

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND

Appellee,

-v-

DESTINY VENTURES, LLC

Appellant.

) Case No. 08-2230
)
) On Appeal from the Cuyahoga County
) Court of Appeals, Eighth Appellate
) District
)
) Court of Appeals
) Case No. CA-08-091018
)

MERIT BRIEF OF APPELLANT DESTINY VENTURES, LLC

Michael A. Poklar (0037692) (COUNSEL OF RECORD)
34950 Chardon Road, Suite 210
Willoughby Hills, OH 44094-9162
Ph: (440) 951-4660
Fax: (440) 953-1962
map@mpoklarlaw.com

ATTORNEY FOR DEFENDANT-APPELLANT
DESTINY VENTURES LLC

Robert J. Triozzi (0016532)
Law Director
Karyn J. Lynn (0066573) (COUNSEL OF RECORD)
Assistant Law Director
City of Cleveland
City Hall
601 Lakeside Ave E Rm. 106
Cleveland, OH 44114-1015
Ph: (216) 664-2680
Fax: (216) 420-8291
klynn@city.cleveland.oh.us

ATTORNEY FOR PLAINTIFF-APPELLEE
CITY OF CLEVELAND

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STATEMENT OF THE FACTS

On August 6, 2007, Cleveland Housing Inspector Nadine Brownlee issued a Notice of Violation to Defendant-Appellant Destiny Ventures (hereinafter, "Appellant") alleging violations of the Cleveland Building Code with respect to property located at 3677 East 117 Street in Cleveland, Ohio. The case initially was set for hearing on December 6, 2007 but Appellant did not appear. Defendant does not recall receiving notice of the hearing.

On January 2, 2008, the court issued a journal entry setting the case for trial on January 14, 2008. The journal entry referenced Appellant's failure to appear at the December 6, 2007 hearing and further stated:

When an organization, served with notice of the criminal charges, fails to appear to answer the charges, the Clerk of Court is required to enter a plea of "not guilty" on the corporation's behalf. R.C. 2941.47. Accordingly, the prosecution may try its case against the defendant in absentia. If the Court concludes that the defendant is guilty, the Court may enter such a finding, and proceed to sentencing and execution.

(See Housing Court's Journal Entry of January 2, 2008) The court also stated that "[s]hould the defendant fail to appear, the Clerk shall enter a not guilty plea on behalf of the defendant, and this case shall proceed to trial immediately. Should the defendant appear and plead not guilty, the Court will either proceed to trial on that date, or, in the alternative, conduct an immediate pretrial."

Appellant retained attorney Ron Johnson for another case and understood that said attorney would appear on its behalf at the January 14, 2008 hearing. On January 11, 2008, Appellant learned for the first time that Attorney Johnson would not be appearing at the January 14, 2008 due to a conflict of interest.

Thereafter, Appellant contacted undersigned counsel regarding the hearing. On the morning of January 14, 2008, undersigned counsel was personally informed by attorney Ronald V. Johnson that he could not represent the defendant at the hearing. Richard Jones, an employee of a company that worked with Appellant, appeared at the hearing. (Tr. 2) Counsel for the Plaintiff-Appellee City of Cleveland (hereinafter, "Appellee") stated on the record that Jones told her that he was attempting to secure counsel for Appellant.

I had a conversation with Mr. Jones who told me that he was attempting to secure counsel, and he gave me the name of Mike Poklar. *** So I called Mr. Poklar this afternoon prior to coming into court, and I asked him if he was representing Destiny Ventures in this case and he said he has not been retained right now. He does need to speak to the clients first. He hasn't spoken to Destiny Ventures. He received a call at 12:10 this afternoon trying to get him retained.

(Tr. 2-3)

Despite being informed that Appellant was actively trying to obtain counsel, the court proceeded with the trial. The court stated on the record that Richard Jones was neither an attorney nor an officer of Appellant (Tr. 7), that Appellant had been notified of the hearing but failed to appear, that no attorney had filed a notice of appearance on behalf of Appellant and that, under R.C. 2941.47, the clerk of courts was authorized to enter a not guilty plea on behalf of Appellant. (Tr. 7-8) Thereafter, the case proceeded to trial.

Inspector Brownlee testified that she inspected the subject property on June 6, 2007 and observed several code violations. (Tr. 10) She re-inspected the property on August 6, 2007 and again on the morning of the hearing and found that the property was not in compliance. (Tr. 13-14) The court found Appellant guilty, assessed a fine of \$140,000.00 and immediately ordered the sentence into civil collection and execution. (Tr. 19)

On January 23, 2008, Appellant filed a Motion for Relief from Judgment under Civ.R. 60(B) and a request for a hearing. In the motion, Appellant argued that it no longer owned the subject property and that the property was sold to Cox Holdings, LLC on February 27, 2007, that the purchase price was paid on March 7, 2007 and that a deed was sent to Cox Holdings on April 4, 2007. (See Appellant's 1/23/08 Motion for Relief from Judgment at page 1) Appellant also argued that it believed that an attorney retained by Appellant in another case would appear at the January 14, 2008 hearing on its behalf and did not learn otherwise until January 11, 2008. (See affidavit of Steve Nodine attached as Exhibit 1 to Appellant's 1/23/08 Motion for Relief from Judgment) The motion was denied by the trial court.

On February 12, 2008, Appellant timely filed its Notice of Appeal in the Eighth District Court of Appeals and assigned error, *inter alia*, in the trial court's decision to conduct the trial of Appellant in absentia. In a decision journalized on October 3, 2008, the Court of Appeals affirmed the Housing Court decision. The Court of Appeals ruled that the Housing Court did not err in proceeding to trial in Appellant's absence. The court held that, under R.C. 2941.47, once an appearance is made or a plea is entered on behalf of a corporate defendant, the defendant is before the court until the case is disposed of. The court pointed out that the Housing Court had issued an order warning that trial would proceed if a corporate representative failed to appear on the day of trial. The court also found no error in the Housing Court's decision to proceed to trial in Appellant's absence and stated that, prior to the day of trial, Appellant did not file a motion for continuance or inform the court that it was in the process of retaining counsel.

Appellant filed its notice of appeal to the Ohio Supreme Court on November 20, 2008. (Appendix 1). On March 4, 2009, the Ohio Supreme Court accepted jurisdiction on the issue of the trial in absentia.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I:

The appellate court's interpretation and application of R.C. 2941.47 to authorize trials in absentia of corporations accused of violating the Cleveland Housing Code improperly infringes upon corporate defendants' fundamental Sixth Amendment rights to representation by counsel, to confrontation of witnesses, and to be present at trial.

Crim.R. 43(A) provides that "the defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules." The defendant's right to be present at trial has been upheld by the United States Supreme Court as recognized by this court in *State v. Meade* (May 16, 1996), Cuyahoga App. No. 69533. In reversing and remanding a defendant's conviction following a trial in absentia, the *Meade* court followed *Crosby v. United States* (1993), 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25. In *Crosby*, the defendant had knowledge of his trial date but failed to appear in court and was tried and convicted in absentia. Citing Fed.R.Crim.P. 43 (which is substantially similar to Ohio's Crim.R. 43), the U.S. Supreme Court reversed his conviction.

The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial.

Meade at *6, citing *Crosby* at 262.

In this case, the Court of Appeals found that R.C. 2941.47 authorized the Housing Court to proceed with the trial of Appellant in absentia. R.C. 2941.47 (Summons on informations and indictments against corporations) provides:

When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner

provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of "not guilty." Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

Without citing to any supporting authority, the Court of Appeals upheld the Housing Court's decision to conduct the trial in absentia pursuant to R.C. 2941.47.

R.C. 2941.47 specifically states that once an appearance is made or a plea is entered, the corporation is before the court until the case is disposed of. The trial court issued an order informing Destiny that if a representative of the company failed to appear, the matter would proceed immediately to trial. Even though Destiny had notice of the hearing, no officer or attorney from Destiny appeared nor did any attorney file a notice of appearance in the case. Moreover, the company never filed a motion for continuance nor otherwise informed the court, prior to the trial date, that it was attempting to obtain counsel. Therefore, we find no error in the court's decision to proceed to trial without a representative of Destiny present.

City of Cleveland v. Destiny Ventures, LLC, Cuyahoga App. No. 91018, 2008-Ohio-4587 at p. 6.

The appellate court's ruling is in direct conflict with well-established constitutional principles, rules of criminal procedure, and case law that an accused has the right to be present at all critical stages of a criminal proceeding when the defendant's absence would adversely affect the fairness of the proceedings. See *Kentucky v. Stincer* (1987), 482 U.S. 730, 745, 107 S.Ct. 2659, 96 L.Ed.2d 631; *State v. Davis* (2008), 116 Ohio St.3d 404, 417, 880 N.E.2d 31; Section 10, Article I, Ohio Constitution. The Ohio Constitution provides an accused party the right to "appear and

defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf.” Section 10, Article I, Ohio Constitution. In *State v. Moore*, Cuyahoga App. No. 86244, 2006-Ohio-816, the Eighth District Court of Appeals recognized that “Crim.R. 43(A) and Section 10, Article I of the Ohio Constitution mandate a defendant’s presence at every stage” of criminal proceedings. *Moore* at par. 8. The *Moore* court recognized that “present” for purposes of Crim.R. 43 means “physically present.” *Id.* at par. 17. In 2008, Crim.R. 43(A) was amended to provide that “the defendant **must be physically present** at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules.”

By applying R.C. 2941.47 to authorize conducting the trial of Appellant in absentia, the Housing Court infringed upon Appellant’s fundamental right to be present at all critical stages of its criminal trial. See *State v. Hill*, 73 Ohio St.3d 433, 444, 653 N.E.2d 271, citing Crim.R. 43(A) and Section 10, Article I, Ohio Constitution. Consequently, as applied to Appellant, the statute must be reviewed under a strict scrutiny standard and is unconstitutional unless it is narrowly tailored to promote a compelling governmental interest. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 423, 633 N.E.2d 504; *Chavez v. Martinez* (2003), 538 U.S. 760, 775, 123 S.Ct. 1994, 155 L.Ed.2d 984.

In this case, the court applied R.C. 2941.47 to completely deny Appellant its right to be present at trial. Whatever governmental interests were promoted by the statute could have been equally served by less drastic measures. Once advised that Appellant was in the process of obtaining counsel, the Housing Court could have granted a brief continuance of the hearing to enable Appellant to retain counsel. To the extent that the Court used R.C. 2941.47 to justify its

decision to proceed to trial in absentia and the resulting deprivation of Appellant's fundamental right to be present at trial, the statute is unconstitutional as applied to Appellant.

If its brief before the appellate court, Appellee argued that Appellant waived its right to be present at trial by failing to appear for trial after being warned that a trial in absentia would ensue. (See Brief of Plaintiff/Appellee City of Cleveland filed April 14, 2008 at p. 12) However, the Ohio Supreme Court has refused to uphold trials in absentia for defendants who are not present at the beginning of trial. Citing *Crosby v. United States* (1993), 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25, the Court held that "the language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. *** [T]he 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." *State v. Meade* (1997), 80 Ohio St.3d 419, 422-423, 687 N.E.2d 278.

This case is analogous to *City of Cleveland v. Washington Mutual*, Cuyahoga App. No. 91379, 2008-Ohio-6956. Decided less than three months after its decision in *Destiny Ventures*, the court of appeals vacated the conviction of a corporate defendant who was tried in absentia by Cleveland's Housing Court. In *Washington Mutual*, as in this case, the defendant was served with notice of the trial date and notified that, should it fail to appear, the trial would proceed in its absence. As in this case, the court entered a not-guilty plea for the defendant and the case proceeded to trial which resulted in a conviction and a fine. As in this case, the City of Cleveland argued that R.C. 2941.47 authorized the Housing Court to proceed with trial *in absentia* because of the defendant's failure to appear by an officer or by counsel in response to the summons issued by

the Court. The Eighth District Court of Appeals vacated the defendant's conviction and sentence as well as the not-guilty plea entered on its behalf and remanded the case for further proceedings.

The court held that R.C. 2941.47 was inapplicable to the case since the corporation was charged by a complaint, rather than by the indictment or information referenced in R.C. 2941.47 which is reserved for felony prosecutions. *Id.* at par. 8. The court wrote that, pursuant to R.C. 2938.12, the trial *in absentia* of a misdemeanor defendant may occur only "upon request in writing, subscribed by him." *Id.* at par. 9. See also, R.C. 2938.12. The court concluded that a trial in absentia is only allowed "either at the express request of the misdemeanor defendant [under R.C. 2938.12] or upon the defendant's voluntary absence after trial has begun." After consideration of R.C. 2941.47, R.C. 2938.12, and Crim.R. 43, the Court concluded that those provisions **do not allow the court clerk to enter a plea on the defendant's behalf, nor do they allow for a trial of a corporate defendant in absentia when the defendant has never appeared in the case.** *Washington Mutual* at par. 10. (Emphasis added.)

The court of appeals' decision in the case at bar should be reversed as it is inconsistent with its subsequent ruling in *Washington Mutual*, the prevailing case law, statutory authority, as well as both the Ohio Constitution and United States Constitutions.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that the Court reverse the decision of the Court of Appeals, vacate Appellant's conviction and sentence and remand this case to the Housing Court for further proceedings.

Respectfully submitted,



Michael A. Poklar (0037692)
34950 Chardon Road Suite 210
Willoughby Hills, OH 44094-9162
Ph: (440) 951-4660
Fax: (440) 953-1962
map@mpoklarlaw.com
ATTORNEY FOR DEFENDANT-
APPELLANT DESTINY VENTURES LLC

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served by U.S. First Class Mail this April 15,
2009 upon the following:

Michelle Comer, Esq.
601 Lakeside Rm 106
Cleveland, OH 44114
Attorney for Plaintiff-Appellee
City of Cleveland



Michael A. Poklar

APPENDIX

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND) Case No. 08-2230
)
Appellee,) On Appeal from the Cuyahoga County
) Court of Appeals, Eighth Appellate
-v-) District
)
DESTINY VENTURES, LLC) Court of Appeals
) Case No. CA-08-091018
Appellant.)

APPENDIX TO MERIT BRIEF OF APPELLANT DESTINY VENTURES, LLC

Michael A. Poklar (0037692) (COUNSEL OF RECORD)
34950 Chardon Road, Suite 210
Willoughby Hills, OH 44094-9162
Ph: (440) 951-4660
Fax: (440) 953-1962
map@mpoklarlaw.com

ATTORNEY FOR DEFENDANT-APPELLANT
DESTINY VENTURES LLC

Robert J. Triozzi (0016532)
Law Director
Karyn J. Lynn (0066573) (COUNSEL OF RECORD)
Assistant Law Director
City of Cleveland
City Hall
601 Lakeside Ave E Rm 106
Cleveland, OH 44114-1015
Ph: (216) 664-2680
Fax: (216) 420-8291
klynn@city.cleveland.oh.us

ATTORNEY FOR PLAINTIFF-APPELLEE
CITY OF CLEVELAND

IN THE SUPREME COURT OF OHIO

08-2230

CITY OF CLEVELAND

Appellee,

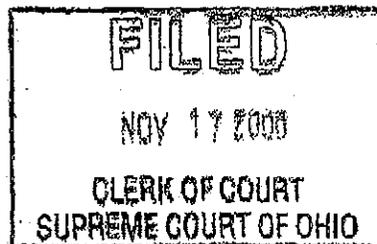
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DESTINY VENTURES, LLC

Appellant.

) On Appeal from the Cuyahoga County
) Court of Appeals, Eighth Appellate
) District
)
) Court of Appeals
) Case No. CA-08-091018
)
)
)

NOTICE OF APPEAL OF APPELLANT
DESTINY VENTURES, LLC



Michael A. Poklar (0037692)
34950 Chardon Road, Suite 210
Willoughby Hills, OH 44094-9162
(440) 951-4660
*Attorney for Defendant-Appellant
Destiny Ventures LLC*

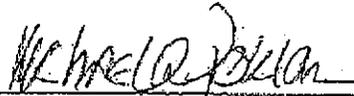
Robert J. Triozzi (0016532)
Law Director
Karyn J. Lynn (0066573)
Assistant Law Director
City of Cleveland
601 Lakeside Avenue Rm 106
Cleveland, OH 44114
*Attorney for Plaintiff-Appellee
City of Cleveland.*

NOTICE OF APPEAL OF APPELLANT DESTINY VENTURES, LLC

Appellant Destiny Ventures, LLC hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-08-091018 on October 3, 2008.

This case raises a substantial constitutional question and is one of public or great general interest.

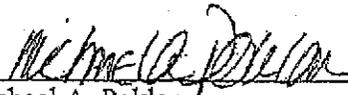
Respectfully submitted,



Michael A. Poklar (0037692)
34950 Chardon Road, Suite 210
Willoughby Hills, OH 44094-9162
(440) 951-4660
*Attorney for Defendant-Appellant
Destiny Ventures LLC*

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee City of Cleveland, Robert J. Triozzi, Law Director and Karyn J. Lynn, Assistant Law Director, 601 Lakeside Avenue Rm 106, Cleveland, OH 44114



Michael A. Poklar
*Attorney for Defendant-Appellant
Destiny Ventures LLC*

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91018

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

DESTINY VENTURES, LLC

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2007 CRB 42411

BEFORE: Cooney, P.J., Calabrese, J., and Rocco, J.

RELEASED: September 11, 2008

JOURNALIZED: OCT 3 - 2008

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A COURT REPORTER SHALL VERIFY THESE PRINTED WORDS BEFORE THE COURT

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ATTORNEY FOR APPELLANT

Michael A. Poklar
34950 Chardon Road, Suite 210
Willoughby Hills, Ohio 44094-9162

ATTORNEYS FOR APPELLEE

Robert J. Triozzi, Esq.
Law Director
Karyn J. Lynn
Assistant Law Director
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

FILED AND JOURNALIZED
PER APP. R. 22(E)

OCT 3 - 2008

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

SEP 11 2008

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

CA08091018

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

667 0267

-1-

COLLEEN CONWAY COONEY, P.J.;

This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

Defendant-appellant, Destiny Ventures, LLC ("Destiny"), appeals the judgment of the Cleveland Municipal Housing Court finding it guilty of failing to comply with the City of Cleveland's housing and building code. Finding no merit to the appeal, we affirm.

Destiny, a limited liability company based in Tulsa, Oklahoma, is a company that specializes in buying foreclosed properties and reselling them "as is." In June 2007, a Cleveland housing inspector inspected property owned by Destiny on East 117th Street for alleged building and housing code violations. The inspector found numerous code violations and sent notice to Destiny to repair the violations. In August, the inspector reinspected the property and found that none of the violations had been corrected. The plaintiff-appellee, City of Cleveland ("City"), subsequently filed a summons and complaint in the municipal housing court. The complaint alleged that Destiny had failed to comply with an order to correct code violations on its property. The case was set for arraignment in December 2007. No one appeared on Destiny's behalf at the

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arraignment and the court issued a capias.¹ The court set the case for trial and sent a notice to Destiny indicating that if a proper representative failed to appear on the scheduled trial date, trial would be held in the company's absence.

Trial was set for January 14, 2008. On that day, an employee of Destiny appeared, stating that the corporation was attempting to obtain counsel. The court, after determining that the employee was neither an officer of Destiny nor an attorney, permitted the case to proceed to trial. The clerk of courts entered a plea of not guilty on behalf of the corporation.

The inspector testified on behalf of the City that she had inspected the East 117th Street property and observed several code violations. She stated that she researched property records and determined that Destiny owned the house. The City entered the deed into evidence, which listed Destiny as the owner of the property. The inspector further testified that none of the violations had been corrected when she reinspected the property in August 2007 as well as on the morning of trial. The court convicted Destiny and ordered a fine of \$140,000.

On January 23, 2008, Destiny, through counsel, filed a motion for relief from judgment pursuant to Civ.R. 60(B), arguing that it no longer owned the subject property. Destiny also argued that it believed that another attorney

¹Destiny does not deny receiving the notice of code violation, the summons and complaint, nor the notice of arraignment date.

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would appear on its behalf at the trial and did not discover that the attorney had a conflict of interest and could not represent Destiny until a few days before trial.

The court denied Destiny's motion, finding that a Civ.R. 60(B) motion did not apply to a criminal proceeding. The court, in its lengthy opinion, stated that it decided to treat Destiny's motion as an argument for a more lenient sentence and found no reason to change the fine levied against Destiny.

Destiny appeals, raising three assignments of error for our review.

In the first assignment of error, Destiny argues that the trial court erred and abused its discretion by denying its motion for relief from judgment and by converting the motion into a motion to reduce sentence.

First, Destiny argues that the trial court should have considered its motion for relief from judgment. A motion for relief from judgment pursuant to Civ.R. 60(B), however, is a civil motion. The trial court correctly found that it is not applicable to a criminal trial. Crim.R. 57(B), however, allows a trial court in a criminal case to look to the Rules of Civil Procedure for guidance when no applicable Rule of Criminal Procedure exists. *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431. That being said, we must consider whether Destiny properly resorted to Civ.R. 60(B) in this case. In other words, we must determine whether the absence of an applicable criminal rule justified invoking

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a civil rule in its place. *Id.* at 156. The City contends, and we agree, that Crim.R. 33, which sets forth the procedure by which a criminal defendant can move for a new trial, was available to Destiny and serves the same purpose as the Civ.R. 60(B) motion which the corporation filed. Thus, in this case, it is not necessary to look to a civil rule or other applicable law for guidance in the manner which Crim.R. 57(B) intends, because a procedure "specifically prescribed by rule" exists, i.e., a Crim.R. 33 motion for a new trial.

Second, Destiny claims that the trial court's decision to convert its motion into a "motion to reduce sentence" denied the corporation an opportunity to be heard and to obtain legal counsel to represent its interests at trial. Destiny makes the presumptuous argument that the trial court erred because it did not convert its motion into a motion for a new trial. We disagree. Destiny's motion for relief from judgment is a nullity in this matter. The trial court could have summarily dismissed the motion. Even though it is within the lower court's discretion to "recast irregular motions into whatever category necessary to identify the criteria by which the motion should be judged," as the supreme court stated in *Schlee*, the court also retains jurisdiction not to recast the motion. And in this case, the court converted Destiny's motion. We do not agree with Destiny, however, that a trial court errs if it chooses to convert an irregular motion into

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a motion different from what the party now believes will best suit the case. We find this especially true when Destiny could have filed a Crim.R. 33 motion.

Thus, we cannot find that the trial court erred because it "failed" to take the corporation's irregular motion and convert it into a motion which would benefit the corporation. It is not incumbent on the trial court to convert an improperly captioned motion into one that will provide relief for a party nor is it the court's duty to make a party's arguments for them.

Therefore, the first assignment of error is overruled.

In the second assignment of error, Destiny argues that the trial court erred in proceeding to trial *in absentia* when the court was told that the corporation was attempting to obtain counsel. Destiny claims that because the trial court went forward with trial without its counsel present, the company was denied its right of confrontation. The record contains no filing by Destiny raising any defenses or seeking a continuance prior to the trial date.

R.C. 2941.47 prescribes the rules for summons on indictments for corporations. The statute provides, in part, that a "corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of 'not guilty.' Upon such appearance

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being made or plea entered, the corporation is before the court until the case is finally disposed of."

In this case, the trial court issued an order that stated that if a representative of Destiny failed to appear on the day of trial, the clerk of courts would enter a not guilty plea on behalf of the defendant and the case would immediately proceed to trial.

We do not agree with Destiny that the trial court's proceedings violated its right to confrontation. R.C. 2941.47 specifically states that once an appearance is made or a plea is entered, the corporation is before the court until the case is disposed of. The trial court issued an order informing Destiny that if a representative of the company failed to appear, the matter would proceed immediately to trial. Even though Destiny had notice of the hearing, no officer or attorney from Destiny appeared nor did any attorney file a notice of appearance in the case. Moreover, the company never filed a motion for continuance nor otherwise informed the court, prior to the trial date, that it was attempting to obtain counsel.

Therefore, we find no error in the court's decision to proceed to trial without a representative of Destiny present. The second assignment of error is overruled.

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In the third assignment of error, Destiny argues that the trial court erred in imposing a fine upon the company without first considering the factors set forth in R.C. 2929.22.

Failure to consider the sentencing criteria set forth in R.C. 2929.22 constitutes an abuse of discretion. *Richmond Heights v. Uy* (Oct. 19, 2000), Cuyahoga App. No. 77117, citing *Strongsville v. Cheriki* (March 4, 1999), Cuyahoga App. No. 73800. However, "when determining a misdemeanor sentence, R.C. 2929.22 does not mandate that the record reveal the trial court's consideration of the statutory sentencing factors. Rather, appellate courts will presume that the trial court considered the factors set forth in R.C. 2929.22 when the sentence is within the statutory limits, absent an affirmative showing to the contrary." *State v. Nelson*, 172 Ohio App.3d 419, 2007-Ohio-3459, 875 N.E.2d 137, citing *State v. Kelly*, Greene App. No. 2004CA122, 2005-Ohio-3058; see, also, *Uy*.

Cleveland Codified Ordinance 3103.99(a) and (c) allow the court to sentence a corporation to a fine of up to \$5,000 each day that a property is not in compliance. The court in this case computed the time not in compliance to be fifty-six days. Then the court elected to impose only one-half of the maximum fine, or \$140,000. Thus, the sentence imposed in this case is within the statutory limits for a first degree misdemeanor. See R.C. 2929.24(A)(1).

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To support its argument that the court did not follow the mandate of R.C. 2929.22, Destiny cites our decision in *Cleveland v. Cuyahoga Lorain Corp.*, Cuyahoga App. No. 82823, 2004-Ohio-2563. That case is easily distinguishable. In that case, the trial court asked the corporation about its ability to pay. Despite being told that there were few assets, the court ordered a fine of \$75,000 due in one month's time. We found an abuse of discretion based on the circumstances of that case. *Id.* Because there was clear factual evidence that the corporation would have difficulty paying the fine, we found that the failure to take into consideration the corporation's ability to pay was an abuse of discretion.

There is no evidence in the instant case, however, that the trial court failed to consider the appropriate factors. Moreover, Destiny has failed to bring forth any evidence to rebut the presumption that the trial court considered all the factors in R.C. 2929.22.

Therefore, the third assignment of error is overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS;
ANTHONY O. CALABRESE, JR., J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION.

ANTHONY O. CALABRESE, JR., J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority's disposition of the first and third assignments of error, but respectfully dissent with the resolution of the second assignment of error. Here, without the benefit of supporting authority, the Housing Court interpreted R.C. 2941.47 to authorize trials *in absentia*. However, I believe such interpretation goes against well established constitutional principles, rules of criminal procedure, and case law that an accused has the right to be present at all critical stages of a criminal proceeding when the defendant's absence would adversely affect the fairness of the proceeding. See *Kentucky v. Stincer* (1987),

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482 U.S. 730, 745; *State v. Davis*, 116 Ohio St.3d 404, 417, 2008-Ohio-2; Section 10, Article I, Ohio Constitution. Accordingly, I would have sustained appellant's second assignment of error.

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Date of Printing: Apr 03, 2009

KEYCITE

▷ **Cleveland v. Destiny Ventures, L.L.C.**, 2008 WL 4175026, 2008-Ohio-4587 (Ohio App. 8 Dist., Sep 11, 2008) (NO. 91018)

History**Direct History**

Page 2 of 2

⇒ 1 **Cleveland v. Destiny Ventures, L.L.C.**, 2008 WL 4175026, 2008-Ohio-4587 (Ohio App. 8 Dist. Sep 11, 2008) (NO. 91018)

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Stay Granted by

■ 2 **Cleveland v. Destiny Ventures, L.L.C.**, 120 Ohio St.3d 1439, 897 N.E.2d 670, 2008-Ohio-6376 (Ohio Dec 09, 2008) (Table, NO. 2008-2230)

AND Appeal Allowed by

■ 3 **Cleveland v. Destiny Ventures, L.L.C.**, 121 Ohio St.3d 1407, 902 N.E.2d 32, 2009-Ohio-805 (Ohio Mar 04, 2009) (Table, NO. 2008-2230)

Court Documents**Dockets (U.S.A.)****Ohio**

4 **CITY OF CLEVELAND v. DESTINY VENTURES, LLC**, NO. 2008-2230 (Docket) (Ohio Nov. 17, 2008)

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Appendix 15

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

CITY OF CLEVELAND
Plaintiff(s)

-VS-

DESTINY VENTURES,
Defendant(s)

DATE: January 2, 2008

CASE NO.: 07-CRB-42411

JUDGMENT ENTRY

*sent
1-14-08*

This case is before the Court on the City's criminal complaint alleging violations of the City's Building Code, regarding the property located at 3677 East 117th St., Cleveland, Ohio. The notice of violation was issued by Inspector Brownlee on August 6, 2007. A review of the record reveals that the complaint was served upon the defendant. The case initially was set for hearing on December 6, 2007; however the defendant failed to appear at that hearing, and since that time, has not appeared in Court to answer the charges against it.

When an organization, served with notice of the criminal charges, fails to appear to answer the charges, the Clerk of Court is required to enter a plea of "not guilty" on the corporation's behalf. R.C. 2941.47. Accordingly, the prosecution may try its case against the defendant in absentia. If the Court concludes that the defendant is guilty, the Court may enter such a finding, and proceed to sentencing and execution. Id.

In this case, the defendant has been served, and has failed to appear and plead. Therefore, the Clerk is required to enter a not guilty plea on the defendant's behalf.

This case is set for trial on **January 14, 2008, at 1:00 p.m.** on the **13th floor**. A representative of the Clerk of Court shall be present on that date. Should the defendant fail to appear, the Clerk shall enter a not guilty plea on behalf of the defendant, and this case shall proceed to trial immediately. Should the defendant appear and plead not guilty, the Court will either proceed to trial on that date, or, in the alternative, conduct an immediate pretrial.

JUDGE RAYMOND L. PLANKA

SERVICE

A copy of this judgment entry was sent by regular U.S. mail to the following on

1 / 3 / 22

Counsel for Plaintiff

Michele Comer
601 Lakeside
City Hall - Room 106
Cleveland, OH 44114

Defendant and its Representative(s)

Destiny Ventures, LLC
5800 E. Skelly Drive, #1101
Tulsa, OK 74135

Corporation Service Co.
115 S W 89th Street
Oklahoma City, OK 73139-8511

STATE OF OHIO,)
COUNTY OF CUYAHOGA,)SS: PIANKA, R. L., J.
1 CITY OF CLEVELAND,)
2
3

4 IN THE MUNICIPAL COURT

5
6 CITY OF CLEVELAND,)
7 Plaintiff,)
8 vs.)
9)
10 DESTINY VENTURES)Case No.2007CRB0042411
11 Defendant.)
12
13

14 TRANSCRIPT OF PROCEEDINGS
15

16 APPEARANCES:

17 On behalf of the plaintiff:

18 Patricia McGinty-Aston, Assistant Law Director

19 City Hall, 601 Lakeside Avenue

20 Cleveland, Ohio 44113

21 On behalf of defendant:

22 PRO SE

23
24 Cleveland, Ohio 44113

25 OFFICIAL COURT REPORTERS
CLEVELAND MUNICIPAL COURT
CLEVELAND, OH 44113

1 compliance. Madame Prosecutor, we did have this property in court before, did
2 we not? EMC?

3 MRS. MCGINTY-ASTON: We are currently working on a case
4 before this Court for EMC. We're scheduled to come back this Wednesday. We
5 are undergoing plea negotiations. They are a previous owner to Destiny Ventures.

6 THE COURT: So EMC Mortgage Corporation has
7 also been cited for this? This is a predecessor owner?

8 MRS. MCGINTY-ASTON: EMC is a predecessor owner.
9 Destiny Ventures is currently the owner and still today the owner.

10 THE COURT: All right. Based upon the finding of
11 guilty, days out of compliance, \$140,000.00 on a finding of guilty. This property
12 is in deplorable condition. There are for sale signs that have been tacked on this
13 property. You can call the phone number of 803-530-8578; owner finances with
14 \$500.00 down and \$300.00 a month. Not only did they tack them on this property
15 in which the porch appears to be collapsing. They even nailed them on the City's
16 shade tree. This fine of \$140,000.00 is ordered into civil collection and
17 execution.

18 Court is adjourned.
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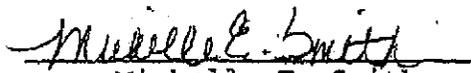
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C E R T I F I C A T E

State of Ohio,)
County of Cuyahoga,) SS:
City of Cleveland.)
City of Cleveland,) 2007CRB0042411
vs.)
DESTINY VENTURES)

I, Michelle E. Smith, Court Reporter, do hereby certify that as a reporter employed by the Cleveland Municipal Court, I took down in stenotype all of the proceedings had in said Cleveland Municipal Court in the above-entitled case on the date set forth; that I have transcribed my said stenotype notes into typewritten form as appears in the foregoing transcript of the proceedings; that said transcript is a complete record of the proceedings had in the hearing of said case and constitutes a true and correct record of the proceedings had therein.

Dated this 29th day of February, 2008


Michelle E. Smith
Court Reporter

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 Not Reported in N.E.2d, 1996 WL 257478 (Ohio App. 8 Dist.)
 (Cite as: 1996 WL 257478 (Ohio App. 8 Dist.))

Page 1

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 Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
 Cuyahoga County.
 STATE of Ohio, Plaintiff-Appellee
 v.
 Claude M. MEADE, Defendant-Appellant.
 No. 69533.

May 16, 1996.

Criminal appeal from Common Pleas Court, Case
 No. CR-302906.

Stephanie Tubbs Jones, Cuyahoga County Prosec-
 utor and Diane Smilanick, Assistant County Prosec-
 utor, Cleveland, for plaintiff-appellee.

James A. Draper, Cuyahoga County Public Defend-
 er and Donald Green, Assistant County Public De-
 fender, Cleveland, for defendant-appellant.

JAMES D. SWEENEY, Judge:

*1. Defendant-appellant Claude M. Meade ("Meade," d.o.b. December 20, 1962) appeals from his jury trial conviction of one count of Carrying a Concealed Weapon [R.C. 2923.12], and one count of Having a Weapon While Under a Disability [R.C. 2923.13] with a firearm specification. For the reasons adduced below, we reverse and remand.

A review of the record on appeal indicates that Meade was arrested for the offenses previously mentioned on October 10, 1993. He was charged and released from jail on bond on October 12, 1993. He was indicted on January 5, 1994.^{FN1}

FN1. The indictment was for the offenses named previously including a violence

specification on each count for a prior Felonious Assault conviction.

The original arraignment of January 20, 1994, was reset to January 28, 1994, at defendant's request. Meade failed to appear at the rescheduled arraignment and the trial court issued a *capias*. Meade was arrested on February 18, 1994, on the *capias*, was arraigned on the original indictment where he pled Not Guilty and had the Public Defender's Office assigned to represent him, and released again after making his bond.

Three successive pretrial conferences were held in March, 1994. Meade and his assigned counsel were present at each of these pretrials. At the second pretrial held on March 18, 1994, the trial date was scheduled for April 4, 1994, at 9:30 a.m.. This trial date was reaffirmed at the third pretrial conducted on March 31, 1994.

On the date of the trial, sometime prior to the scheduled starting time, Meade and his counsel were present in the courtroom. A number of prospective jury members had been ordered up from the pool of potential jurors in the downstairs main jury room, had not been brought into the courtroom to be impanelled, and at that point were waiting in the jury room attached to the courtroom to be called for the start of the voir dire process.

While Meade was waiting in the courtroom, defense counsel apparently met with the prosecution in chambers where a plea bargain was discussed. Defense counsel left these negotiations and returned to the courtroom to transmit the proposed plea bargain to his client. At this point, after having been told of the substance of the plea bargain (guilty to carrying a Concealed Weapon with a violence specification) and that the sentence would include imprisonment, Meade, against the advice of counsel, announced that he was going downstairs to get something to eat. Before Meade could leave the courtroom, defense counsel told Meade that he

Not Reported in N.E.2d
 Not Reported in N.E.2d, 1996 WL 257478 (Ohio App. 8 Dist.)
 (Cite as: 1996 WL 257478 (Ohio App. 8 Dist.))

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(defense counsel) was going back to chambers to attempt to obtain a better plea bargain. When defense counsel returned to the courtroom with a slightly better plea bargain offer (guilty to Carrying a Concealed Weapon, a definite term third degree felony, with no specifications), Meade was nowhere to be found.

The trial Court (Judge Timothy McGinty) waited until approximately 10:15 a.m. before announcing that as far as the Court was concerned, the trial had started and that Meade would be tried *in absentia*. The Court then conducted its voir dire of the prospective jury panel and impanelled the jury. The defense then objected to the continuation of the trial in defendant's absence. This motion was overruled. Before recessing before noon, the Court advised defense counsel and the sheriff's office to attempt to contact the defendant overnight and secure his attendance for the morning proceedings. The trial reconvened on Tuesday, April 5, 1994, at 10:15 a.m.. Despite attempts by counsel and law enforcement officials to contact the defendant, Meade was still absent. Over the renewed objections of defense counsel, the trial Court resumed the trial without the presence of the defendant. Following the presentation of evidence by the prosecution (the defense offered no evidence or testimony) the jury returned its verdict of guilty.

*2 Meade was again arrested on July 31, 1995. At Meade's bond hearing on August 1, 1995, Meade admitted that he voluntarily left the courtroom on the scheduled trial date after seeing the witnesses against him, knew that persons had tried to contact him to obtain his attendance at the trial which would proceed in his absence, and expressed his innocence.

On August 3, 1995, Meade was sentenced to: (1) 3 years of actual incarceration on the firearm specification; (2) 1 and 1/2 years for Carrying a Concealed Weapon as charged in count one; (3) 2 years for Having a Weapon While Under a Disability as charged in count two; (4) a total fine of \$7,500.00; and, (5) the sentences on each of the counts to run

consecutive, and these sentences to run consecutive to the sentence on the firearm specification.

This timely appeal followed presenting two assignments of error.

I

THE TRIAL COURT ERRED IN VIOLATION OF R.C. 2945.12, CRIM.R. 43(A), SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHEN THE COURT PROCEEDED WITH THE TRIAL WITHOUT THE APPELLANT BEING PRESENT.^{FN2}

FN2. R.C. 2945.12 provides in pertinent part:

A person indicted for a misdemeanor, upon request in writing subscribed by him and entered in the journal, may be tried in his absence by a jury or by the court. *No other person shall be tried unless personally present*, but if a person indicted escapes or forfeits his recognizance *after the jury is sworn*, the trial shall proceed and the verdict be received and recorded. * * *. If the offense charged is a felony, *the case shall be continued until the accused appears in court, or is retaken.* (Emphasis added.)

Crim.R. 43(A) provides in pertinent part:

(A) Defendant's presence. The defendant *shall be present at the arraignment and every stage of the trial*, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the voluntary absence *after the trial has commenced in his presence* shall not prevent continuing the trial to and including the verdict. * *

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 Not Reported in N.E.2d, 1996 WL 257478 (Ohio App. 8 Dist.)
 (Cite as: 1996 WL 257478 (Ohio App. 8 Dist.))

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*. (Emphasis added.)

As was recently expressed in *State v. Hill* (August 30, 1995), 73 Ohio St.3d 433, 444, citing Section 10, Article I, Ohio Constitution, and Crim.R. 43(A), a defendant "has a fundamental right to be present at all critical stages of his criminal trial." However, R.C. 2945.12 and Crim.R. 43(A) provide for the waiver of defendant's fundamental right to be present. From the clear language of this statute and rule, this waiver is conditioned upon whether the trial had already commenced at the time of the defendant's absence from the trial. In addition, Crim.R. 1(A) mandates that the procedure contained in Crim.R. 43(A) be exercised in criminal case jurisdiction. ^{FN3}

FN3. Crim.R. 1(A) provides:

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in subdivision (C) of this rule. (Note—the exceptions in subdivision [C] are inapplicable to the present case.)

In the present case, we find *Crosby v. United States* (1993), 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25, to be compelling authority. In *Crosby*, the Court applied Fed.R.Crim.P. 43 ^{FN4} to a case where a defendant, although having had knowledge of the trial date, failed to appear at the courtroom at the appointed trial date and time, thereby voluntarily absented himself prior to the start of the trial. The defendant in *Crosby* was tried *in absentia* and convicted. The Circuit Court affirmed the District Court. The Supreme Court of the United States reversed, noting at 113 S.Ct. at 753, that:

FN4. Fed.R.Crim.P. 43, from which Ohio's Crim.R. 43(A) is drawn, provides in pertinent part:

(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* Emphasis added.)

The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present *at the beginning of trial*. (Emphasis added.)

The prosecution, without mentioning *Crosby*, attempts to rely on several cases to support the notion that the trial *in absentia* in the present case was proper. These cases are readily distinguishable from the facts of the present case. In *Diaz v. United States* (1912), 223 U.S. 442, and *Falk v. United States* (1899), 181 U.S. 618, unlike the present case, the defendants absented themselves *after* the jury had been sworn in, thereby permitting the application of waiver to the defendants' right to be present at trial. The case of *United States v. Tortora* (2d Cir.1972), 464 F.2d 1202, cert. denied at 409 U.S. 1063, which permitted a trial *in absentia* of a defendant who, despite having notice of the trial date beforehand and no justifiable reason for not attending the trial, had absented himself before the jury was impaneled, has been impliedly overruled by the application of *Crosby v. United States*, *supra*. The final case, *State v. Wolford* (December 21, 1978), Cuyahoga App. No. 38110, unreported, unlike the case at issue, involved a defendant's voluntary absence after the trial had begun.

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 Not Reported in N.E.2d, 1996 WL 257478 (Ohio App. 8 Dist.)
 (Cite as: 1996 WL 257478 (Ohio App. 8 Dist.))

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*3 In the present case, contrary to the asseverations of the trial court and the prosecution, the trial had not yet commenced at the time the defendant voluntarily absented himself from the courtroom. At the time of his absence, the voir dire of the prospective jurors had not even begun. Those prospective jurors were not yet even in the courtroom, let alone impaneled/sworn in. Accordingly, the trial *in absentia* in this case was an improper violation of defendant's right to be present at the time of his trial, the conviction must therefore be vacated and the matter remanded to the trial court for further proceedings.

begin to run.

Ohio App. 8 Dist., 1996.
 State v. Meade
 Not Reported in N.E.2d, 1996 WL 257478 (Ohio App. 8 Dist.)

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The first assignment of error is affirmed.^{FNS}

FN5. The second assignment of error, which alleges error in the sentencing of the defendant to three years actual imprisonment for the firearm specification where the underlying sentence was allegedly a definite term rather than an indefinite term, is moot by virtue of our holding in the first assignment, *infra*, and will not be addressed. App.R. 12(A)(1)(c).

Judgment reversed and remanded.

This cause is reversed and remanded.

It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

SPELLACY, C.J., and PORTER, J., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will

Westlaw.

Date of Printing: Apr 03, 2009

KEYCITE**H** State v. Meade, 1996 WL 257478 (Ohio App. 8 Dist., May 16, 1996) (NO. 69533)**History****Direct History**

- => 1 State v. Meade, 1996 WL 257478 (Ohio App. 8 Dist. May 16, 1996) (NO. 69533)
Appeal Allowed by
- H** 2 State v. Meade, 77 Ohio St.3d 1478, 673 N.E.2d 141 (Ohio Dec 18, 1996) (Table, NO. 96-1549)
AND Judgment Affirmed by
- H** 3 State v. Meade, 80 Ohio St.3d 419, 687 N.E.2d 278, 1997-Ohio-332 (Ohio Dec 24, 1997) (NO. 96-1549)

Court Documents**Appellate Court Documents (U.S.A.)****Ohio Appellate Briefs**

- 4 STATE OF OHIO, Plaintiff-Appellant, v. Claude MEADE, Defendant-Appellee., 1996 WL 33579274 (Appellate Brief) (Ohio Jul. 11, 1996) *State's Response to Appellee's Motion to Dismiss* (NO. 96-1549)
- 5 STATE OF OHIO, Appellant, v. Claude MEADE, Appellee., 1997 WL 33709421 (Appellate Brief) (Ohio Mar. 28, 1997) *Appellee's Merit Brief* (NO. 96-1549)

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Appendix 25

THE STATE OF OHIO, APPELLANT, v. MEADE, APPELLEE.

[Cite as *State v. Meade* (1997), 80 Ohio St.3d 419.]

Criminal procedure — Jury trial commences after jury is impaneled and sworn in the presence of the defendant — Crim.R. 43(A), construed and applied.

A jury trial commences after the jury is impaneled and sworn in the presence of the defendant. (Crim.R. 43[A], construed and applied.)

(No. 96-1549 — Submitted October 8, 1997 — Decided December 24, 1997.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 69533.

In October 1993, appellee, Claude M. Meade, a.k.a. Michael Meade, was arrested in a bar in Cleveland, Ohio. During a pat-down search of Meade, a handgun was found in his right rear pants pocket.

Following his arrest, Meade was released on bond. On January 5, 1994, Meade was indicted by the Cuyahoga County Grand Jury for carrying a concealed weapon (count one) and having a weapon while under disability (count two). Both counts carried a specification that in 1985 Meade had been convicted of an offense of violence. Count two also included a firearm specification.

Thereafter, Meade failed to appear for his rescheduled arraignment date, and a *capias* was issued for his arrest. He was eventually arrested, jailed, and arraigned. At his arraignment, Meade pled not guilty to the charges in the indictment. He was assigned a public defender and again released on bond.

In March 1994, Meade attended three pretrial conferences. He was informed that his trial was to begin on April 4, 1994. On the day of trial, defense counsel and counsel for appellant, the state of Ohio, discussed possible plea agreements. After initial plea discussions, defense counsel informed Meade that his sentence would likely include imprisonment. Meade then told his attorney that he was going to the cafeteria to get something to eat. Meade was advised by his

counsel not to leave, but, while further plea negotiations were being conducted, Meade absconded. During this time, potential jurors were awaiting voir dire proceedings, the state's witnesses had appeared, and counsel and court personnel were present.

After delaying trial for nearly one hour, the trial judge announced that "as far as I'm concerned, the trial has started. It started here at 9:30 [a.m.]. * * *

"Now, we're starting without him. Now, we're going to pick the jury this morning."

The jury was then impaneled and sworn and a capias was issued for Meade's arrest. The trial judge then adjourned court for the day.

The next day, Meade did not appear for his trial nor could he be found. The trial proceeded without Meade over defense counsel's continuing objection. The jury found Meade guilty of the offenses of carrying a concealed weapon and having a weapon while under disability. The jury also found him guilty of the firearm specification.

Meade was subsequently arrested and sentenced to two years on the concealed weapon conviction and one and one-half years for having a weapon while under disability. The trial court ordered the sentences to run consecutively. Meade was also sentenced to three additional years of actual incarceration on the firearm specification and he was fined \$7,500.

Upon appeal, the court of appeals reversed Meade's convictions and remanded the cause to the trial court. The court of appeals held that Meade's trial had not officially commenced at the time he disappeared from the courtroom and that the trial court erred in proceeding with the trial in Meade's absence.

The cause is now before this court upon the allowance of a discretionary appeal.

Stephanie Tubbs Jones, Cuyahoga County Prosecuting Attorney, *George J. Sadd* and *Diane Smilanick*, Assistant Prosecuting Attorneys, for appellant.

James A. Draper, Cuyahoga County Public Defender, and *Donald Green*, Assistant Public Defender, for appellee.

DOUGLAS, J. The trial court concluded, and the state contends, that by the time Meade absented himself from the courtroom, Meade's trial had already commenced for purposes of Crim.R. 43(A), and, accordingly, it was proper to proceed with Meade's trial in his absence. We disagree.

Crim.R. 43(A) provides:

"Defendant's Presence. The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, *the defendant's voluntary absence after the trial has been commenced in his presence* shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes." (Emphasis added.)

Crim.R. 43(A) requires that the defendant be present "at the arraignment and every stage of the trial * * *." See, also, *State v. Hill* (1995), 73 Ohio St.3d 433, 444, 653 N.E.2d 271, 281 (The defendant "has a fundamental right to be present at all critical stages of his criminal trial."). However, the defendant's right to be present at trial is not absolute. Crim.R. 43(A) also establishes that the defendant's voluntary absence "after the trial has been commenced in [the defendant's] presence" is deemed a waiver of the right to be present. In other words, the right to be present at trial may be waived by the defendant's own act.

The court of appeals in the case at bar concluded that the trial had not officially "commenced" at the time Meade fled the courtroom because "[a]t the time of his absence, the voir dire of the prospective jurors had not even begun. Those prospective jurors were not yet even in the courtroom, let alone impaneled/sworn in." The court of appeals therefore concluded that "the trial *in absentia* in this case was an improper violation of defendant's right to be present at the time of his trial * * *."

In reaching this conclusion, the court of appeals relied heavily on *Crosby v. United States* (1993), 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25, wherein the Supreme Court, interpreting analogous former Fed.R.Crim.P. 43,¹ held that the rule prohibits trial of a defendant who was not present at the beginning of the trial. In *Crosby*, the petitioner (Crosby) and others were indicted on several counts of mail fraud. Crosby attended various pretrial conferences and was informed of his trial date. Crosby, however, did not appear for his trial. A search for Crosby ensued and, after several days of delay, the trial court permitted the proceedings to go forward in his absence. The jury returned guilty verdicts on charges against Crosby, and he was subsequently arrested and sentenced. On appeal, the court of appeals affirmed the convictions, rejecting Crosby's argument that the trial was precluded by Fed.R.Crim.P. 43. The Supreme Court disagreed with the appellate court and held that "[t]he language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant *who is not present at the beginning of trial.*" (Emphasis added.) *Id.* at 262, 113 S.Ct. at 753, 122 L.Ed.2d at 33. The court in *Crosby* commented that the federal rule made a logical distinction between pretrial and midtrial flights because "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.” *Id.*, 506 U.S. at 261, 113 S.Ct. at 752, 122 L.Ed.2d at 32.

The *Crosby* court also noted that under the common law, felony defendants generally had an unwaivable right to be present at trial and that an exception to this rule, set forth in Fed.R.Crim.P. 43, stemmed from the court’s holding in *Diaz v. United States* (1912), 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500. *Crosby*, 506 U.S. at 259-260, 113 S.Ct. at 751, 122 L.Ed.2d at 31. In the case now before us, the state relies on *Diaz* for the proposition that Meade’s trial in his absence was proper because, by absconding, Meade waived his right to be present.

However, we agree with the court of appeals that the state’s reliance on *Diaz* is misplaced. In *Diaz*, the defendant had absented himself voluntarily on two occasions *from the later stages of his ongoing trial*. The court in *Diaz* concluded that the trial properly proceeded in his absence because it did “ ‘not seem * * * to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial *already commenced*.’ ” (Emphasis added.) *Id.*, 223 U.S. at 457, 32 S.Ct. at 254, 56 L.Ed. at 506, quoting *Falk v. United States* (1899), 15 App.D.C. 446, 454. The court in *Diaz* also stated:

“[W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, *after the trial has begun in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.” (Emphasis added.) *Id.*, 223 U.S. at 455, 32

S.Ct. at 254, 56 L.Ed. at 505, citing, among other authorities, *Fight v. State* (1835), 7 Ohio 180, Pt. I.

In *Fight*, this court held that where a trial is already *in progress*, and the defendant absconds, it is proper to proceed with the trial in his or her absence. In *Fight*, the defendant was present for the first day of his jury trial and testimony was taken. The next morning, however, the defendant failed to appear. Trial proceeded in his absence and the jury found the defendant guilty. Notably, this court in *Fight* indicated that the trial court did not err in proceeding with the trial because the jury had been impaneled *before* the defendant absconded. Specifically, Justice Wood, speaking for the court, reasoned that “[i]f on bail, I apprehend, neither the courts in Great Britain, nor the United States, *would proceed to impanel a jury, in a trial for felony, unless the accused were present*, to look to his challenges. If the trial, however, *is once commenced*, and the prisoner in his own wrong *leaves the court, abandons his case to the management of counsel and runs away*, I can find no adjudged case to sustain the position, that, in England, the proceedings would be stayed.” (Emphasis added in part.) *Id.* at 182-183.

We believe that the holdings in *Crosby*, *Diaz* and *Fight* support the court of appeals’ finding that Meade’s felony jury trial in his absence was improper. In addition, the court of appeals’ determination is consistent with the mandates of R.C. 2945.12, which provides:

“A person indicted for a misdemeanor, upon request in writing subscribed by him and entered in the journal, may be tried in his absence by a jury or by the court. *No other person shall be tried unless personally present, but if a person indicted escapes or forfeits his recognizance after the jury is sworn, the trial shall proceed and the verdict be received and recorded.* If the offense charged is a

misdemeanor, judgment and sentence shall be pronounced as if he were personally present. If the offense charged is a felony, the case shall be continued until the accused appears in court, or is retaken." (Emphasis added.)

R.C. 2945.12 is clear. The statute permits the trial of accused felons in absentia only if their voluntary absence occurred *after* the jury has been sworn.

Moreover, we also note that the conclusion reached by the court of appeals in this case is consistent with the law regarding the Fifth Amendment protection against double jeopardy. See, e.g., *Crist v. Bretz* (1978), 437 U.S. 28, 35, 98 S.Ct. 2156, 2161, 57 L.Ed.2d 24, 31; and *United States v. Martin Linen Supply Co.* (1977), 430 U.S. 564, 569, 97 S.Ct. 1349, 1353, 51 L.Ed.2d 642, 650 (Jeopardy attaches when the jury is impaneled and sworn, or, in a bench trial, when the judge begins to receive evidence). In this regard, we find that the better course is to remain uniform with an area of the law that is firmly rooted in our system of jurisprudence.

The court of appeals' decision that Meade's trial had not officially commenced at the time Meade absented himself is supported by case law and the plain language of both R.C. 2945.12 and Crim.R. 43(A). A jury trial commences after the jury is impaneled and sworn in the presence of the defendant. Here, Meade fled before the jury had been impaneled and sworn. The trial court should have continued the proceedings until Meade reappeared or was apprehended on the *capias*.

Accordingly, we affirm the judgment of the Cuyahoga County Court of Appeals and remand the cause to the trial court for further proceedings not inconsistent with this opinion.

*Judgment affirmed
and cause remanded.*

MOYER, C.J., RESNICK, F.E. SWEENEY, PFBIFBR, COOK and LUNDBERG
STRATTON, JJ., concur.

FOOTNOTE:

1. Fed.R.Crim.P. 43 currently provides:

“(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, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

“(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial),

“(2) in a noncapital case, is voluntarily absent at the imposition of sentence,
or

“(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

“(c) Presence Not Required. A defendant need not be present:

“(1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;

“(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the

defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

“(3) when the proceeding involves only a conference or hearing upon a question of law; or

“(4) when the proceeding involves a correction of sentence under Rule 35.”

[Cite as *State v. Moore*, 2006-Ohio-816.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 86224

STATE OF OHIO

Plaintiff-Appellee :

vs.

JOHN MOORE, JR. :

Defendant-Appellant :

JOURNAL ENTRY

and

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

February 23, 2006

CHARACTER OF PROCEEDING:

Civil appeal from
Common Pleas Court
Case No. CR-392440

JUDGMENT:

SENTENCE VACATED; CASE
REMANDED FOR RESENTENCING

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON
Cuyahoga County Prosecutor
T. ALLAN REGAS, Assistant
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant:

TERRY H. GILBERT
Friedman & Gilbert
1370 Ontario Street, #1700

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, John Moore, Jr. (“Moore”), appeals his sentence. Finding merit to the appeal, we vacate his entire sentence and remand for a complete resentencing.

{¶ 2} In 2000, Moore was convicted of aggravated robbery and two counts of kidnapping and was sentenced to 33 years in prison. This court affirmed Moore’s convictions but reversed the imposition of consecutive sentences because the trial court failed to make the proportionality finding required for imposing consecutive sentences. *State v. Moore*, Cuyahoga App. No. 78751, 2002-Ohio-1831 (“*Moore I*”). The matter was remanded for resentencing.

{¶ 3} Prior to resentencing in 2005, the trial court sua sponte ordered the resentencing hearing to be conducted via “video teleconference.” Moore objected, arguing that video conferencing violated his right to be physically present at his sentencing hearing. The court overruled his objections and denied Moore’s motion to be physically present. At resentencing, the court imposed its original sentence of 33 years in prison.

{¶ 4} Moore appeals, raising four assignments of error. Because we find his third assignment of error dispositive, we will address it first.

Physical Presence at Sentencing

{¶ 5} Moore argues in his third assignment of error that the trial court erred in denying him his right to be physically present at sentencing.

{¶ 6} At the sentencing hearing, the trial court explained that the hearing was conducted via video conference for “security reasons,” stating:

“[T]he court will take judicial notice of the entries of the convictions, subsequent convictions, and the fact that the defendant has had a horrific series of problems for whatever reason with the local county sheriff when he comes back here, and with their officers when he comes back. So for security reasons I have left Mr. Moore in Ross Correctional. It doesn’t make any sense to bring him back and forth. The record will speak for itself and for the various reasons why he was here and why the proceedings couldn’t go forward before.” (Tr. 45).

*** * ***

“It’s been a very interesting experience and it’s saved the county the expense, money, and far more importantly the exposure to further danger to its employees at the county jail by this process. And I hope it will deter others who have engaged in violent and intimidating behavior to be forewarned that should they do so, they may forfeit their opportunity to appear in person at the court.” (Tr. 54-55).

{¶ 7} Moore argues that his exclusion violated his right to be physically present at sentencing. We agree.

{¶ 8} The Confrontation Clause of the Sixth Amendment provides “[I]n all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witness against him.” The United States Supreme Court has held that one of the most basic rights guaranteed by the Confrontation Clause is a defendant’s correlative right to be present in the courtroom at every stage of the trial. *Illinois v. Allen* (1970), 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353. Moreover, Crim.R. 43(A) and Section 10, Article I of the Ohio Constitution, mandate a defendant’s presence at every stage of the criminal proceedings. See, *State v. Marshall*, Lucas App. No. L-00-1381, 2002-Ohio-4826. Although there is no Confrontation Clause right at sentencing, the broad scope and protection offered by Crim.R. 43 embodies the constitutional guarantee under the Confrontation Clause. See, *State v. Wright* (July 29, 1994), Scioto App. No. 93CA2110; *Lindh v. Murphy* (7th Cir.,

1996), 96 F.2d 856, 870, rev'd on other grounds, (1997), 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481.

{¶ 9} Crim.R. 43(A) requires a defendant to be present at “every stage of the trial, including * * * the imposition of sentence, except as otherwise provided by these rules.”

Crim.R. 43(B) permits a court to exclude a defendant from any stage of a hearing or trial for disruptive conduct. Crim.R. 43(B) provides:

“Where a defendant’s conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with his continued presence, the hearing or trial may proceed in his absence, and judgment and sentence may be pronounced as if he were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.”

{¶ 10} A defendant’s presence is required at trial unless he waives his right or extraordinary circumstances exist requiring exclusion, such as misconduct. *State v. Brown*, Richland App. No. 2003-CA-01, 2004-Ohio-3368, citing *State v. Williams* (1983), 6 Ohio St.3d 281, 286, 452 N.E.2d 1323.

{¶ 11} A defendant may lose his right to be present at trial if, after he has been warned, he continues to conduct himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot proceed with him in the courtroom. *Brown*, supra ¶ 75, citing *Allen*, supra at 343. Once lost, however, the right to be present can be reclaimed as soon as the defendant is willing to conduct himself with proper decorum and respect. *Id.*

{¶ 12} In the instant case, the court conducted the resentencing hearing by video conference. Although Moore was able to see and hear the proceedings being conducted, he was not physically present in the courtroom or with his trial counsel.

{¶ 13} Therefore, the issue before this court is whether the use of video conferencing at sentencing violates the provision of Crim.R. 43(A), which requires a defendant to be “present” at the imposition of sentence. This case appears to be one of first impression in Ohio; thus, we will look to other courts for guidance.¹

{¶ 14} In *United States v. Navarro* (5th Cir. 1999), 169 F.3d 228, the court held that sentencing a defendant by video conference does not comply with Fed.R.Crim.P. 43 because the defendant is not “present.” In making this determination, the court analyzed Rule 43 and the definition of “presence.”

{¶ 15} The court found that the common-sense meaning of “presence” is “physical existence in the same place * * *. The common-sense understanding of the definition is that a person must be in the same place as others in order to be present.” *Id.* at 236. In reviewing the context of the language in Rule 43, the court stated:

“*The scope of the protection offered by Rule 43 is broader than that offered by the Constitution, and so the term ‘present’ suggests a physical existence in the same location as the judge. This means that, for the purposes of sentencing, a defendant must be at the same location as the judge to be ‘present.’ Considering the context of the term ‘present’ in Rule 43(a) indicates that a defendant must physically be in the courtroom.**

The context of the rest of Rule 43 supports the interpretation that ‘presence’ means a defendant’s physical presence in court. The language of 43(b) is instructive to the meaning of ‘presence’ in 43(a), because 43(b) defines the

¹ We recognize that there are instances in which Ohio courts have upheld the use of video conferencing. *State v. Phillips*, 74 Ohio St.3d 72, 1995-Ohio-171, 656 N.E.2d 643 (arraignments conducted by video conference permissible); *Wilkins v. Wilkinson*, 157 Ohio App.3d 209, 2004-Ohio-2530, 809 N.E.2d 1206 (video conferencing at parole hearing permissible).

situations in which a defendant waives the right to be present. Rule 43(b) states that ‘the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, . . . after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.’ The words ‘initially present’ indicate that the defendant is physically in the courtroom, and may be removed or excluded ‘from the courtroom’ for certain behavior.” *Id.* at 237. (Citations omitted).

{¶ 16} See, also, *United States v. Lawrence* (4th Cir. 2001), 248 F.3d 300 (followed *Navarro* and found that physical presence at sentencing ensures a defendant the right to consult with counsel, to confront adverse witnesses, and one last chance to plead his case and any mitigating evidence); *United States v. Torres-Palma* (10th Cir. 2002), 290 F.3d 1244 (followed *Navarro* and *Lawrence* and held that the use of video conferencing at sentencing is not a substitute for physical presence of a defendant unless an exception applies).

{¶ 17} We find these federal court decisions persuasive and conclude that “present” or “presence” as used in Crim.R. 43 means physically present.² Crim.R. 43(B) expressly provides that where a defendant’s conduct is so disruptive that the hearing cannot reasonably be conducted “with his continued presence,” the court may exclude the

² The Ohio Supreme Court has stated that “in all relevant aspects, Fed.R.Crim.P. 43(a) is virtually identical to Ohio Crim.R. 43(A).” *Williams*, *supra* at 287.

defendant. Therefore, we can logically conclude that the defendant must initially have been able to be physically present.

{¶ 18} In the instant case, the trial court did not first conduct a hearing or inquire of Moore whether he could be present at sentencing without disruption or disorderly behavior before the court sua sponte physically excluded him from the courtroom. Moreover, the record does not reveal whether the trial court warned Moore prior to the hearing as to the possibility that he may be excluded for disruptive behavior. Although the court may have been taking a proactive step in excluding Moore, Moore was entitled to be present in the courtroom barring any incident at the hearing which would warrant his removal.

{¶ 19} The State argues in its brief that the trial court was within its rights to physically exclude Moore because “the trial court had previously held [Moore] in contempt. Further, [Moore] had committed felony assault upon institutional guards when brought back for resentencing.”

{¶ 20} Although we acknowledge that Moore engaged in disruptive conduct in 2001, we find that the trial court did not allow Moore any opportunity prior to the instant sentencing hearing in 2005 to show that he would conduct himself with proper decorum. The 2001 incident occurred over four years prior to the resentencing hearing, and he claims he apologized to the court for the incident.

{¶ 21} The plain language of Crim.R. 43 requires that a defendant be present and, if he is disruptive, he may be removed from the courtroom. The trial court would be well within its rights to warn a defendant at a hearing that the first sign of disruptive conduct would be deemed a waiver of the right to be present. However, a defendant cannot be

excluded based on prior conduct years earlier and unrelated to the instant case. Crim.R. 43(A) and (B).³

{¶ 22} Moreover, to suggest that a defendant can be denied his right to be present during sentencing based upon speculation concerning his future misconduct, is to ignore the mandates of *Allen* and its progeny, which allow a defendant to regain his right to attend his trial. *Brown*, supra at ¶ 78. “Virtually any defendant who is difficult to deal with could be barred from the courtroom because he ‘might’ act up in front of jury, or because the trial judge ‘doesn’t trust him.’ Such expansion of the rule would emasculate the Confrontation Clause.” *Id.*

{¶ 23} Therefore, we hold that Crim.R. 43 mandates that a defendant be physically present at sentencing except when the rule specifically provides otherwise or a defendant waives his right to be present. Because Moore was not physically present at his sentencing hearing and timely objected, and because his absence did not meet any exceptions contained in Crim.R. 43(B), his sentence must be vacated.⁴

{¶ 24} Accordingly, we sustain Moore’s third assignment of error. Having sustained this assignment of error, Moore’s remaining assignments of error, which also challenge his sentence, are moot.

{¶ 25} Nevertheless, we are compelled to address the trial court’s repeated failure to make the proportionality finding required for imposing consecutive sentences. Pursuant

³ Under the trial court’s “policy,” any defendant previously convicted of resisting arrest or assault on a law enforcement officer might be barred from the courtroom and required to appear by video conference.

⁴ Because we resolve this issue on statutory grounds, we do not need to address whether the Constitution itself requires physical presence at sentencing.

to R.C. 2929.14(E), the trial court, before imposing consecutive sentences, must find that “consecutive sentences are not disproportionate to the seriousness of the offender’s conduct.”

{¶ 26} The trial court must also comply with R.C. 2929.19(B)(2)(c), which requires that the court “make a finding that gives its reasons” for selecting consecutive sentences. This requirement is separate and distinct from the duty to make the findings required by R.C. 2929.14(E)(4). *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473. See, also, *State v. Hudak*, Cuyahoga App. No. 82108, 2003-Ohio-3805, citing, *State v. Brice* (Mar. 29, 2000), Lawrence App. No. 99 CA21. Moreover, “a trial court must clearly align each rationale with the specific finding to support its decision to impose consecutive sentences.” *Comer*, supra. These findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision. *State v. Cottrell*, Cuyahoga App. No. 81356, 2003-Ohio-5806; *Comer*, supra, citing, Griffin & Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan* (2002), 53 Case W.Res.L.Rev. 1, 12. R.C. 2929.11(B) further requires that the sentence imposed shall be “consistent with sentences imposed for similar crimes committed by similar offenders.”

{¶ 27} In the instant case, the trial court again failed to make a proportionality finding with supporting reasons, although Moore raised the issue at resentencing. More importantly, failing to make a proportionality finding was the basis for this court’s decision in *Moore I*. The State argues that the court made the requisite finding and provided adequate reasoning. We strongly disagree.

{¶ 28} The court seemingly supported its proportionality finding by stating:

“The Court now states that the sentences I am going to impose are not disproportionate to the offense and offenses, that the offender committed these crimes one after another while each was pending before him and the harm caused in each was great and unusual and this his criminal history, which speaks for itself and we have spoken to it in detail, requires consecutive sentences, otherwise we’re rewarding this individual and others like him, which is a consideration in the future, that there is no consequence for committing other violent crimes following the first, if they can’t be consecutive.” (Tr. 49-50).

{¶ 29} Although the court may have been addressing recidivism, it did not state why or how consecutive sentences were not disproportionate to the current offense for which Moore was being sentenced. In fact, Moore and his counsel requested that the court compare Moore’s sentence to the shorter sentences his co-defendants received. Although the court stated that the issue was addressed in the original sentencing, it was clearly insufficient because we remanded the case on this issue in *Moore I*.

{¶ 30} Therefore, because the trial court again failed to find and support, with reasons, that consecutive sentences were not disproportionate to the offense, we find further cause to vacate Moore’s sentence.

Sentence vacated and case remanded for a full and complete resentencing consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate

JOHN MOORE, JR.

Defendant-Appellant

DATE: February 23, 2006

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶ 31} I concur in judgment only with the majority view to vacate the sentence imposed; however, I respectfully disagree with the analysis that Ohio Crim.R. 43 requires, in all instances, a defendant to be “physically” present for sentencing. In 1973, when Crim.R. 43 was implemented, no one contemplated the use of video conferencing, and this case highlights how technology often transcends existing Ohio law. Today video conferencing is a practical reality, and it has been effectively used in many situations, such as arraignments. Crim.R. 1(B) states that “[t]hese rules are intended to provide for the just determination of every criminal proceeding. They *shall be construed and applied* to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the *elimination of unjustifiable expense and delay.*” (Emphasis added.) Since Crim.R. 43 does not expressly define the term “present,” and Crim.R. 1 requires that the rules be construed in order to avoid unjustifiable expense, I would have afforded the defendant the option to be physically present in court or to proceed by video conference at his resentencing hearing. Because the defendant herein did not consent to the video conference and in fact objected to it, I would vacate the sentence.

{¶ 32} I believe that technology should not be automatically precluded or ignored, and that the term “present” should not be so narrowly construed, especially in light of the large volume of resentencing hearings caused by Senate Bill 2. The term “present” should

be reevaluated by the Supreme Court of Ohio through the Commission on Rules of Practice and Procedure.

{¶ 33} Finally, I see no reason to address the issue regarding the claim that the court failed to make the proportionality findings required for the imposition of consecutive sentences imposed pursuant to R.C. 2929.14(E) because of the majority's decision to vacate the sentence on other grounds. If this issue needed to be addressed (and in light of the majority's decision in the third assignment of error, it did not), I would have upheld the trial court's ruling.

Date of Printing: Apr 03, 2009

KEYCITE**H** State v. Moore, 2006 WL 439961, 2006-Ohio-816 (Ohio App. 8 Dist., Feb 23, 2006) (NO. 86244)**History****Direct History****H** 1 State v. Moore, 2002 WL 664104, 2002-Ohio-1831 (Ohio App. 8 Dist. Apr 18, 2002) (NO. 78751)*Motion for Delayed Appeal Granted by***H** 2 State v. Moore, 96 Ohio St.3d 1510, 775 N.E.2d 854, 2002-Ohio-4950 (Ohio Sep 25, 2002) (Table, NO. 2002-1351)*AND Appeal Not Allowed by***H** 3 State v. Moore, 98 Ohio St.3d 1422, 782 N.E.2d 77, 2003-Ohio-259 (Ohio Jan 29, 2003) (Table, NO. 2002-1351)*AND Appeal after New Sentencing Hearing***⇒** 4 State v. Moore, 2006 WL 439961, 2006-Ohio-816 (Ohio App. 8 Dist. Feb 23, 2006) (NO. 86244)*AND Habeas Corpus Conditionally Granted by***H** 5 Moore v. Haviland, 476 F.Supp.2d 768 (N.D. Ohio Feb 28, 2007) (NO. 1:04CV0242)*Affirmed by***▷** 6 Moore v. Haviland, 531 F.3d 393 (6th Cir. (Ohio) Jul 15, 2008) (NO. 07-3380), rehearing and rehearing en banc denied (Dec 17, 2008)**Related References****H** 7 Moore v. Haviland, 2007 WL 4460610 (N.D. Ohio Dec 14, 2007) (NO. 1:04 CV 0242)**Court Documents****Appellate Court Documents (U.S.A.)****Ohio Appellate Petitions, Motions and Filings**8 STATE OF OHIO, Appellee, v. John MOORE, Jr., Appellant., 2002 WL 32576033 (Appellate Petition, Motion and Filing) (Ohio Oct. 25, 2002) **Memorandum in Support of Jurisdiction of Appellant John Moore, Jr.** (NO. 2002-1351)9 STATE OF OHIO, Plaintiff-Appellee, v. John MOORE, Jr., Defendant-Appellant., 2002 WL 32576030 (Appellate Petition, Motion and Filing) (Ohio Nov. 21, 2002) **Memorandum in Response to Jurisdiction** (NO. 2002-1351)

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Dockets (U.S.A.)

C.A.6

10 MOORE v. HAVILAND, NO. 07-3380 (Docket) (C.A.6 Mar. 29, 2007)

N.D.Ohio

11 MOORE v. HAVILAND, NO. 1:04cv00242 (Docket) (N.D.Ohio Feb. 11, 2004)

Ohio

12 STATE OF OHIO v. JOHN MOORE, JR., NO. 2002-1351 (Docket) (Ohio Aug. 7, 2002)

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Westlaw.

-- N.E.2d --

-- N.E.2d --, 2008 WL 5423552 (Ohio App. 8 Dist.), 2008 -Ohio- 6956

(Cite as: 2008 WL 5423552 (Ohio App. 8 Dist.))

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Court of Appeals of Ohio,
Eighth District, Cuyahoga County.
CITY OF CLEVELAND, Appellee,

v.

WASHINGTON MUTUAL BANK, Appellant.
No. 91379.

No. 91379.

Decided Dec. 31, 2008.

Background: Corporate defendant was convicted in the Cleveland Municipal Court, No. 2007 CRB 005057, for misdemeanor building and housing code violations. Defendant appealed.

Holding: The Court of Appeals, Cuyahoga County, Kenneth A. Rocco, J., held that trial court could not proceed to trial in absentia.
Vacated and remanded.

West Headnotes

Criminal Law 110  636(1)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k636 Presence of Accused

110k636(1) k. In General. Most Cited

Cases

Prosecution of corporate defendant on complaint charging misdemeanor building and housing code violations could not proceed in absentia, when defendant had never appeared in case. R.C. §§ 2938.12, 2941.47, 2945.12; Rules Crim.Proc., Rule 43 (2007).

Robert J. Triozzi, Cleveland Director of Law, and Andrew A. Meyer, Assistant Director of Law, for appellee.

Shapiro, Van Ess, Phillips & Barragate, L.L.P., and Benjamin D. Carnahan, Cleveland, for appellant.

Robert J. Triozzi, Cleveland Director of Law, and

Andrew A. Meyer, Assistant Director of Law, for appellee. Shapiro, Van Ess, Phillips & Barragate, L.L.P., and Benjamin D. Carnahan, for appellant.
KENNETH A. ROCCO, Judge.

*1 {¶ 1} Defendant-appellant, Washington Mutual Bank, appeals from its misdemeanor conviction under the city's codified ordinances for building and housing code violations. Appellant contends that the court erred by proceeding with a trial in absentia, by finding that the evidence was sufficient to support its conviction, by failing to adequately consider all of the relevant sentencing factors, and by imposing an excessive sentence. Appellant further argues that it received ineffective assistance of counsel. We agree that the court erred by trying appellant in absentia. Therefore, we vacate the judgment and remand for further proceedings.

{¶ 2} The record in this case reveals that appellant was cited in a complaint filed in the Cleveland Municipal Court with (1) failing to comply with the order of the director of building and housing as stated in a violation notice dated August 29, 2006, and (2) violation of Cleveland Codified Ordinance sections 369.13 and 369.15. A summons was issued February 7, 2007, commanding the defendant to appear on May 1, 2007. A United States Postal Service return receipt indicates that it was received by Deanne Kessler at Washington Mutual, c/o "CSC-Lawyers Inc. Ser" (sic), 50 Broad Street, Suite # 1800, Columbus, Ohio 43215, on February 12, 2007. Appellant apparently did not appear, and a capias was issued, bond being set at \$10,000.

{¶ 3} On November 13, 2007, the court entered a judgment entry scheduling this matter for trial on November 26, 2007, and instructing the clerk to appear at the hearing and enter a not-guilty plea on this organizational defendant's behalf if the defendant did not appear. The court further stated that it would proceed to trial immediately. However, for reasons not apparent on the record, the court

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entered a not-guilty plea for the defendant and continued the matter for pretrial on December 7, 2007. A pretrial was held on that date, and the matter was continued again to January 18, 2008.

{¶ 4} On January 18, 2008, attorney Romi T. Fox moved the court for an order allowing her to withdraw from the case, indicating that she had been unable to make contact with appellant and that appellant no longer owned the property. The court granted this motion. It then scheduled the matter for trial in absentia on February 11, 2008. On February 11, the court continued the matter again to March 3, 2008, instructing the clerk to reissue a summons to the appellant for that date. A summons apparently was issued, addressed to "Washington Mutual Corp. Service, 50 Broad St. Suite # 1800, Columbus, OH 43215." It is not clear how the summons was served. Another *capias* was issued after appellant failed to appear on March 3, 2008.

*2 {¶ 5} The matter was set for trial again on April 7, 2008, again accompanied by an order that if the defendant did not appear, a not-guilty plea would be entered on its behalf and the court would proceed to trial. On April 7, 2008, a trial was conducted, after which the court found appellant guilty and fined it \$100,000.

{¶ 6} In its first assignment of error, appellant complains that the court erred by proceeding to trial in absentia, emphasizing its right to be present at all stages of the trial. See Crim.R. 43. The city urges that appellant's failure to appear by an officer or by counsel in response to the summons authorized it to proceed to trial in absentia pursuant to R.C. 2941.47.

{¶ 7} R.C. 2941.47 provides: "When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corpora-

tions in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of 'not guilty.' Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information."

{¶ 8} R.C. 2941.47 does not apply here. Appellant was not charged by indictment or information (a procedure reserved for felony prosecutions, see Crim.R. 7). It was charged by a complaint. Therefore, R.C. 2941.47 does not apply.

{¶ 9} R.C. 2938.12 describes the circumstances under which the court may conduct a trial in absentia in a misdemeanor case: "A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present." See also R.C. 2945.12.

{¶ 10} Crim.R. 43 also informs our decision. This rule was recently amended, effective July 1, 2008, after the trial and judgment in this case. We quote the pertinent part of the rule in effect at the time of trial: "The defendant shall be present at the arraignment and every stage of the trial * * *, except as

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otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes."

*3 {¶ 11} These provisions allow a trial in absentia to occur either at the express request of the misdemeanor defendant or upon the defendant's voluntary absence after trial has begun. They do not allow the court clerk to enter a plea on the defendant's behalf, nor do they allow for a trial of a corporate defendant in absentia when the defendant has never appeared in the case.^{FN1} Accordingly, we must vacate the judgment of conviction and sentence and the not-guilty plea entered on appellant's behalf by the clerk, and remand for further proceedings.

Judgment vacated and cause remanded.

JAMES J. SWEENEY, A.J., and BOYLE, J., concur.
 SWEENEY, A.J., AND BOYLE, J., CONCUR.

FN1. We recognize that this decision leaves a difficult gap in the law: there is neither a provision for enforcing a summons issued to a corporate defendant in a misdemeanor case (as there is for individual defendants, see R.C. 2935.11), nor is there a provision for proceeding in absentia. However, we cannot issue advisory opinions, and therefore we can provide no guidance on this issue.

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Cleveland v. Washington Mut. Bank, -- Ohio App.3d ---, -- N.E.2d ---, 2008 WL 5423552, 2008-Ohio-6956 (Ohio App. 8 Dist., Dec 31, 2008) (NO. 91379)

History

Direct History

=> 1 **Cleveland v. Washington Mut. Bank, --- Ohio App.3d ----, --- N.E.2d ----, 2008 WL 5423552, 2008-Ohio-6956 (Ohio App. 8 Dist. Dec 31, 2008) (NO. 91379)**

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Appendix 53

THE OHIO CONSTITUTION

(with amendments to 2006)

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PREAMBLE

PREAMBLE

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

ARTICLE I: BILL OF RIGHTS

INALIENABLE RIGHTS.

§1 All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

(1851)

RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.

§2 All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

(1851)

RIGHT TO ASSEMBLE.

§3 The people have the right to assemble together, in a peaceable manner, to consult for the common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances.

(1851)

BEARING ARMS; STANDING ARMIES; MILITARY POWER.

§4 The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

(1851)

TRIAL BY JURY.

§5 The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the

rendering of a verdict by the concurrence of not less than three-fourths of the jury.

(1851, am. 1912)

SLAVERY AND INVOLUNTARY SERVITUDE.

§6 There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime.

(1851)

RIGHTS OF CONSCIENCE; EDUCATION; THE NECESSITY OF RELIGION AND KNOWLEDGE.

§7 All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

(1851)

WRIT OF HABEAS CORPUS.

§8 The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

(1851)

BAIL

§9 All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great and except for a person who is charged with a felony where the proof is evident or the presumption great and who where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and

ARTICLE I: BILL OF RIGHTS

conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the State of Ohio.

(1851, am. 1997)

TRIAL FOR CRIMES; WITNESS.

§10 Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(1851, am. 1912)

RIGHTS OF VICTIMS OF CRIME.

§10a Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the General Assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(1994)

FREEDOM OF SPEECH; OF THE PRESS; OF LIBELS.

§11 Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

(1851)

TRANSPORTATION, ETC. FOR CRIME.

§12 No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

(1851)

QUARTERING TROOPS.

§13 No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

(1851)

SEARCH WARRANTS AND GENERAL WARRANTS.

§14 The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describ-

ARTICLE II: LEGISLATIVE

ing the place to be searched and the person and things to be seized.

(1851)

NO IMPRISONMENT FOR DEBT.

§15 No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

(1851)

REDRESS FOR INJURY; DUE PROCESS.

§16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(1851, am. 1912)

NO HEREDITARY PRIVILEGES.

§17 No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

(1851)

SUSPENSION OF LAWS.

§18 No power of suspending laws shall ever be exercised, except by the General Assembly.

(1851)

EMINENT DOMAIN.

§19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851)

DAMAGES FOR WRONGFUL DEATH.

§19a The amount of damages recoverable by civil action in the courts for death caused by the wrongful act,

neglect, or default of another, shall not be limited by law.

(1912)

POWERS RESERVED TO THE PEOPLE.

§20 This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

(1851)

ARTICLE II: LEGISLATIVE

IN WHOM POWER VESTED.

§1 The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as herein after provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

(1851, am. 1912, 1918, 1953)

INITIATIVE AND REFERENDUM TO AMEND CONSTITUTION.

§1a The first aforesaid power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed

2938.12 Presence of defendant required.

A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present.

Effective Date: 01-01-1960

2941.47 Summons on informations and indictments against corporations.

When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of "not guilty." Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information.

Effective Date: 10-01-1953

RULE 43. Presence of the defendant

(A) Defendant's presence.

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(2) Notwithstanding the provisions of division (A)(1) of this rule, in misdemeanor cases or in felony cases where a waiver has been obtained in accordance with division (A)(3) of this rule, the court may permit the presence and participation of a defendant by remote contemporaneous video for any proceeding if all of the following apply:

(a) The court gives appropriate notice to all the parties;

(b) The video arrangements allow the defendant to hear and see the proceeding;

(c) The video arrangements allow the defendant to speak, and to be seen and heard by the court and all parties;

(d) The court makes provision to allow for private communication between the defendant and counsel. The court shall inform the defendant on the record how to, at any time, communicate privately with counsel. Counsel shall be afforded the opportunity to speak to defendant privately and in person. Counsel shall be permitted to appear with defendant at the remote location if requested.

(e) The proceeding may involve sworn testimony that is subject to cross examination, if counsel is present, participates and consents.

(3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.

(B) Defendant excluded because of disruptive conduct. Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence or by remote contemporaneous video, and judgment and sentence may be pronounced as if the defendant were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

[Effective: July 1, 1973; amended effective July 1, 2008.]

Staff Note (July 1, 2008 amendments)

Rule 43 is amended so that in misdemeanor cases and in felony cases where the defendant has waived the right to be present, the "presence" requirement can be satisfied either by physical presence or presence by video teleconferencing. Advances in video teleconferencing technology have enabled courts to save considerable expense by conducting proceedings by video teleconferencing while still preserving the rights of the defendant.

In order to ensure that the defendant's rights are protected, any proceeding conducted through video teleconferencing must meet certain requirements: the defendant must be able to see and hear the judge, the judge must be able to see and hear the defendant, and the defendant must have the ability to communicate confidentially with his or her attorney. Furthermore, presence by video teleconferencing is permitted under limited circumstances involving sworn testimony. Counsel must be present and must consent to the use of video teleconferencing. Contemplated in this type of hearing is a miscellaneous criminal proceeding such as probation revocation, protection order hearing or bond motion.

FORMER

RULE 43. Presence of the Defendant

(A) Defendant's presence. The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(B) Defendant excluded because of disruptive conduct. Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with his continued presence, the hearing or trial may proceed in his absence, and judgment and sentence may be pronounced as if he were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

[Effective: July 1, 1973.]

FEDERAL RULES OF CRIMINAL PROCEDURE
As amended to December 31, 2007

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

- (1) Organizational Defendant. The defendant is an organization represented by counsel who is present.
- (2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.
- (3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.
- (4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. sec. 3582(c).
- (c) Waiving Continued Presence.

- (1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
 - (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
 - (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
 - (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
- (2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)