NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
GARY LEE KAY	:	
Appellant	:	No. 1184 WDA 2025

Appeal from the Judgment of Sentence Entered August 3, 2023
In the Court of Common Pleas of Fayette County
Criminal Division at No: CP-26-CR-0002334-2019

BEFORE: STABILE, J., DUBOW, J., and STEVENS, P.J.E.*

MEMORANDUM BY STABILE, J.: **FILED: OCTOBER 22, 2026**

Appellant, Gary Lee Kay, appeals *pro se* from the August 3, 2023, judgment of sentence imposing 42 to 84 months of incarceration for aggravated assault.[1] For the reasons that follow, we vacate and remand for a new trial.

The conviction resulted from a February 12, 2019, altercation between Appellant and his wife, during which Appellant threw a barstool and a saltshaker at her. The saltshaker hit her in the head and caused a large laceration that required ten staples. Trial was scheduled for December 6, 2021, but Appellant failed to appear. The trial court issued a bench warrant,

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 2702(a)(1).

and Appellant was apprehended on January 3, 2021. Trial was rescheduled for February 7, 2022, but Appellant, who was out on bond, once again failed to appear. The prosecutor and defense counsel presented the matter to a motions judge on the morning of trial, and the motions judge ordered the trial to proceed in Appellant's absence. There is no indication that the proceeding before the motions judge was recorded, and no record of it exists. At the conclusion of the trial, the jury returned a conviction for aggravated and simple assault.

Appellant failed to appear for a March 2, 2022, sentencing proceeding. The trial court issued a bench warrant. Appellant was apprehended, his bond revoked, and he was sentenced as set forth above on August 3, 2023.[2] Subsequently, Appellant was granted an extension of time within which to file a post-sentence motion, which he did on August 21, 2023. The only issue Appellant raised in that motion was that his failure to appear at trial was the result of a mental health emergency. Appellant attached to the motion a letter from a therapist stating that Appellant had been admitted to a clinic for in-patient treatment on February 8, 2022, the day after his trial. Post Sentence Motion, 8/21/23, at ¶ 4, Exhibit A.

On October 26, 2023, the trial judge presiding over the post-sentence motion issued an order declining to take any position on Appellant's post-

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[2] The trial court did not impose a penalty for the simple assault conviction.

sentence motion, because "other members of the bench were involved with pretrial hearings and no transcripts of any prior hearings were provided[.]" Order, 10/26/23. Appellant filed a notice of appeal on November 17, 2023.

In a memorandum filed August 6, 2024, this Court quashed the appeal, concluding that Appellant's judgment of sentence was not yet final. We remanded to the trial court for disposition of Appellant's post sentence motion. ***Commonwealth v. Kay***, 1362 EDA 2023 (Pa. Super. August 6, 2023) (unpublished memorandum).[3]

On September 3, 2025, the trial court issued an opinion and order in response to our remand, in which it addressed two issues. First the trial court concluded that there was no merit to Appellant's pre-trial motion pursuant to Pa.R.Crim.P. 600. Second, the trial court recommended that a new trial be granted, because there was no record of the February 7, 2022, pretrial conversation regarding Appellant's absence, and thus no way to determine whether the Commonwealth met its burden of establishing that Appellant was absent without cause. Trial Court Opinion, 9/3/25. We consider these issues in turn.

Appellant filed the Rule 600 motion on May 3, 2021, but it was never acted upon until September 3, 2025, due to Appellant's apparent failure to present it in accordance with Fayette County Criminal Procedure. Assuming

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[3] The facts and procedural history set forth above are a condensed version of what appeared in this Court's August 6, 2024, memorandum.

without deciding that this issue is properly before us, it is meritless. As the trial court explains, the charges against Appellant were filed on February 12, 2019, resulting in a mechanical run date of February 12, 2020. Pa.R.Crim.P. 600(A)(2)(a). But two continuances, owing to the Covid pandemic and authorized by the Pennsylvania Supreme Court, along with several continuances requested by Appellant, accounted for a total of 457 days of delay not attributable to the Commonwealth. Trial Court Opinion, 9/3/25, at 3. The adjusted run date fell on May 14, 2021, eleven days after Appellant filed his motion. Appellant never renewed the motion, and many of the subsequent delays were of his own making. We agree with the trial court that Appellant was not entitled to dismissal of the prosecution under Rule 600.

Next, we consider Appellant's argument that the Commonwealth failed to establish that he was absent without cause prior to trying him *in absentia*. A criminal defendant has the right to be present at every stage of a criminal proceeding against him. U.S. CONST. amend. VI; PA. CONST. art. I, § 9. Rule 602 of the Pennsylvania Rule of Criminal Procedure provides as follows:

> The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. **The defendant's absence without cause at the time scheduled for the start of trial or during trial shall not preclude proceeding with the trial**, including the return of the verdict and the imposition of sentence.

Pa.R.Crim.P. 602(A) (emphasis added). The comment to Rule 602 explains:

> Comment: This rule was amended in 2013 to clarify that, upon a finding that the absence was without cause, the trial judge

> may conduct the trial in the defendant's absence when the defendant fails to appear without cause at the time set for trial or during trial. The burden of proving that the defendant's absence is without cause is upon the Commonwealth by a preponderance of the evidence.

Pa. R. Crim. P. 602, comment. The comment cites ***Commonwealth v. Scarborough***, 421 A.2d 147 (Pa. 1980), for the proposition that a defendant's waiver of a constitutional right must be knowing, intelligent, and voluntary; ***see also Commonwealth v. Kelly***, 78 A.3d 1136, 1143 (Pa. Super. 2013) (holding that the Commonwealth bears the burden of proving by a preponderance of the evidence that a defendant's absence from trial was without cause), *disapproved in part on other grounds by* ***Commonwealth v. King***, 234 A.3d 549 (Pa. 2020).

Instantly, as noted above, the reasons for the trial court's decision to proceed *in absentia* are not of record. There is no indication in the record that the trial court conducted an on-the-record evidentiary hearing on this issue. The trial court's post-remand opinion explains:

> On the date of trial, when Appellant failed to appear for trial, the prosecutor and defense counsel appeared before the plea/motions court judge, the Honorable Joseph M. George, to determine whether the case would be continued as Appellant had failed to appear or whether the trial would proceed in his absence. After a purported continuance hearing with Judge George, the parties returned to this court for trial[, c]ounsel having advised this court that the continuance motion had been denied. Therefore, a jury panel proceeded in the absence of Appellant.
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> [T]his court was not present during the discussion of whether the case would be continued or proceed in Appellant's absence and took no position on the motion. No opinion was presented by Judge George, who was the plea/motions court that

> trial term, on the issue. Since remand of the case, Judge George has indicated privately to the undersigned that he has no personal recollection of the continuance hearing and lacks a transcript of what was presented at that proceeding. In the absence of a record, this Court is unable to address the issue and recommends that a new trial be granted.

Trial Court Opinion, 9/3/25, at 4.[4]

We have our misgivings about the result we reach, given Appellant's habitual failure to appear for proceedings throughout this matter. Nonetheless, there is no evidence that the Commonwealth carried its burden before the trial court of proving by a preponderance of the evidence that Appellant failed to appear for trial without cause. Furthermore, the Commonwealth has failed to file a brief in this appeal and thus has not advocated for any result other than the one the trial court proposes. We cannot fault the Appellant for the absence of a transcript, as there is no indication in the record that the pretrial hearing that led to his trial *in absentia* was recorded. Finally, we are cognizant that Appellant—in support of his assertion that a mental health crisis prevented his attendance at trial—attached to his post-sentence motion a letter from a healthcare professional evidencing the fact that Appellant was committed to in-patient treatment at a mental health facility the day after the trial took place. Given all of the

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[4] We note our displeasure with the failure of the motions court and counsel to create a record of the motions proceeding referenced in the trial court's opinion. We also note our displeasure with the motions court's failure to file an order explaining why the court chose to proceed *in absentia*. These failures have caused a significant waste of judicial resources.

foregoing, we are unable to conclude that Appellant waived his constitutional right to be present at his trial by failing to appear without cause. We therefore vacate the judgment of sentence and remand for a new trial.

Judgment of sentence vacated. Case remanded for a new trial. Jurisdiction relinquished.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 10/22/2026