

## MEMORANDUM DECISION

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

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Jacquez A. Hooks,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

August 30, 2022

Court of Appeals Case No.  
21A-CR-2516

Appeal from the Marion Superior  
Court

The Honorable Mark D. Stoner,  
Judge

The Honorable Jeffrey L. Marchal,  
Magistrate

Trial Court Cause No.  
49D32-2103-F4-8353

**Brown, Judge.**

[1] Jacquez A. Hooks appeals his convictions for carrying a handgun without a license as a level 5 felony, criminal recklessness as a level 6 felony, and invasion of privacy as a class A misdemeanor. He challenges his waiver of the right to be present for a portion of his trial. We affirm.

### ***Facts and Procedural History***

[2] On March 19, 2021, the State charged Hooks with: Count I, unlawful possession of a firearm by a serious violent felon as a level 4 felony; Count II, carrying a handgun without a license as a class A misdemeanor; Count III, criminal recklessness as a level 6 felony; and Count IV, invasion of privacy as a class A misdemeanor. The State also alleged that Hooks had a previous felony conviction which would support the enhancement of his offense for carrying a handgun without a license to a level 5 felony.

[3] On September 1, 2021, the court commenced a jury trial at which Hooks was present, and the State presented the testimony of five witness and its exhibits. The next day the court noted that Hooks's defense counsel and the prosecutors were in the courtroom, Hooks was on the telephone, and the court had been advised by the Marion County Sheriff that Hooks's roommate had tested positive for COVID and Hooks could not receive a test until the afternoon. The court stated: "I did want [defense counsel] to have an opportunity to consult with his client to see if his client would waive his appearance for the remainder of the trial. I knew that would be problematic because no decision had yet been made as to whether or not Mr. Hooks was going to testify." Transcript Volume

III at 8. The court indicated the State was moving to dismiss the serious violent felon charge and granted the motion. The court stated, “[s]o if there is a conviction on the misdemeanor handgun, the State is going to proceed with the Level 5 enhancement.” *Id.* at 9. It further referred to the State making a new plea offer, defense counsel informed Hooks of the offer, and Hooks indicated that he was not interested.

[4] The following exchange occurred:

COURT: So where are we now in terms of your client’s willingness to waive his appearance?

[Defense Counsel]: Judge, he is willing to waive both his appearance and his right to testify.

\* \* \* \* \*

COURT: Did [defense counsel] explain your options in this case?

[Hooks]: Yes, sir.

COURT: And do you understand why I haven’t been able to bring you over?

[Hooks]: Yes, sir, because of the exposure to COVID-19.

COURT: Correct. Now, what’s going to happen is, I’m going to have to have you tested, because I need to let the jury know whether or not they have then been exposed. So do you understand I’m going to need you to submit to that test, hopefully later today.

[Hooks]: Yes, sir.

COURT: And they will let me know the results. You’ll likely have to file a HIPPA waiver, so that can be disclosed, and then, I’ll be able to

tell the jury whether or not you were negative or positive, because they'll need to act once they know. Now, as it --

[Hooks]: Yes, sir.

COURT: -- as it pertains to the rest of the trial, I really only have two options at this point. Declare a mistrial, in which case we'd have to start over or with your consent, we will continue this trial without your presence. And I'll talk to the lawyers about what, if anything, we're going to tell the jury as to why. We could limit it to his roommate tested positive, and he hasn't been able to get a test yet and we leave it at that. So we're not telling them that you're currently in the Marion County Jail, but I'll take that up with the lawyers in a minute.

Mr. Hooks, I need to know. Do you want to waive your right to be present in courtroom for the remainder of your trial?

[Hooks]: How long would the remainder be? How long? How many days?

COURT: Well, the, the trial is going [to] be finished today.

[Hooks]: Oh, okay.

COURT: So, do you want to stay there in the jail and have your lawyers finish the trial without you being here?

[Hooks]: Yeah, even though I wish I could be there, but I can't. But yeah, yes.

COURT: Now, has anybody forced you to waive your right to appear?

[Hooks]: No, sir.

COURT: Did anybody give you anything as an inducement, like money or anything?

[Hooks]: No, sir.

COURT: Have you had sufficient time to talk to [defense counsel] about this issue?

[Hooks]: Yes, sir.

COURT: Now, because you are waiving your right to appear, that means you will not be testifying in this case. Do you understand this?

[Hooks]: Yes, sir.

COURT: So, the State's going to rest. I don't know if the Defense is going to call any witnesses. Potentially Ms. A. may come in and testify, but then, we would finish up the trial today, and if you are convicted of the -- a misdemeanor, we'll proceed without you on the enhancement phase, where the State would have to show that you have a prior felony conviction within 15 years. Do you understand this?

[Hooks]: So, if convicted, I won't be able to be there to know what's going on?

COURT: No. If you are -- well, you won't be there for the verdict. We will let you know what happens. If you are acquitted of Count I, the carrying a handgun without a license misdemeanor, that ends the trial for that count. The State will not be able to pursue the Level 5 enhancement. Only if they convict you of that, can they proceed on the enhancement. If you are found guilty by this jury of anything, you will be back in court with me for sentencing. I will not sentence you without you being present in the courtroom. Do you understand that?

[Hooks]: Yes, sir.

COURT: So the only part of the trial you're going to miss is the rest of today, leading up to the verdicts. Do you understand this?

[Hooks]: Yes, sir.

COURT: Do you want more time to talk to [defense counsel] about this?

[Hooks]: Yes.

COURT: That's fine. We'll go ahead and go off the record. We'll pass the phone back to [defense counsel] and you can talk to him. I want to give you all the time you need to discuss this. Go ahead and go off, please.

\* \* \* \* \*

(Off the record at 10:40 a.m.)

COURT: We are back on record. Mr. Hooks has had an opportunity to have further discussions with [defense counsel]. [Defense counsel], is there anything you wanted to put on the record?

[Defense Counsel]: No, Judge.

COURT: So Mr. Hooks, have you had sufficient time to consult with [defense counsel]?

[Hooks]: Yes, I did, Your Honor.

COURT: And again, I want to ask you, are you waiving your appearance for the remainder of the trial today?

[Hooks]: Yes, sir.

COURT: And you're waiving your right to testify in this trial; is that correct?

[Hooks]: Yes, sir.

COURT: And you understand that I -- if you are convicted of anything, I will conduct a sentencing hearing with you in the courtroom. Do you understand this?

[Hooks]: Yes, sir.

*Id.* at 9-13. A short time later, the following exchange occurred:

COURT: Okay. Anything else before we hang up? Now, I guess I should throw this out there. I don't know if we could do it surreptitiously. What if Mr. Hooks wanted to listen in?

[Hooks]: Yeah.

COURT: I have to cover all my bases here. If that was -- I don't know if that's a meaningful opportunity to appear and participate if he's here by phone, or by video, but we would not show them --

[Defense Counsel]: Right.

COURT: -- that he was there.

[Defense Counsel]: My concern is that, in the event that he had questions, everyone in the room would be able to hear him asking.

COURT: Well, he would not be able to say anything. He'd have to be on mute on his end. All he could do is listen in.

[Defense Counsel]: Right. And I don't believe that that poses a meaningful opportunity for him to understand what's going on. And so, I would rather be able to explain to him later what was going on without him sitting in jail confused by something.

COURT: That's fine. You'd rather have an all or nothing approach?

[Defense Counsel]: Yes.

COURT: That's fine. As I was sitting here, I just started to think about, have I explored all our alternatives. But it is your desire that he waive and that you'll explain everything to him --

[Defense Counsel]: Yes, sir.

COURT: -- when we get there?

[Defense Counsel]: Yes, sir.

*Id.* at 14-15.

[5] The court gave the following admonishment to the jury:

Due to a verified medical issue, the Defendant cannot attend the remainder of the trial. The fact that the Defendant is unable to be present for part of this jury trial raises no presumption against him of any amount. It shall not be commented upon, referred to, or in any manner considered by the jury in determining the guilt or innocence of the Defendant.

*Id.* at 21. Following the presentation of testimony from one witness for the State and closing arguments, the jury found Hooks guilty of carrying a handgun without a license as a class A misdemeanor, criminal recklessness as a level 6 felony, and invasion of privacy as a class A misdemeanor.

[6] The State indicated that it intended to proceed with the second phase of the carrying a handgun without a license charge. The court reconvened the jury to hear the allegation that Hooks had a prior unrelated felony conviction, read preliminary instructions to the jury, and sent the jury to the jury room. The court was later informed that Hooks “was just throwing huge fits and is not allowing them to do a test.” *Id.* at 74. Following a recess, the court stated:

We are back on the record. We’re outside the presence of the jury. I want the record to reflect what has taken place in the last few minutes. State needed to get a print from Mr. Hooks for comparison purposes of his documentational Phase 2 of Count I.<sup>[1]</sup>

We got Mr. Hooks downstairs from the jail to the City County Build [sic] in the loading dock area. And a representative of the

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<sup>1</sup> This appears to be a reference to the carrying a handgun without a license charge.

identification unit was there to meet him. Mr. Hooks declined to submit to fingerprint testing. So he was brought upstairs. He has not been in the courtroom. He is in the jury room of a neighboring court, and he and I have been communicating via WebEx. So that we could explain to him what was going to happen.

To say that Mr. Hooks is irate would be the understatement of the year. He is livid. He is not listening to reason. And unfortunately, he has been raising his voice and yelling to such an extent that we are now all fearful that our jury has heard him. This is after the jury has been told only that there is a medical issue, and he could not be brought over. Could not attend.

*Id.* at 74-75. Hooks's counsel moved for a mistrial. The court asked "[a]re you asking for a mistrial of the entire proceeding, or only as to the second phase on the Part 2 of Count I," and defense counsel answered "[o]nly as to the second phase." *Id.* at 75. The court asked "[y]ou are not requesting a mistrial as to the first phase for which we've already received verdicts of guilty," and defense counsel replied: "That is correct, Judge. I don't believe that the jury before now was tainted in any way." *Id.* The court stated that, over any objection by the State, it was declaring a mistrial as to Phase 2 of the proceedings, and it discharged the jury. On October 14, 2021, Hooks signed a written waiver of trial by jury for Phase 2. Also on that day, the court held a hearing at which it questioned Hooks about his written waiver and found that he made a knowing, voluntary, and intelligent waiver of his right to trial by jury with respect to Phase 2. The court then proceeded to hold a bench trial as to Phase 2 and found that the State met its burden of proof as to the enhancement. On October 21, 2021, the court sentenced Hooks to concurrent terms of five years with two

years suspended for carrying a handgun without a license as a level 5 felony, 365 days for criminal recklessness a level 6 felony, and 365 days for invasion of privacy as a class A misdemeanor. The court also indicated that it would consider a modification to community corrections after 545 days.

### *Discussion*

[7] Hooks contends that “[t]he trial court violated [his] right to confront under the Sixth Amendment and Article 1, Section 13 of the Indiana Constitution when he was forced to choose between either a mistrial or waiving his right to be present following his cellmate’s positive COVID-19 test which required him to quarantine beginning on the second day of his jury trial.” Appellant’s Brief at 19. He asserts the court’s failure to advise him that he was waiving his right to confront witnesses against him was structural error. He argues there was no evidence regarding whether he was vaccinated or had COVID-19 symptoms, whether the person who exposed him to COVID-19 was symptomatic or had a fever, whether his defense counsel, the prosecutor, the judge, or the remaining witnesses were vaccinated, how the courtroom was arranged to protect the participants and jurors from possible infection, whether he, the participants, and jurors were required to wear masks, or whether the State’s witnesses were available to testify the next day or the following Monday if the trial were to be postponed by one day or a few days. He asserts that his “waiver of his right to be present was not knowingly, voluntarily, and intelligently made because he was presented with only two choices when the trial court had a duty to present him with options that protected his constitutional rights” and that his choices

were limited “even though trial courts had been conducting hearings by live videoconferencing for months, even though he was expected to have access to a rapid test in a few hours, even though he was not diagnosed with COVID-19 himself, and even though vaccines had been available since December of 2020.” *Id.* at 38-39. He asserts that his waiver “was nullified after the trial court raised the possibility that he could listen to the trial, and [he] stated that he wanted to do so.” *Id.* at 42. Hooks also argues the trial court failed to follow the Ind. Administrative Rule 14 and Indiana Supreme Court’s orders on March 16 and May 13, 2020.<sup>2</sup>

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<sup>2</sup> Ind. Administrative Rule 14 generally governs the use of telephone and audiovisual telecommunication in trial courts and provides in part that, “in any conference, hearing or proceeding not specifically enumerated in Section (A) of this rule, with the exception of criminal proceedings involving the right of confrontation or the right to be present, a trial court may use telephone or audiovisual communications subject to . . .” Ind. Administrative Rule 14(B). In its March 16, 2020 order, the Court ordered “each trial court statewide to implement all relevant and necessary portions of its continuity of operations plan (COOP) in conjunction with county emergency and public health authorities” and directed trial courts “to utilize Indiana Office of Court Services (IOCS) assistance to prepare appropriate emergency local plans to protect the health of court personnel, court users, and the public through enhanced social distancing.” *Matter of Admin. Rule 17 Emergency Relief for Ind. Trial Court Relating to the 2019 Novel Coronavirus (COVID-19)*, 141 N.E.3d 388, 388 (Ind. March 16, 2020). The Court’s May 13, 2020 order provided in part:

Being duly advised, the Court ORDERS that Indiana Administrative Rule 14 is modified as follows, effective until further order of the Court:

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4. All proceedings must be consistent with a party’s Constitutional rights.

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6. Courts may allow a witness to testify remotely except in criminal proceedings involving the right of confrontation or the right to be present, absent personal waiver.

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8. The court must create a procedure that allows confidential communication between a party and the party’s counsel.

[8] The State maintains the trial court did not err in allowing Hooks to waive his right to be present for the second day of his trial. It argues that Hooks’s waiver was valid and that his “assertions about the force or effect of his own personal desires and calculations do not amount to coercion inflicted by the trial court that deprived [his] decision of its voluntary character.” Appellee’s Brief at 20. It argues that confrontation rights include the components of a defendant’s right to cross-examine and subject evidence to adversarial testing and the right to be personally present and see the witnesses during trial, the court “amply explained the physical-presence component of the right to confrontation,” and it provided an explanation of what would occur if Hooks decided to waive his right to be present. *Id.* at 23. It argues that Hooks saying “[y]eah,” when the court referred to Hooks listening in, did “not suggest that Hooks was retracting his waiver of his right to be present in court or attempting to retroactively condition that waiver on a new demand to remotely audit the trial.” *Id.* at 25. The State also argues that Hooks invited any error and that the Indiana Supreme Court’s orders did not bar defendants from waiving their right to be present at hearings or trials.

[9] The Federal and Indiana Constitutions afford defendants in a criminal proceeding the right to be present at all stages of their trial. *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007) (citing U.S. CONST. AMEND. VI; Ind. Const. art. 1,

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*Matter of Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to 2019 Novel Coronavirus (COVID-19)*, 144 N.E.3d 197, 197-198 (Ind. May 13, 2020).

§ 13)). However, a defendant may knowingly and voluntarily waive that right. *See id.* (citations omitted). *See also Partee v. State*, 184 N.E.3d 1225, 1234 (Ind. Ct. App. 2022) (noting the right to be present is one of the rights guaranteed by the confrontation clauses of the Federal and Indiana Constitutions and that a defendant may lose the right by consent) (citing *Wells v. State*, 176 N.E.3d 977, 982 (Ind. Ct. App. 2021) (citing *Illinois v. Allen*, 397 U.S. 337, 342-343, 90 S. Ct. 1057, 1060 (1970) (“We accept instead the statement of Mr. Justice Cardozo who, speaking for the Court . . . said: ‘No doubt the privilege (of personally confronting witnesses) may be lost by consent or at times even by misconduct.’”)) (citation omitted))), *trans. denied*. “As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial.” *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005) (citation omitted), *trans. denied*.

[10] The record reveals that the trial court explained the situation presented by the fact that Hooks’s roommate tested positive for COVID and that it had the option of declaring a mistrial or, with Hooks’s consent, continuing the trial without Hooks being present. The court asked Hooks if he wanted to waive his right to be present in the courtroom for the remainder of his trial, Hooks asked the court how long the remainder of the trial would be, and the court informed him the trial would finish that day. The court asked Hooks if he wanted to stay in jail and have his counsel finish the trial without him being there, and Hooks responded affirmatively. Hooks indicated that no one forced him to waive his

right to appear or gave him anything as an inducement. The court informed Hooks that the only part of the trial he would miss was the rest of that day, and Hooks indicated that he understood. The court went off the record to provide Hooks with additional time to discuss the decision with his counsel, emphasizing “I want to give you all the time you need to discuss this.” Transcript Volume III at 12. When the proceedings were back on the record, the court noted that Hooks had an opportunity to have further discussions with his counsel and asked Hooks if he had sufficient time to consult with his counsel, Hooks replied affirmatively, the court asked Hooks whether he was waiving his appearance for the remainder of the trial on that day, and Hooks responded affirmatively. Hooks was represented by counsel for the entirety of his trial, and his counsel cross-examined the witness called by the State on September 2nd when Hooks was not present. Based on the record, we conclude that Hooks knowingly, voluntarily, and intelligently waived his right to be present during the portion of his trial which occurred on September 2, 2021. We agree that Hooks stating “[y]eah” following the trial court’s reference “to listen[ing] in,” *see id.* at 14, in light of the entire discussion and subsequent statements by his counsel, did not amount to a retraction of his waiver of his right to be present. We also agree that the language of Administrative Rule 14 and the Indiana Supreme Court’s orders related to the public health emergency to which Hooks points does not suggest that a defendant is prohibited from waiving the right to be present. We find no reversible error.

[11] For the foregoing reasons, we affirm Hooks’s convictions.

[12] **Affirmed.**

Mathias, J., and Molter, J., concur.