

SIXTH DIVISION  
December 29, 2000

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-99-0860

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellant,	)	of Cook County.
	)	
v.	)	No. 97 CR 17647
	)	
DEVON DIXON,	)	Honorable
	)	Vincent Gaughan,
Defendant-Appellee.	)	Judge Presiding.

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ORDER

Defendant, Devin Dixon appeals his finding of guilt and judgment for possession of a controlled substance with the intent to deliver, armed violence and unlawful use of a weapon and his sentence of 18 years imprisonment. On appeal, defendant contends the circuit court erred in: (1) sentencing him *in absentia* without first warning him that his failure to appear in court would result in trial and sentence *in absentia*; (2) sentencing him under Public Act 88-680 which was held unconstitutional; and, (3) the issue of an incorrect mittimus. We reverse and remand.

At trial, the testimony revealed that on June 3, 1997, at approximately 11:50 p.m., Chicago Police Officer Clark was driving near 5536 South Morgan when he saw defendant with a loaded Tech-9 machine pistol in his right hand exit a white automobile. Officer Clark and another officer exited their car and chased defendant on foot. Defendant ran up the stairs and onto the porch of the residence at 5536 South Morgan. The officers saw his weapon and tackled defendant directly inside the door of the

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house. Defendant threw the gun at them and they recovered crack cocaine from defendant's pants during a pat down.

The parties stipulated to the chain of custody. The substance tested positive for 147 grams of cocaine.

Defendant failed to appear for the last two days of his bench trial. No evidence was presented on either day. Over defense counsel's objection, the court found that the trial should proceed without defendant present. The court noted:

"It is true that Mr.--and the record does not reflect that Mr. Dixon was given his admonishment about his rights about trial *in absentia* prior to trial or beginning, but we're going under that alternative that once the trial has begun we have fulfilled the requirements of the statute and constitution. Therefore, Mr. Dixon can waive his rights either implicitly or explicitly."

On the last day, without the presence of defendant, the defense rested, closing arguments were heard and the circuit court made its findings. Defendant was sentenced *in absentia*. Defendant appeals.

On appeal, defendant contends his convictions and sentence should be reversed because he was not provided with the statutory admonitions regarding trial and sentence *in absentia*. We agree.

In Illinois, a criminal defendant has a constitutional and statutory right to be present at all stages of trial but may be tried in absentia. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8 Section 5/113-4(e) provides:

"If a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence." 725 ILCS 5/113-4(e) (West 1999).

Trials conducted in the absence of a defendant are not favored, and courts are reluctant to permit

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a trial to proceed in a defendant's absence. People v. Partee, 125 Ill. 2d 24, 40, 530 N.E.2d 460 (1988); People v. Smith, 188 Ill. 2d 335, 721 N.E.2d 553, 557 (1999). In order for a trial to proceed *in absentia*, the defendant must first be informed of his right to be present and have knowingly and intelligently waived that right. Absent a knowing and intelligent waiver, the defendant's statutory right to be notified he could be tried *in absentia* is violated. People v. Garner, 147 Ill. 2d 467, 590 N.E.2d 470, 477 (1992). Section 113-4(e) serves as the procedural mechanism to effect a formal waiver of the right to be present. People v. Garner, 147 Ill. 2d 467, 590 N.E.2d 470, 477 (1992).

In People v. Partee, 125 Ill.2d 24, 40, 530 N.E.2d 460 (1988), the court noted that "the 113-4(e) admonishment was part of a complex series of tradeoffs designed to balance the defendant's right to be present at trial, the State's interest in the expeditious administration of justice, and our traditional distrust of trials in absentia." Thus, the legislature intended to ensure that trial in the defendant's absence is not held unless defendant has made a valid waiver of his right to be present at trial and to confront witnesses against him. Here, this trial court, having noted honestly on the record that defendant had not been admonished pursuant to section 113-4(e), committed reversible error in continuing the trial and sentencing defendant in defendant's absence.

Because of the disposition on the first contention of error, we have no need to address defendant's other claims of error.

No question is raised on the sufficiency of the evidence; however, retrial raises concerns of double jeopardy. Having examined the record and considered the evidence presented at trial, we find that the evidence is sufficient to support a finding of guilt of the charged offenses. Accordingly, defendant will not be exposed to double jeopardy upon retrial. We make no inference, nor have we made

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any determination, concerning defendant's guilt. People v. Taylor, 76 Ill. 2d 289, 391 N.E.2d 366 (1979).

Reversed and remanded.

O'BRIEN, J., with BUCKLEY, J., and GALLAGHER, J., concurring.