

UPDATES FROM THE FIELD

Teen Parties: Who has Parties, What Predicts whether there is Alcohol and who Supplies the Alcohol?

This study explores which teens are more likely to have parties at home, what factors are associated with the presence of alcohol at parties, and who supplies the alcohol. Researchers collected data in 2011 and 2012 through telephone interviews with 1,121 teens, ages 15-19, living in 50 mid-sized California cities.

The majority of teens who had parties with alcohol reported that parents knew about the party and the alcohol. Social host ordinances may not be sufficiently enforced to have an impact on parents' or teens' behavior. Alternatively, parents may be unaware of social host ordinances and the possible legal consequences of allowing minors to drink in their home. This highlights the need to better inform parents about their liabilities for allowing minors to drink in their homes. To learn more visit:

<http://link.springer.com/article/10.1007/s10935-014-0361-4>

INNOVATIVE APPROACHES TO REDUCING UNDERAGE DRINKING IN STATES

Vertical Driver's Licenses No Longer OK for Alcohol Purchases

Arizona's Senate Bill 1397, passed during this year's legislative session and signed by the governor in late April, amends State statute to say identification issued to a person when they are younger than 21 is no longer acceptable for alcohol purchases after a 30-day grace period once the person turns 21. This applies to driver's licenses and all other State-issued identification cards. The bill went into effect Thursday.

The change is intended to discourage those who obtain a new, horizontal driver's license after turning 21 from passing on their still-valid vertical licenses to someone who is underage and might use it to purchase alcohol or get into bars. To learn more visit:

<http://www.azcentral.com/story/news/arizona/politics/2014/07/25/vertical-drivers-licenses-longer-ok-alcohol-purchases/13144879/>

UDETIC WEBINAR

TRAPPED SOBER: Idaho's Success in Engaging Youth in Underage Drinking Prevention

Date: Thursday, October 9, 2014

Time: 3:00 p.m. – 4:00 p.m. ET

The Bonneville Youth Development Council (BYDC) works with youth to prevent underage drinking and other substance abuse in Bonneville County. As an EUDL-supported program, BYDC has engaged youth in the development of the Council's prevention work providing a unique perspective and insight into what reaches teens best and to make positive changes in their community. This webinar will showcase what

BYDC is doing to engage youth in these activities and give helpful tips to keep youth involved. Youth members will share what they have gained, why they continue to stay engaged and how they sustain their efforts.

To register for this webinar, visit:

<http://www.udetc.org/audioconfregistration.asp>.

LEGAL CASE

"Don't I Have a Right to be Present at My Trial?"

On July 31, 2014, the Court of Appeals of Indiana rendered its opinion in the matter of Calvert v. State of Indiana 32A01-1312-CR-535. This case involves an appeal of the conviction of 20-year old U.S. Army Private William T. Calvert for the illegal consumption of alcohol.

The facts as reported show that during the early morning hours of January 19, 2013, then 20-year-old Calvert, an Army Private stationed at Fort Knox, Kentucky, was visiting friends at a residence in Plainfield when a neighbor called police to report that "young subjects ... [were] consuming alcoholic beverages and ... urinating in the yard and causing noise and being disruptive." Corporal Scott Neville of the Hendricks County Sheriff's Department arrived at the residence to investigate. When Corporal Neville confronted Calvert, he smelled an odor of alcohol coming from Calvert, who submitted to a portable breath test. The test confirmed that Calvert had consumed alcohol.

This case offers the reader an excellent opportunity to read how the Court ruled on this appeal when asked to review:

1. Whether the trial court erred when it tried him in absentia while he was on active duty with the United States Army in Afghanistan.
2. Whether a retrial would violate the prohibition against double jeopardy under Article 1, Section 14 of the Indiana Constitution.

To learn more visit:

<http://www.udetc.org/documents/ResourceAlerts/Sept2014case.pdf>

UDETIC WEBSITE - BREAKING NEWS AND A NEW DISTANCE LEARNING COURSE!

For recent information about underage drinking, visit the *Breaking News* section on the UDETIC website at www.udetc.org. It provides highlights on *Breaking News, Webinars, Product Alerts, Research, and UDETIC Resources.*

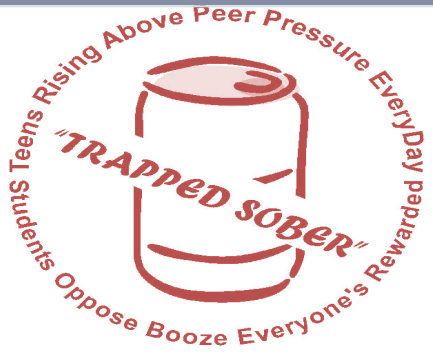
NEW COURSE: Using Community Volunteers to Support Prevention & Enforcement of Underage Drinking. This two hour course explores the recruitment, selection, training, use, and management of community volunteers that support the prevention and enforcement strategies focused on underage drinking. To learn more visit:

<http://www.udetc.org/distancelearning.htm>

To print a copy of this month's *Resource Alert*, visit:

www.udetc.org/documents/ResourceAlerts/ResourceAlert0914.pdf

Visit www.udetc.org for the latest information on underage drinking.



REGISTER ONLINE NOW!

To register, please visit <http://www.udetc.org/audioconfregistration.asp>
and complete the online registration form

THURSDAY, OCTOBER 9, 2014
3:00 – 4:00 pm Eastern Time

TRAPPED SOBER: Idaho's Success in Engaging Youth in Underage Drinking Prevention

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PRESENTERS:

Alisha Passey
Coalition Coordinator
BYDC's Promise

Shelby Bauer & Stephan Bills
Youth Coalition Members
BYDC's Promise

MODERATOR:

Mary V. Gordon
UDET Director
PIRE

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Court of Appeals of Indiana.

William T. CALVERT, Appellant–Defendant, v. STATE of Indiana, Appellee–Plaintiff.

No. 32A01–1312–CR–535.

Decided: July 31, 2014

Brian J. Johnson, Danville, IN, Attorney for Appellant. Gregory F. Zoeller, Attorney General of Indiana, Eric P. Babbs, Deputy Attorney General, Indianapolis, IN, Attorneys for Appellee.

OPINION

STATEMENT OF THE CASE

William T. Calvert appeals his conviction for illegal consumption of alcohol by a minor, a Class C misdemeanor, following a bench trial. Calvert presents two issues for our review:

1. Whether the trial court erred when it tried him in absentia while he was on active duty with the United States Army in Afghanistan.
2. Whether a retrial would violate the prohibition against double jeopardy under Article 1, Section 14 of the Indiana Constitution.

We reverse and remand for a retrial.

FACTS AND PROCEDURAL HISTORY

During the early morning hours of January 19, 2013, then twenty-year-old Calvert, an Army private stationed at Fort Knox, Kentucky, was visiting friends at a residence in Plainfield when a neighbor called police to report that “young subjects . [were] consuming alcoholic beverages and . urinating in the yard and causing noise and being disruptive.” Tr. at 10. Corporal Scott Neville of the Hendricks County Sheriff's Department arrived at the residence to investigate. When Corporal Neville confronted Calvert, he smelled an odor of alcohol coming from Calvert, who submitted to a portable breath test. The test confirmed that Calvert had consumed alcohol.

The State charged Calvert with illegal consumption of alcohol by a minor, a Class C misdemeanor.¹ The trial court scheduled a bench trial for April 16, 2013. On March 11, 2013, Calvert received Orders for deployment “on or about 16 April 2013.” Appellant's App. at 34. On March 14, Calvert's attorney contacted the prosecutor by email to inform him about the deployment and included a copy of the U.S. Army Orders for deployment “in support of Operating Enduring Freedom Afghanistan.” Id. The trial court rescheduled the bench trial on its own motion for June 27.² And the court rescheduled the trial again on its own motion for August 15.

On August 12, Calvert's attorney filed a motion to continue the August 15 bench trial. In that motion, Calvert's attorney stated two reasons for seeking the continuance: the attorney's wife had "a post-op appointment with a surgeon the same afternoon and is unable to drive herself to the appointment"; and Calvert "is currently deployed to Afghanistan as a soldier with the U.S. Army." Appellant's App. at 31. The trial court granted that motion and rescheduled the bench trial for October 4.

On October 3, Calvert's attorney moved to continue the October 4 trial, stating that Calvert "is, and has been, deployed to Afghanistan since April of 2013 as part of Operation Enduring Freedom, with said deployment lasting no more than 291 days (see attached exhibit A)." Id. at 33. Calvert's attorney attached an "official copy" of Calvert's deployment orders with the motion to continue. Id. at 34–35. The State filed an objection to the motion to continue, stating:

1. This case has been continued three times by the Defendant:

6/12/2013—motion filed one day before the scheduled suppression hearing

8/12/2013—motion filed three days before the scheduled trial

10/3/2013—motion filed one day before the scheduled trial

2. These last minute continuances create an undue hardship for the State's witness, Cpl. Scott Neville. Each time the case is set for a contested hearing, he must arrange his schedule to appear for court, reserving the date for a period of months, only to have the case reset by the Defendant at the last minute.

3. Tomorrow's trial was scheduled on 8/12/2013. Thus, the Defendant knew the case was set for trial for the past 52 days, yet only now files a motion to continue the day before trial.

4. The Defendant provides no reason in his motion for filing a request to continue less than 24 hours from the scheduled trial.

Id. at 36 (emphases original).

The trial court denied the motion to continue and proceeded to try Calvert in absentia on October 4. The court stated:

Well, it seems we have a conflict between the State and Federal law[.][T]he Federal government apparently thinks it's more important for Mr. Calvert to be in Afghanistan. It's directly in conflict with the statutes that you've cited. I'm going to deny the request for continuance. We'll go ahead with the trial.

Tr. at 8. The trial court found Calvert guilty as charged and entered judgment and sentenced him to sixty days "with credit for 1+1 days served (actual and good time)," and fifty-eight days suspended. Appellant's App. at 45. Calvert's attorney filed a motion to correct error, which the trial court denied. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Trial In Absentia

Calvert contends that the trial court erred when it tried him in absentia. Specifically, Calvert maintains that the undisputed evidence shows that he did not have notice of the date of the bench trial and, moreover, that he had good cause for his absence. Accordingly, Calvert asserts that he did not knowingly or intentionally waive his right to be present at his trial. We review such questions for an abuse of discretion. See *Brown v. State*, 839 N.E.2d 225, 231 (Ind.Ct.App.2005), trans. denied. A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court or if the court misapplies the law. See *Speybroeck v. State*, 875 N.E.2d 813, 818 (Ind.Ct.App.2007).

As our supreme court has stated:

A defendant in a criminal proceeding has a right to be present at all stages of his or her trial. U.S. Const. amend. VI; Ind. Const. art. I, § 13; *Fennell v. State*, 492 N.E.2d 297, 299 (Ind.1986). 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. *Freeman v. State*, 541 N.E.2d 533, 535 (Ind.1989); *Fennell*, 492 N.E.2d at 299.

Lampkins v. State, 682 N.E.2d 1268, 1273 (Ind.1997). Further, “[a] defendant’s explanation of his absence is a part of the evidence available to this Court on the question of whether it was error to try him in absentia.” *Id.* (quotations omitted).

Here, Calvert’s deployment to Afghanistan justified a continuance of his trial. The State of Indiana cannot compel a defendant’s presence for a judicial proceeding while, at the same time, the United States compels his absence for active duty in military service overseas. Trial Rule 53.5 provides in relevant part that, “Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence.” Regardless of whether Calvert had actual or constructive knowledge of his trial date, he has shown good cause why he was unable to attend the trial on October 4.³ Indeed, he was subject to military orders that made it impossible for him to attend the trial while on active duty in Afghanistan. Thus, it cannot be said that he voluntarily waived his right to be present at the trial. See *Lampkins*, 682 N.E.2d at 1273.

The record indicates that Calvert’s attorney was dilatory and inconsiderate of the prosecutor and the trial court when he waited until the day before trial to move for a continuance. His attorney apologized, stated that he did not mean to inconvenience the court, that he understood the State’s frustration, and that he accepted responsibility for having filed the motion for a continuance so late. After objecting to the trial on due process grounds, Calvert’s attorney even suggested that the court “punish” him rather than his client. Tr. at 9.

Notwithstanding the tardy motion for a continuance, the reason for Calvert’s absence is undisputed, and the timing of the motion does not obviate the fact that the motion was made for undeniable good cause. Calvert had a constitutional right to be present at his trial, but he was

bound by his U.S. Army Orders for deployment overseas, which compelled him to be absent from the trial. We conclude that the motion for a continuance should have been granted and that Calvert should not have been tried in absentia. Thus, we reverse his conviction.⁴

Issue Two: Double Jeopardy

Calvert also contends that his retrial is barred by Article 1, Section 14 of the Indiana Constitution. Calvert maintains that the prosecutor committed misconduct both during the course of his trial and in opposition to Calvert's motion to correct error, and Calvert urges the application here of a narrow exception to the rule that double jeopardy principles are no bar to retrial following a mistrial. We cannot agree.

We review an alleged double jeopardy violation de novo. See, e.g., *Grabarczyk v. State*, 772 N.E.2d 428, 432 (Ind.Ct.App.2002). As our supreme court observed in relevant part in *Richardson v. State*, 717 N.E.2d 32, 37 n. 3 (Ind.1999), prohibitions against double jeopardy protect against re prosecution of a defendant in limited circumstances after a mistrial has been declared. Under the Fifth Amendment to the United States Constitution, “the United States Supreme Court has provided a narrow exception that bars a second trial after a mistrial ‘[o]nly where the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial.’” *Butler v. State*, 724 N.E.2d 600, 603 (Ind.2000) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982)).

Calvert did not move for a mistrial, and he was convicted following a bench trial. Nonetheless, Calvert directs us to case law from other jurisdictions where courts have “rejected the rule announced in *Kennedy* in favor of broader double jeopardy protection based upon state constitutional grounds.” Appellant's Br. at 13. For instance, on remand from the United States Supreme Court in *Kennedy*, the Oregon Supreme Court held that

a retrial is barred by article I, section 12, of the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal.

State v. Kennedy, 666 P.2d 1316, 1326 (Or.1983) (emphasis added).⁵

Here, while there was no mistrial, Calvert contends, in effect, that the prosecutor advocated an untenable position to the trial court and was indifferent to Calvert's constitutional right to be present at the trial. Calvert reasons that this alleged indifference amounts to prosecutorial misconduct that was so improper and prejudicial that he was denied a fair trial and that his retrial would violate Article 1, Section 14 of the Indiana Constitution. Calvert maintains that the State “advocated a position both at trial and in response to a motion to correct [error] clearly in conflict with well-established statutory and case law, with willful disregard of the resulting reversal.” Appellant's Br. at 9. And Calvert alleges that the prosecutor committed misconduct when he suggested that Calvert had enlisted in the Army subsequent to his arrest in an attempt to avoid prosecution (this contention was incorrect: Calvert was in the military and stationed at Fort Knox at the time of his arrest), and the prosecutor erroneously stated that defense counsel had

sought a continuance one day before the June 2013 trial date (the motion to continue was filed two weeks before the scheduled trial).

While the State was frustrated by defense counsel's "last minute" motion for a continuance, Appellant's App. at 36, the prosecuting attorney misrepresented to the trial court the timing of Calvert's enlistment in the Army and his motion to continue the June trial, both of which facts were readily ascertainable. But the challenged conduct occurred in argument prior to Calvert's trial and cannot be construed to have been intended to goad Calvert into moving for a mistrial. On these facts, we decline Calvert's invitation to adopt the rule Oregon rule in *State v. Kennedy* and apply it here. The general rule is that retrial of a defendant is permissible when the conviction is reversed on grounds other than sufficiency of the evidence. *Hastings v. State*, 560 N.E.2d 664, 670 (Ind.Ct.App.1990), trans. denied. Because we reverse Calvert's conviction on the basis that the trial court erred when it tried him in absentia, the State may retry Calvert.

Reversed and remanded for a new trial.

FOOTNOTES

1. Calvert immediately reported the arrest to a superior in the Army. Calvert was referred to the Army Substance Abuse Program, had his pass privileges revoked, and was ordered to undergo "corrective training." Defendant's Exh. A. The corrective training entailed Calvert's volunteering for MADD ("Mothers Against Drunk Driving") or "some other type of underage drinking program." Id.

2. Calvert's attorney had moved to reschedule the June 27 bench trial, but the CCS states that that date was rescheduled on the court's own motion. Calvert also filed a motion to suppress, which the trial court denied following a hearing on July 15.

3. We are not persuaded by the State's argument that the trial court properly denied the October 3 motion to continue because the State and its witness were unduly inconvenienced. Any inconvenience to the State is far outweighed by the prejudice suffered by Calvert, who was denied the opportunity to be present at his trial due to his military duty.

4. Calvert also contends that the trial court erred when it sentenced him in absentia, but, because we reverse his conviction, we need not address the sentencing issue.

5. Calvert correctly observes that the Oregon Constitution was modeled after the Indiana Constitution and that Article I, Section 12 of the Oregon Constitution is identical to Article 1, Section 14 of the Indiana Constitution.

NAJAM, Judge.

VAIDIK, C.J., and BROWN, J., concur.

DISTANCE LEARNING COURSES

<http://www.udetc.org/distancelearning.htm>

Best Practices to Reduce Underage Drinking

The UDETC offers no-cost distance learning opportunities featuring courses that present best practices and strategies for enforcement of underage drinking laws and efforts to reduce underage drinking. Funded by an OJJDP grant, these web-based, on-line courses allow flexible scheduling, reduce travel costs and offer the ability to learn at your own pace in an online environment. Participants can receive a certificate upon completion of one of these courses.

This project was supported by Grant No. 2009-AH-FX-K001 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Conducting Compliance Check Operations

Four hour course provides guidelines and operational information on reducing alcohol sales to minors through compliance check operations.



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Two hour course provides information on effective environmental prevention strategies to address underage drinking.



Party Prevention & Controlled Party Dispersal

Six hour course discusses the role of enforcement and the community in preventing and safely dispersing underage drinking parties.



Techniques for Managing Special Events

Two hour course identifies the complexity of planning a special event. The course provides information on the role of enforcement, effective planning, proper management and policy application.



Source Investigations

Two hour course discusses the importance of conducting source investigations for underage drinking events, methodology and the benefits of effective enforcement and environmental strategies.



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Two hour course explores the recruitment, selection, training, utilization, and management of community volunteers that support the prevention and enforcement strategies focused on underage drinking.

