

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.Ct. No. 20-0630  
 )  
 RANDALL HURLBUT, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR PLYMOUTH COUNTY  
HONORABLE JOHN D. ACKERMAN (MOTIONS TO  
WITHDRAW), TIMOTHY JARMAN (MOTION TO SUPPRESS,  
MOTION FOR NEW COUNSEL), JEFFREY A. NEARY (MOTION  
FOR NEW TRIAL, TRIAL & SENTENCING), JUDGES

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APPELLANT'S BRIEF AND ARGUMENT

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## **CERTIFICATE OF SERVICE**

On the 8<sup>th</sup> day of February, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Randall Hurlbut, No. 0207347, Iowa Medical & Classification Facility, 2700 Coral Ridge Avenue, Coralville, IA 52241.

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SJ/lr/10/20

SJ/sm/2/21

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## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

**I. DID THE DISTRICT COURT ERR IN DENYING HURLBUT'S MOTION FOR A CONTINUANCE AND CONDUCTING HIS TRIAL IN ABSENTIA DESPITE THE FACT THAT HURLBUT WAS NOT INITIALLY PRESENT AND DID NOT WAIVE HIS RIGHT TO BE PERSONALLY PRESENT AT TRIAL?**

### **Authorities**

State v. Shipley, 757 N.W.2d 228, 231 (Iowa 2008)

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U.S. v. Gagnon, 470 U.S. 522, 527, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985)

Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), abrogated in part on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)

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Iowa Code § 1245, Rule 25 (1976)

Iowa R. Crim. P. 2.27 (2020)

In Re Hatch, 519 B.R. 783, 789 (Bankr.N.D.Iowa 2014)

## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Can a jury trial proceed in a misdemeanor case in the defendant's absence when the defendant is not initially present and has not waived his right to be present for trial?

### **STATEMENT OF THE CASE**

***Nature of the Case:*** This is an appeal, by Randall Hurlbut, following conviction and sentencing for Operating While Intoxicated, First Offense, in violation of Iowa Code § 321J.2 (2017).

***Course of Proceedings:*** Mr. Hurlbut was charged with the above-referenced offense by trial information on August 18, 2017. (Trial Information) (App. pp. 5-7).

On October 30, 2017, Hurlbut filed a motion to suppress evidence. (Motion to Suppress) (App. pp. 16-17).

A hearing was held on the motion to suppress, and the court entered an order denying the motion. (07/12/18 Ruling on Motion to Suppress) (App. pp. 25-27).

On November 7, 2017, Hurlbut filed a partial waiver of his right to speedy trial. (Partial Waiver) (App. pp. 18-19).

On November 26, 2017 a waiver of the right to trial within one year was filed. (Waiver) (App. pp. 20-21).

On January 31, 2020, Hurlbut filed a motion for change of venue. (Motion for Change of Venue) (App. pp. 42-49).

February 3, 2020, the court issued an order denying the motion for change of venue. (Order and Ruling Re Motion for Change of Venue) (App. pp. 50-51).

On February 3, 2020, an amended trial information was filed. (Amended Trial Information) (App. pp. 52-54).

On the first day of trial, prior to voir dire, the court revealed that it had been informed, the day before, that Mr. Hurlbut was in Fort Dodge and did not have transportation to LeMars to attend his trial. (Transcript of Voir Dire Examination pp. 2 L 4-25, 3 L 1-14). Defense counsel

requested a continuance to allow Hurlbut to attend his trial. (Transcript of Voir Dire p. 3 L 15-17).

Following arguments advanced by the attorneys, the court denied the motion for continuance. (Transcript of Voir Dire Examination pp. 3 L 15-25, 4 L 1-25, 5 L 1-17).

The case went to trial and a verdict of guilty as charged was returned by the jury. (02/05/20 Verdict) (App. pp. 60-61).

On March 6, 2020, Hurlbut received a sentence of 365 days, with all but two days suspended and a fine of \$1,250 with \$625 to be waived upon presentation of a temporary restricted license. (Judgment and Sentence pp. 1-2) (App. pp. 62-63).

A notice of appeal was filed on April 6, 2020. (Notice of Appeal) (App. p. 95).

**Facts:** Brenda Arens, a dispatcher for the Plymouth County Sheriff's Office, testified that on August 3, 2017, at about 10:00 a.m., she received a call from Hurlbut who asserted that he was being followed by personnel from the Plymouth County

Sheriff's Department; according to Arens, this claim had no basis in fact. (Transcript Day 1 pp. 8 L 8-24, 9 L 16-25, 10 L 1-7).

Later, she received a call from an unidentified man who claimed that he witnessed a white Roadmaster<sup>1</sup> being driven in a reckless manner. (Transcript Day 1 p. 10 L 13-17).

Arens dispatched the call to the deputies. (Transcript Day 1 10 L 20-24, State's Exhibit 10 - 911 calls).

Dillon Kunkel is the owner of Kunkel Trucking. At the time of the incident, the company was located in LeMars. (Transcript Day 1 pp. 12 L 4-25, 13 L 1). Kunkel knew Hurlbut who had previously worked at Kunkel Trucking. (Transcript Day 1 p. 13 L 6-19).

On August 3, 2017, was in his shop working with other employees when Hurlbut drove up and asked them to get the snowman off the top of his car. Not observing any snowman

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<sup>1</sup> Roadmaster is an automobile produced by the Buick Division of General Motors from 1936-1958 and 1990-1996.

atop Hurlbut's car, Kunkle called the police. (Transcript Day 1 pp. 13 L 11-25, 14 L 1-15).

Plymouth County Sheriff Deputy Rick Singer testified that he first observed Hurlbut's vehicle in LeMars and saw it parked in the Kunkel Trucking parking lot. He drove past the vehicle, made a u turn. (Transcript Day 1 pp. 49 L 15-25, 50 L 1-9, 54 L 5-25, 55L 1).

The vehicle took off and headed south. Singer pursued, the vehicle turned into a driveway, cut through the yard, got back on the highway and headed north. (Transcript Day 1 p. 55 L 2-24).

Singer pursued the vehicle, turned on patrol car lights and followed the vehicle into the parking lot of Kunkel Trucking at which time the vehicle stopped. Singer ordered the driver out of car and ordered him to get on the ground. The driver, Mr. Hurlbut, was compliant. (Transcript Day 1 pp. 55 L 25, 56-59 L 1-25, 60 L 1-16).

Hurlbut told Singer that there was someone on the roof of his car and he was trying to get him off of the roof.

According to Singer, there was no individual on the roof of Hurlbut's vehicle. (Transcript Day 1 p. 61 L 1-7).

Singer observed that Hurlbut was grinding his teeth, was "unkempt" and making "off-the-wall comments". (Transcript Day 1 p. 62 L 1-20, State's Exhibit 1 Video of Pursuit/Arrest). He believed, at that point, that Hurlbut was under the influence of methamphetamine. (Transcript Day 1 p. 68 L 16-22).

Singer read the implied consent to Hurlbut, and Hurlbut agreed to provide a urine sample. (Transcript Day 1 p. 65 L 1-22, State's Exhibit 8 Implied Consent Form) (App. p. 55).

Hurlbut provided the sample. The sample was sent to the DCI Criminalistics laboratory and the subsequent report indicates a positive test for the presence of methamphetamine. (Transcript Day 1 pp. 67 L 18-25, 68 L 1-4, 10/13/17 State's Exhibit 9 DCI Criminalistics Laboratory report) (App. p. 56).

After the State rested, Hurlbut's attorney renewed his objection to proceeding without the defendant being present. (Transcript Day 1 pp. 84 L 2-8).

He also made a motion for judgment of acquittal based upon the questionable handling and sealing. The court overruled both motions. (Transcript Day 1 pp. 84 L 9-25, 85 L 1-25, 86 L 1-6).

Additional relevant facts will be discussed below.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN DENYING HURLBUT'S MOTION FOR A CONTINUANCE AND CONDUCTING HIS TRIAL IN ABSENTIA DESPITE THE FACT THAT HURLBUT WAS NOT INITIALLY PRESENT AND DID NOT WAIVE HIS RIGHT TO BE PERSONALLY PRESENT AT TRIAL.**

**Standard of Review:** Constitutional claims are reviewed de novo. State v. Shipley, 757 N.W.2d 228, 231 (Iowa 2008).

**Preservation of Error:** Error was preserved by virtue of Hurlbut's request for continuance prior to voir dire and in moving for relief following the State's case-in-chief. (Transcript Day 1 pp. 84 L 2-8, Transcript of Voir Dire Examination pp. 3 L 15-25, 4 L 1-25, 5 L 1-17).

**Discussion:** The right of confrontation is guaranteed in both state and federal constitutions:



“The Confrontation Clause of the United States Constitution states the accused has the right ‘to be confronted with the witnesses against him.’ U.S. Const. amend. VI. Identically, the confrontation clause of the Iowa Constitution states the accused has the right ‘to be confronted with the witnesses against him.’ Iowa Const. art. I, § 10.”

State v. Kennedy, 846 N.W.2d 517, 522 (Iowa 2014).

Additionally, both constitutions guarantee the right of counsel and due process. U.S. Const. amend. VI, Iowa Const. art. I § 10, U.S. Const. amend. XIV, Iowa Const. art. I, § 9.

A defendant has a due process right to be present at a legal proceeding “whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” U.S. v. Gagnon, 470 U.S. 522, 527, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) *quoting* Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), abrogated in part on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Iowa Rule of Criminal Procedure 2.27 states that the defendant:

“...shall be personally 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. In other cases the defendant may appear by counsel.”

Iowa R. Crim. P. 2.27(1) (2020).

The defendant’s continued presence is not necessary if the defendant absents himself from trial after being “initially present”. Iowa R. Crim. P. 2.27(2) (2020).

The United State’s Supreme Court has previously determined that proceeding with a trial in a situation in which the defendant is not initially present violates Federal Rule of Criminal Procedure 43, the relevant language of which is quoted as follows:

“(a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, 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.  
“(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

“(1) is voluntarily absent after the trial has commenced....”

Crosby v. United States, 506 U.S. 255, 258, 113 S.Ct. 748, 751, 122 L.Ed.2d 25 (1993).

The language of Federal Rule of Evidence 43 is similar to the language of Iowa R. Crim. P. 2.27. See State v. Bell, No. 19-0161, 2020 WL 2487608, at \*4 (Iowa Ct. App. May 13, 2020).

In this case, Hurlbut was never “initially present”. According to his attorney, Hurlbut was residing in Fort Dodge, Iowa, at the time of the trial and said that he did not have transportation to LeMars. (Transcript of Voir Dire Examination pp. 2 L 4-25, 3 L 1-14). The distance between the two cities is 93.25 miles.

<https://www.distancecalculator.net/>.

The State resisted the motion for continuance despite the fact that it was of the opinion that Hurlbut believed the date set for trial was actually the date of the pretrial conference and elaborated “I think it was accurate that it was confusion on his part, not that any change was made about which he had not

been informed...” (Transcript of Voir Dire Examination pp. 3 L 15-17 4 L 1-12).

The court recalled that a final pretrial conference had been held the previous Friday and that Hurlbut was not in attendance. (Transcript of Voir Dire Examination pp. 5 L 9-25, 6 L 1-4).

Hurlbut’s attorney revealed, upon being questioned by the court, that he told Hurlbut that the trial could proceed without him.<sup>2</sup> (Transcript of Voir Dire Examination p. 88 L 8-15). Counsel also advised the court that Hurlbut had been informed of the pretrial and trial dates. (Transcript of Voir Dire Examination p. 5 L 4-8).

“Like the Eighth Circuit, we do not recommend using defense counsel as an intermediary to address issues such as these.” State v. Carey, No. 12-0230, 2014 WL 3928873, at \*12-13 (August 13, 2014)(referencing United States v. Ward,

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<sup>2</sup> The court advised counsel that he was not obligated to answer the question if it involved a violation of attorney-client privilege. The record contains no waiver of attorney-client privilege.

598 F.3d 1054, 1060 (8th Cir.2010)).

Using counsel as an intermediary is cause for other concerns related to the voluntariness of Hurlbut's absence and the sufficiency of the court's advice to him regarding the waiver of rights.

One such concern consists of the trial court's duty to advise Hurlbut that he had a right to testify on his own behalf and that his absence could constitute a waiver of that right.

The right to testify in one's own defense is a fundamental constitutional right "...that can only be waived by the defendant, which can only be done voluntarily, knowingly, and intelligently." Ledezma v. State, 626 N.W.2d 134, 146 (Iowa 2001).

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Moreover, the court appeared to be under the impression that Hurlbut's presence at trial was not required:

THE COURT: "...under Rule 2.27 and a particular subpart under that, in a case where we have a felony pending, we cannot proceed without the defendant's presence absent certain circumstances which don't apply to misdemeanors. This is a misdemeanor only."

(Transcript of Voir Dire Examination p. 5 L 11-15).

The court's confusion may have been its reading of Iowa R. Crim. P. 2.27(1) which specially addresses felony cases.

However, the plain language of Iowa Rule of Criminal Procedure 2.27(2) applies to "all cases", only provides for absences occurring after the defendant has already been in attendance and is "...voluntarily absent after the trial or other proceeding has commenced." Iowa R. Crim. P. 2.27(2)(a) (2020).

The rationale behind the Iowa Rule's mandate that a trial in absentia may only occur if the defendant is initially present and then absents himself is identical to that described by the United States Supreme Court in Crosby:

"As a general matter, the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun. If a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the

commencement of trial is at least a plausible place at which to draw that line.”

Crosby v. United States, 506 U.S. 255, 261, 113 S.Ct. 748, 752.

Additionally, the Court determined that the act of absenting oneself from a trial in progress evinces a “...knowing and voluntary waiver of the right to be present.” *Id.*

The provisions for defendant’s absence, as listed in Rule 2.27, are not applicable in this case. Iowa R. Crim. P. 2.27(2)(a-b), 2.27(3)(a-b), 2.27(4)(a-c).

In this case, Hurlbut did not knowingly, voluntarily and intelligently waive his right to be present at trial. The record indicates that he was unable, not unwilling, to attend the trial.

Since Hurlbut was available by phone, presumably the district court could have fully advised him of the consequences of flowing from his absence at trial, but there was no effort made to do so.

Hurlbut has been prejudiced as he was unable to assist his attorney at trial and did not execute a knowing, voluntary and intelligent waiver of his right to be present at trial.

Owing to his absence, he was unable to provide information to his attorney during jury selection:

“...[i]t is of the utmost importance that the defendant be present when the jury is being selected.... [T]he defendant has unique knowledge which is important at all stages of the trial, including voir dire. At the voir dire he may, for example, identify prospective jurors that he knows. He may also have knowledge of facts about himself or the alleged crime which may not have seemed relevant to him in the tranquility of his lawyer's office, and thus may not have been disclosed, but which may become important as the individual prejudices or inclinations of the jurors are revealed. He may also be a member of the community in which he will be tried and might be sensitive to particular local prejudices his lawyer does not know about.”

United States v. Alessandrello, 637 F.2d 131, 151 (3rd

Cir.1980). A criminal defendant has a right to be present at every stage of the trial, including conversations between the judge, attorneys, and jurors concerning the jurors' ability to be impartial. State v. Atwood, 602 N.W.2d 775, 780-81 (Iowa 1999) *citing* State v. Wise, 472 N.W.2d 278, 279 (Iowa 1991).

Absence from the jury selection process is inherently prejudicial as the defendant is denied his right to challenge jurors based upon the “sudden impressions and unaccountable prejudices we are apt to conceive upon the



bare looks and gestures of another”. Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136, 138-39, 36 L.Ed. 1011 (1892) (*abrogated for the proposition that “... a trial can never continue in the defendant's absence ...”* Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970); *See also Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) (“No doubt the privilege may be lost by consent or at times even by misconduct.”)).

“Under our caselaw, there is no discretion regarding the presence of defendant and counsel.” State v. Shorter, 893 N.W.2d 65, 83 (2017) *citing* State v. Griffin, 323 N.W.2d 198, 201 (Iowa 1982). “When the rule is violated, prejudice is presumed unless the record shows to the contrary.” *Id.*

Hurlbut was prevented from providing his attorney with factual information which would have enhanced counsel’s ability to examine witnesses and make objections.

A court order preventing the defendant’s communication with counsel is a violation of the right to counsel. “I join in most of the Court's opinion, and I agree with its conclusion

that an order preventing a defendant from consulting with his attorney during an overnight recess violates the defendant's Sixth Amendment right to counsel.” Geders v. United States, 425 U.S. 80, 92, 96 S.Ct. 1330, 1337, 47 L.Ed.2d 592 (1976) (*Marshall, J. concurring*).

Cases dealing with the defendant’s absence from misdemeanor criminal offenses are few, old and not exactly on point. In State v. Hughes, the Supreme Court found no error where judgement was rendered in the defendant’s absence based upon the defendant’s failure to timely object. Iowa Code § 3059. State v. Hughes, 4 Iowa 554, 556 (1857).

The applicable code section, at the time Hughes was decided, provided:

"For the purpose of judgment, if the conviction be for a felony the defendant must be personally present; if it be for a misdemeanor judgment may be pronounced in his absence."

Iowa Code § 3059 (1851).

In State v. COUNEHAM, the court overruled defendant’s motion for continuance, based upon his absence and defendant’s attorney waived defendant’s presence and

demanded a trial. The court overruled the request for trial and forfeited the defendant's bond and assessed \$30 in court costs. State v. Counham, 57 Iowa 351, 10 Iowa 677 (Iowa 1881).

The Supreme Court found that it was error for the district court to deny the defendant's trial demand based upon Iowa Code § 3960 which provided for trial in absentia for misdemeanors if the defendant appeared by counsel. *Id.*

State v. Brandt dealt with acts and omissions, in this case, the defendant's absence, as a factor in tolling speedy trial. State v. Brandt, 253 N.W.2d 253 (Iowa 1977).

Brandt was charged pursuant to the provisions of the 1973 edition of the Iowa Code. *Id.* at 255. The provisions in question are as follows:

A person charged with a felony, or in custody without an attorney, must be personally present for arraignment, but in other cases he may appear therefor by counsel.

Iowa Code § 775.2 (1973); and,

Personal presence at trial. If a felony is charged, the defendant must be personally present at the trial, but the trial of a misdemeanor may be had in his absence, if he

appears by counsel.

Iowa Code § 775.8 (1973).

The 1976 Iowa Code section addressing the defendant's presence in the courtroom is similar to Iowa R. Crim. P. 2.27. Provisions for the defendant's appearance by interactive audiovisual closed-circuit system for the initial appearance, arraignment and plea, and for written arraignment, are among those since added. Iowa Code § 1245, Rule 25 (1976).

In considering the former versions of the Iowa Code dealing with trial in absentia, it is apparent that previously, the legislature provided for misdemeanor trials without the defendant's presence, whereas the current authority, Iowa R. Crim. P. 2.27 only permits the practice under limited circumstances, which do not apply to this case, and then, only when the defendant is initially present. Iowa R. Crim. P. 2.27 (2020).

The provision addressing the presence of the defendant has been amended several times. The removal of the

language allowing defendants in misdemeanor to appear by counsel has been excised from the rule.

“Amendments to a statute are relevant to the application and intent of the law.” In Re Hatch, 519 B.R. 783, 789 (Bankr.N.D.Iowa 2014).

“Courts have declared that the mere fact that a legislature enacts an amendment indicates that it intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights.”

*Id.*

Iowa R. Crim. P. 2.27 does not allow the defendant to appear by counsel at trial for a misdemeanor offense unless he has been present initially, or has voluntarily absented himself.

In light of the fact that Hurlbut was not initially present and did not waive his presence at trial, this matter should be reversed and remanded for retrial.

## **CONCLUSION**

**WHEREFORE**, for the reasons asserted above, Randall Hurlbut respectfully requests that this Court reverse and remand this matter for retrial.

**NONORAL SUBMISSION**

Counsel requests not to be heard in oral argument.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$2.85, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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Dated: 2/8/21