissible under the business records exception, the trial court did not abuse its discretion when it admitted the test results or the testimony of Weinburg.

II. Trial in Absentia

Hicks next argues that the trial court erred when it found his absence from trial was knowing and voluntary and denied his motion to set aside the judgment of

conviction. Hicks's motion is akin to a motion to correct error pursuant to Indiana Criminal Rule 16. The decision to grant or deny a motion to correct error is within the trial court's discretion, and we reverse such a decision only for an abuse of that discretion. State v. Hollars, 887 N.E.2d 197, 201 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law. Id.

A defendant has a constitutional right to be present at all stages of his own trial. Brown v. State, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005). However, a "defendant may waive this right and be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right." Lampkins v. State, 682 N.E.2d 1268, 1273 (Ind. 1997), modified on other grounds by 685 N.E.2d 698.

Hicks admits that he was present at the final pre-trial hearing when the trial court set the date for trial; and therefore, that the knowing element of waiver is met. However, Hicks contends that his absence from trial was not voluntary because he was incarcerated at the time of trial. Hicks had made arrangements for his sister to pick him up at a hotel and take him to the trial. Nonetheless, two days prior to the trial, Hicks left the hotel – allegedly because he had run out of money to pay for a room – and began walking to his sister's house. While walking through Whiteland, Indiana, Hicks laid down in the middle of a parking lot until a police officer arrived. Hicks then explained that he was homeless, had nowhere to go and asked to be arrested. When the officer offered to assist Hicks by driving him to a coffee shop or truck stop where he could call someone for help, Hicks

repeated his demand to be arrested and threatened to cause trouble if he were not taken to jail.

Once in jail, Hicks made no attempt to contact his attorney. Hicks claims that he did not know the number. However, Hicks also made no attempt to contact his sister for help or to inform the trial court that he was incarcerated. In addition, although Hicks was incarcerated during the first day of his trial, he was released that afternoon. Hicks did not contact his sister to pick him up so that he could attend the second day of trial; similarly, he did not contact his attorney or the trial court on the second day. Under these circumstances, we agree with the trial court that Hicks's failure to appear at his trial was voluntary. See Maez v. State, 530 N.E.2d 1203, 1206 (Ind. Ct. App. 1998) ("The continued absence of a defendant who knows of his obligation to be in court, when coupled with a failure to notify the court and provide it with an explanation, constitutes a knowing and voluntary waiver."). Therefore, the trial court did not abuse its discretion when it denied Hicks's motion to set aside the judgment of conviction.

Conclusion

The trial court did not abuse its discretion when it admitted the results of Hicks's blood tests and the testimony of Weinburg. In addition, the trial court did not abuse its discretion when it denied Hicks's motion to set aside the judgment of conviction.

Affirmed.

BAILEY, J., concurs.

DARDEN, J., concurs in result.