ORIGINAL

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.	)

REPLY 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

RECEIVED
JUL 01 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUL 01 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

LAW AND ARGUMENT 1

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

Armour Packing v. United States (1908), 209 U.S. 56, 29 S.Ct. 428 8

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

City of Cleveland v. Washington Mutual Bank, 179 Ohio App.3d 692, 903 N.E.2d 384, 2008 - Ohio- 6956 10

Crosby v. United States (1993), 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25 5

Cuoco v. U.S. (C.A.2 2000), 208 F.3d 27 5

Fight v. State (1835), 7 Ohio 180 5

Illinois v. Allen (1970), 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 4

State v. Meade (1997), 80 Ohio St.3d 419, 687 N.E.2d 278 ..... 4, 5

State v. Mineola (Nassau Cty, NY 1971), 65 N.Y. Misc.2d 731 8

State v. Parker (1982), 57 N.Y.2d 136, 440 N.E..1313 7

State v. Rosicky (Nassau Cty, NY 2008), 19 Misc.3d 557 7

Taylor v. United States (1973), 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 4

United States v. Rad-O-Lite of Philadelphia, Inc. (3rd Cir. 1979), 612 F.2d 740, 743 8

United States v. Thevis (1982), 665 F.2d 616, 645 n. 35 8

United States v. Unimex, Inc. (9th Cir. 1993), 991 F.2d 546, 549 8

Statutes

General Code § 13428-12 9

R.C. 1701.01(G) 8

R.C. 2901.23 8

R.C. 2938.12 4

Other Authorities

C.M.C. 902-8 9

Rules

Crim. R. 43 4

Fed. R. Crim. P. 43 ..... 3, 5

Treatises

2 LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 11.3(c) (1984) 3

LAFAVE, ISRAEL & KING, CRIMINAL PROCEDURE § 24.2(b),(c) (4th Ed. 2004) 3

Constitutional Provisions

Ohio Const. Art 1, § 10 1

U.S. Const. Amend VI 1

LAW AND ARGUMENT

The rights to counsel and confrontation, which the federal and Ohio Constitutions both expressly recognize,[1] have long been among criminal defendants' most essential rights. The central question in this case is whether the City of Cleveland can use a state statute, R.C. 2941.47, to eviscerate these rights in order to address its housing foreclosure problem. The rights to counsel and confrontation are not "absolute."[2] In limited circumstances, defendants can waive or forfeit them. But legislatures and courts have set high and demanding standards for the forfeiture of such fundamental rights. The City of Cleveland asks this Court to depart from this long-standing practice and dramatically lower the forfeiture standard. The City would read R.C. 2941.47 to require that a corporation forfeits its essential rights where it learns on the eve of trial that its counsel has withdrawn and tries diligently, but unsuccessfully, to retain alternative counsel prior to the hearing. That cannot be right. Courts must require more before they find that a corporate defendant has forfeited its essential rights to counsel and confrontation. If not, corporate defendants that try in good faith to appear at criminal trials, but are unable to do so, will be convicted without counsel and without the chance to mount a defense. This will undermine and weaken the essential constitutional rights to counsel and confrontation.

The City of Cleveland and its Amici Curiae have mischaracterized Destiny Ventures' behavior in this case and it is important, at the outset, to correct this distortion. The City claims

---

[1] U.S. Const. Amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense); Ohio Const. Art 1, § 10 ("In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel . . . [and] to meet the witnesses face to face.")

[2] *Amicus Curiae* the Ohio Attorney General mischaracterizes Destiny Ventures' position as being "that the right to be present at trial should be absolute." (Amicus Brief of Ohio Attorney General, at 9.) This has not been Destiny Ventures' position. (See, e.g., Appellant's Memorandum in Support of Appeal, at 5 (discussing New York cases that "balance" defendants rights against the need for trials in absentia); Appellant's Brief, at 5 (defendant has right to be present "when the defendant's absence would adversely affect the fairness of the proceedings."))

that Destiny Ventures was "disrespectful to the Court" and that it "failed to take seriously" the court's summons. (Appellee's Brief, at 8, 11.) The Attorney General states that Destiny Ventures has "thumb[ed its] nose[]" at the courts. (Amicus Brief of Ohio Attorney General, at 5.) The City of Cincinnati says that Destiny Ventures "cho[se] simply not to appear." (Amicus Brief of City of Cincinnati, at 3.) The facts tell a very different story, as the Transcript of Proceedings in the Record on Appeal attests:

> MRS. MCGINTY-ASTON: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. The phone number is 440-951-4660. 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.

(Transcript of Proceedings, January 14, 2008, Cleveland Municipal Housing Court [hereinafter "Hearing Transcript"] at page 2, line 25 through page 3, line 7.)

> THE COURT: Did Destiny Ventures have an attorney?
> MR. JONES: Yes.
> THE COURT: And who was that?
> MR. JONES: Ron Johnson. He was removed on Friday. When I found out <u>this morning</u>, I only had a couple of hours.

(Hearing Transcript at page 4, line 22 – page 5, line 2) (emphasis added.)

As Destiny Ventures has explained, see Appellant's Brief at 1-2, the company had diligently retained counsel for its January 14, 2008 Housing Court trial and had every reason to believe that counsel would attend the trial on its behalf. It was not until the Friday before that Monday morning trial that Destiny Ventures learned that its counsel was withdrawing due to a conflict of interest. (Hearing Transcript at page 4, line 22 – page 5, line 2.) As Appellant's officers were located in Tulsa, Oklahoma, they were unable to appear in Cleveland, Ohio to

attend the trial on such short notice. Instead, they sent a property manager to request a continuance – a request that is preserved in the record on appeal (Hearing Transcript at page 5, lines 20-25 through page 6, lines 1-7) – while they spent Monday morning trying to retain other counsel (the undersigned). The Housing Court judge telephoned the undersigned counsel who confirmed that Destiny Ventures was in the process of retaining him, although it had not yet had time to confirm the engagement. The court nonetheless decided to proceed against the company in absentia and to fine it $140,000. (See generally Hearing Transcript and Judgment Entry.) Cleveland and its Amici conveniently disregard these facts as they argue that Appellant's "misconduct" in "ignoring" the Housing Court's summons justified proceeding without it. In fact, as courts have long recognized, convicting a company in absentia under these circumstances deprives it of core Constitutional and statutory rights.

The law on this subject is clear. Courts may proceed in absentia only where a criminal defendant either waives, or forfeits, its rights to counsel and confrontation. 2 LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 11.3(c) (1984) [hereinafter "LAFAVE 1984"] (waiver and forfeiture of the right to counsel); LAFAVE, ISRAEL & KING, CRIMINAL PROCEDURE § 24.2(b),(c) (4th Ed. 2004) [hereinafter "LAFAVE 2004"] (waiver and forfeiture of the right to confrontation). Given the vital rights at stake, legislatures and courts have long provided that defendants only *waive* their rights to counsel or confrontation where they make a voluntary, intentional and knowing decision to do so. LAFAVE 1984§11.3(a). Defendants *forfeit* these essential rights where they either have behaved so disruptively that the court cannot continue the trial in defendant's presence, or have abandoned the proceedings *after* trial had begun. See, e.g., Fed. R. Crim. P. 43 (defendants give up right to be present at trial when, after warning, "the defendant persists in [disruptive] conduct that justifies removal from the courtroom" or where the defendant is "[v]oluntarily absent *after*

trial has begun") (emphasis added); R.C. 2938.12 (court may only proceed in absentia on a misdemeanor charge "upon request in writing" from the defendant, or where "*after* trial commences a person being tried escapes or departs without leave") (emphasis added); Crim. R. 43 (court may proceed without defendant where "defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued presence" or upon "defendant's voluntary absence *after* trial has begun") (emphasis added). Judicial decisions – including the cases that the City and its Amici themselve cite in their briefs – follow the same stringent forfeiture requirements. For example, in *Illinois v. Allen* (1970), 397 U.S. 337, 341-43, 90 S.Ct. 1057, 25 L.Ed.2d 353 (discussed in Appellee's Brief, at 5-6) the U.S. Supreme Court affirmed a decision to exclude the defendant because he had repeatedly interrupted the proceedings, torn his file and thrown the papers on the courtroom floor, berated the trial court in a highly "abusive" manner, and ignored warnings that he must desist from this "disorderly, disruptive, and disrespectful" behavior. In *Taylor v. United States* (1973), 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (per curiam) (discussed in the Attorney General's Brief, at 7) the Court affirmed a decision to proceed in absentia where defendant, who had been present for the morning session of his first day of trial, had absconded after the lunch recess, failed again to appear the following morning and could not be located. In each of these cases, the Defendant – unlike Destiny Ventures here – <u>was present</u> at the start of trial and either committed some misconduct that justified excluding him from trial, or voluntarily abandoned the proceedings *after* they had already begun.

This Court itself discussed the relevant precedents and summed up this area of law in *State v. Meade* (1997), 80 Ohio St.3d 419, 687 N.E.2d 278, where this Court *refused* to allow trials in absentia for defendants who are not present at the beginning of trial:

> In *Crosby [v. United States* (1993), 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25], the petitioner (Crosby) and others were indicted on several counts of mail fraud. Crosby attended several 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 "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.*"
>
> ***
>
> In *Diaz* [*v. U.S.* (1912), 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500],the defendant had absented himself voluntarily on two occasions *from the later stages of his ongoing trial.*
>
> ***
>
> In *Fight* [*v. State* (1835), 7 Ohio 180, Pt. I], 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.
>
> ***
>
> We believe that the holdings of *Crosby*, *Diaz*, and *Fight* support the court of appeals' finding that Meade's felony jury trial in his absence was improper.

Meade, 80 Ohio St.3d at 422-24 (emphasis in original). The City of Cleveland does not cite, much less distinguish, this Court's seminal decision in *Meade*.

Cleveland relies on *Cuoco v. U.S.* (C.A.2 2000), 208 F.3d 27, but that case is distinguishable from the case at bar and fits comfortably within the standards described above. In *Cuoco,* the defendant was held to have forfeited his right to appear only after he was specifically advised by the judge of the consequences of his absence. See *Cuoco*, 208 F.3d at 32. ("Because <u>the waiver in this case took place in open court after a full explanation of the advantages Cuoco would lose by leaving the courtroom</u> and while the jury venire was in the courthouse, the facts argue more strongly for finding a waiver.") (Emphasis added.) The defendant, who was in

custody, refused to be transported to court. Significantly, the *Cuoco* court found that Cuoco's trial "already had begun when Cuoco decided to leave the courtroom." *Id.* Cleveland and its Amici have failed to produce a single case supporting their argument that a trial in absentia may be held of a defendant who is not present at the start of trial.

The Housing Court's decision to proceed in absentia against Destiny Ventures conflicts with the long-established standards for waiver or forfeiture of Sixth Amendment rights described above. Destiny Ventures did not make a voluntary, intentional and knowing *waiver* of its rights to counsel and confrontation. To the contrary, Destiny Ventures retained counsel for the scheduled trial. It then sent a property manager to request a continuance when that original counsel withdrew at the eleventh hour on the Friday before the Monday trial, so that it could retain other counsel. The company was actively attempting to do so on the very morning of the trial, as the Hearing Transcript proves. Destiny Ventures' behavior did not come close to meeting the standards for *forfeiture*. It did not act disruptively in court, abandon the proceedings *after* they had begun, or do anything that could be equated with these long-established measures of disruptiveness or indifference. The Housing Court's and Eighth District's application of R.C. 2941.47 to Destiny Ventures is thus in direct conflict with well established standards for waiver and forfeiture. The judge who dissented from the Eighth District's decision in this case got it right when he stated that the majority's "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." *City of Cleveland v. Destiny Ventures, LLC*, Cuyahoga App. No. 91018, 2008-Ohio-4587 (Calabrese, J., dissenting). Were this Court to uphold the Eighth

District's decision, it would undermine and weaken defendants' vital rights to counsel and confrontation.

The City of Cleveland and its Amici Curiae argue that the Cleveland Housing Court's denial of Appellant's core constitutional rights is justified as a response to the foreclosure crisis that has impacted Cleveland and many other American cities. Cleveland claims that its draconian application of R.C. 2941.47 – a statute that by its own terms does not even apply to Municipal Courts[3] – is the only way to force corporations to comply with Cleveland's Housing Code. However, although a trial in absentia may indeed be expedient, it is not constitutional in circumstances such as those present here, where a diligent defendant that has neither waived nor forfeited its Sixth Amendment rights is unlawfully deprived of its opportunity to appear and defend itself against criminal charges that result in substantial penalties.

Moreover, it is not the only option. The Housing Court could just as easily apply the long-standing, constitutional standards for the waiver or forfeiture of Sixth Amendment rights and still be able to deal effectively with those truly irresponsible defendants who, unlike Appellant, repeatedly and intentionally miss their court dates. For example, in the State of New York, courts have refused to try Defendants in absentia without first conducting a hearing at which it must be determined if their absence was voluntary or if they may be located within a reasonable time. See *State v. Parker* (1982), 57 N.Y.2d 136, 440 N.E.2d1313; *State v. Rosicky* (Nassau Cty, NY 2008), 19 Misc.3d 557 ("[A] defendant's failure to appear for trial does not automatically authorize a trial in absentia") Although New York's Code of Criminal Procedure authorizes trials in absentia of corporations served by an indictment, New York courts have strictly construed the provision,

[3] Cleveland itself raises the question whether R.C. 2941.47 "is applicable in municipal court." (Cleveland Brief, at 8.) As Cleveland notes, the current version of the statute specifies that the clerk of "common pleas" is the one who may enter a plea of not guilty on behalf of a defendant in absentia. (Cleveland Brief, at 11.)

declining to authorize such trials of corporations that are served by an information rather than by an indictment. See, also *State v. Mineola* (Nassau Cty, NY 1971), 65 N.Y. Misc.2d 731. Trials in absentia are authorized only in limited circumstances.

In an attempt to circumvent the clear case law prohibiting the trial in absentia of a defendant who is not present at the beginning of trial, Cleveland and its Amici argue that, as a corporation, Appellant is not entitled to the protections of the Sixth Amendment. Cleveland even goes so far as to conclude its Merit Brief with the bald assertion that "[a] corporation is not a person" – an assertion flatly contradicted by Ohio law, which both expressly defines the term "person" as including corporations *and* expressly makes corporations potentially liable for criminal offenses. R.C. 1701.01(G); R.C. 2901.23. In any event, as Cleveland must acknowledge, United States courts have recognized that corporations fall within the definition of an "accused" for purposes of the Sixth Amendment. See *Armour Packing v. United States* (1908), 209 U.S. 56, 29 S.Ct. 428. See, also, *United States v. Rad-O-Lite of Philadelphia, Inc.* (3rd Cir. 1979), 612 F.2d 740, 743; *United States v. Unimex, Inc.* (9th Cir. 1993), 991 F.2d 546, 549; *United States v. Thevis* (1982), 665 F.2d 616, 645 n. 35 ("The Sixth Amendment guarantees apply generally to an 'accused;' a corporation which is a defendant at trial is an 'accused' within the meaning of the amendment and enjoys that protection afforded by it.")

Neither Cleveland nor its Amici has meaningfully addressed Appellant's argument that R.C. 2941.47 is unconstitutional *as applied*, opting instead to rewrite Appellant's argument as presenting only a *facial* challenge to the constitutionality of the statute and as a "procedural due process challenge." (Amicus brief of Ohio Attorney General, at 6; Appellee's brief, at 11.) Appellant's argument, however, was clear: "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." (Appellant's brief, at 6.) Indeed, this Court accepted discretionary review over the "*as applied*" Proposition of Law set forth in Appellant's Memorandum in Support of Jurisdiction. (Appellant's Mem. in Support, Proposition of Law No. I: "The appellate court's interpretation **and application** of R.C. 2941.47 to authorize trials in absentia *** improperly infringes upon corporate defendants' fundamental Sixth Amendment rights *** [.]") Cleveland's and its Amici's misguided attempts to recast or limit Appellant's claim as presenting only a facial challenge to R.C. 2941.47 should be rejected by this Court. By resolving Appellant's as-applied challenge, the one that the Court already deemed to present a question of public or great general interest, this Court can give appropriate guidance to the bench and bar about the circumstances under which trials in absentia may – or may not – occur in a manner consistent with the Sixth Amendment and the Ohio Constitution.

In its Amicus Brief, the Ohio Attorney General argues that statutes similar to R.C. 2941.47 exist in 27 other states. However, a review of the statutes listed in Exhibit 1 to the City of Cincinnati's brief reveals that R.C. 2941.47 is dissimilar to 20 of those statutes as it contains no reference to "trial," "judgment," "sentence," or "execution."

Notably, R.C. 2941.47 also contains no reference to either Municipal or Housing Courts, yet that is the forum in which the statute was applied against Appellant here.[4] The current version of the statute specifies that the clerk of "common pleas" is the one who may enter a plea of not guilty on behalf of a defendant in absentia. Given that the prior version of R.C. 2941.47 did not specify "common pleas" (See former General Code § 13428-12), and that legislative amendments

[4] Cleveland's Amicus Curiae, the City of Cincinnati, notes in its brief that Cincinnati, "pursuant to its Home Rule Authority," has enacted a municipal ordinance, C.M.C. 902-8, "to address the problem of absentee organizations that fail to appear in municipal court and answer to criminal charges *** [.]" This argument, of course, does not help Cleveland. If R.C. 2941.47 truly applied in Municipal Housing Courts in the manner that the City of Cleveland applied it here against Appellant, then there would be no need for municipalities to enact duplicative municipal ordinances pursuant to Home Rule.

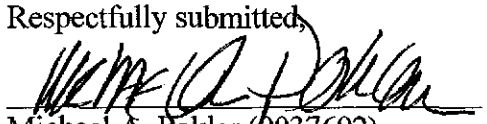
are presumed to have some meaning, the General Assembly seems to have intended that only common pleas clerks – not municipal or housing court clerks – may enter not guilty pleas pursuant to this provision. Additionally, as the Eighth District Court of Appeals itself held in *City of Cleveland v. Washington Mutual Bank,* 179 Ohio App.3d 692, 903 N.E.2d 384, 2008-Ohio-6956, R.C. 2941.47 by its express terms applies only to defendants who have been charged by "indictment or information," whereas Destiny Ventures was charged by complaint. By interpreting R.C. 2941.47 to authorize Destiny Ventures' trial in absentia, the Housing Court went beyond the plain language of the statute, imparted its own meaning to the statute without any legal basis for doing so, and applied the provision to Appellant in such a way as to deprive Appellant of its fundamental Sixth Amendment rights to be represented by counsel and to be present at its own trial. The statute is, therefore, unconstitutional as applied to Appellant.

For all the foregoing reasons, as well as those set forth in its Merit Brief, Appellant respectfully requests that the decision of the Court of Appeals be reversed and that this case be remanded to the Housing Court for further proceedings.

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 not inconsistent with its Opinion.

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

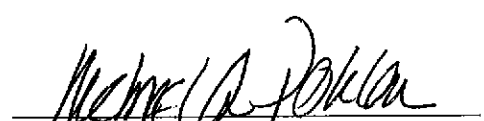
A true and accurate copy of the foregoing was served by U.S. First Class Mail this July 1, 2009 upon the following:

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

Robert J. Triozzi, Esq.
Director of Law
Karyn J. Lynn, Esq.
601 Lakeside Avenue E. Rm 106
Cleveland, OH 44114
Attorneys for Appellee City of Cleveland

Richard Cordray, Esq.
Ohio Attorney General
Benjamin C. Mizer, Esq.
Solicitor General
Alexandra T. Schimmer, Esq.
Chief Deputy Solicitor
Mark Wiseman, Esq.
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Attorneys for Amicus Ohio Attorney General

John C. Curp, Esq.
City of Cincinnati Solicitor
Ernest F. McAdams, Jr., Esq.
City of Cincinnati Prosecutor
Keith C. Forman, Esq.
Assistant City Prosecutor
801 Plum Street, Room 226
Cincinnati, Ohio 45202
Attorneys for Amicus Curiae City of Cincinnati



Michael A. Poklar

APPENDIX

1701.01 General corporation law definitions.

As used in sections 1701.01 to 1701.98 of the Revised Code, unless the context otherwise requires:

(A) "Corporation" or "domestic corporation" means a corporation for profit formed under the laws of this state.

(B) "Foreign corporation" means a corporation for profit formed under the laws of another state, and "foreign entity" means an entity formed under the laws of another state.

(C) "State" means the United States; any state, territory, insular possession, or other political subdivision of the United States, including the District of Columbia; any foreign country or nation; and any province, territory, or other political subdivision of such foreign country or nation.

(D) "Articles" includes original articles of incorporation, certificates of reorganization, amended articles, and amendments to any of these, and, in the case of a corporation created before September 1, 1851, the special charter and any amendments to it made by special act of the general assembly or pursuant to general law.

(E) "Incorporator" means a person who signed the original articles of incorporation.

(F) "Shareholder" means a person whose name appears on the books of the corporation as the owner of shares of the corporation. Unless the articles, the regulations adopted by the shareholders, the regulations adopted by the directors pursuant to division (A)(1) of section 1701.10 of the Revised Code, or the contract of subscription otherwise provides, "shareholder" includes a subscriber to shares, whether the subscription is received by the incorporators or pursuant to authorization by the directors, and such shares shall be deemed to be outstanding shares.

(G) "Person" includes, without limitation, a natural person, a corporation, whether nonprofit or for profit, a partnership, a limited liability company, an unincorporated society or association, and two or more persons having a joint or common interest.

(H) The location of the "principal office" of a corporation is the place named as the principal office in its articles.

(I) The "express terms" of shares of a class are the statements expressed in the articles with respect to such shares.

(J) Shares of a class are "junior" to shares of another class when any of their dividend or distribution rights are subordinate to, or dependent or contingent upon, any right of, or dividend on, or distribution to, shares of such other class.

(K) "Treasury shares" means shares belonging to the corporation and not retired that have been either issued and thereafter acquired by the corporation or paid as a dividend or distribution in shares of the corporation on treasury shares of the same class; such shares shall be deemed to be issued, but they shall not be considered as an asset or a liability of the corporation, or as outstanding for dividend or distribution, quorum, voting, or other purposes, except, when authorized by the directors, for

dividends or distributions in authorized but unissued shares of the corporation of the same class.

(L) To "retire" a share means to restore it to the status of an authorized but unissued share.

(M) "Redemption price of shares" means the amount required by the articles to be paid on redemption of shares.

(N) "Liquidation price" means the amount or portion of assets required by the articles to be distributed to the holders of shares of any class upon dissolution, liquidation, merger, or consolidation of the corporation, or upon sale of all or substantially all of its assets.

(O) "Insolvent" means that the corporation is unable to pay its obligations as they become due in the usual course of its affairs.

(P) "Parent corporation" or "parent" means a domestic or foreign corporation that owns and holds of record shares of another corporation, domestic or foreign, entitling the holder of the shares at the time to exercise a majority of the voting power in the election of the directors of the other corporation without regard to voting power that may thereafter exist upon a default, failure, or other contingency; "subsidiary corporation" or "subsidiary" means a domestic or foreign corporation of which another corporation, domestic or foreign, is the parent.

(Q) "Combination" means a transaction, other than a merger or consolidation, wherein either of the following applies:

(1) Voting shares of a domestic corporation are issued or transferred in consideration in whole or in part for the transfer to itself or to one or more of its subsidiaries, domestic or foreign, of all or substantially all the assets of one or more corporations, domestic or foreign, with or without good will or the assumption of liabilities;

(2) Voting shares of a foreign parent corporation are issued or transferred in consideration in whole or in part for the transfer of such assets to one or more of its domestic subsidiaries.

"Transferee corporation" in a combination means the corporation, domestic or foreign, to which the assets are transferred, and "transferor corporation" in a combination means the corporation, domestic or foreign, transferring such assets and to which, or to the shareholders of which, the voting shares of the domestic or foreign corporation are issued or transferred.

(R) "Majority share acquisition" means the acquisition of shares of a corporation, domestic or foreign, entitling the holder of the shares to exercise a majority of the voting power in the election of directors of such corporation without regard to voting power that may thereafter exist upon a default, failure, or other contingency, by either of the following:

(1) A domestic corporation in consideration in whole or in part, for the issuance or transfer of its voting shares;

(2) A domestic or foreign subsidiary in consideration in whole or in part for the issuance or transfer of voting shares of its domestic parent.

(S) "Acquiring corporation" in a combination means the domestic corporation whose voting shares are issued or transferred by it or its subsidiary or subsidiaries to the transferor corporation or corporations or the shareholders of the transferor corporation or corporations; and "acquiring corporation" in a majority share acquisition means the domestic corporation whose voting shares are issued or transferred by it or its subsidiary in consideration for shares of a domestic or foreign corporation entitling the holder of the shares to exercise a majority of the voting power in the election of directors of such corporation.

(T) When used in connection with a combination or a majority share acquisition, "voting shares" means shares of a corporation, domestic or foreign, entitling the holder of the shares to vote at the time in the election of directors of such corporation without regard to voting power which may thereafter exist upon a default, failure, or other contingency.

(U) "An emergency" exists when the governor, or any other person lawfully exercising the power and discharging the duties of the office of governor, proclaims that an attack on the United States or any nuclear, atomic, or other disaster has caused an emergency for corporations, and such an emergency shall continue until terminated by proclamation of the governor or any other person lawfully exercising the powers and discharging the duties of the office of governor.

(V) "Constituent corporation" means an existing corporation merging into or into which is being merged one or more other entities in a merger or an existing corporation being consolidated with one or more other entities into a new entity in a consolidation, whether any of the entities is domestic or foreign, and "constituent entity" means any entity merging into or into which is being merged one or more other entities in a merger, or an existing entity being consolidated with one or more other entities into a new entity in a consolidation, whether any of the entities is domestic or foreign.

(W) "Surviving corporation" means the constituent domestic or foreign corporation that is specified as the corporation into which one or more other constituent entities are to be or have been merged, and "surviving entity" means the constituent domestic or foreign entity that is specified as the entity into which one or more other constituent entities are to be or have been merged.

(X) "Close corporation agreement" means an agreement that satisfies the three requirements of division (A) of section 1701.591 of the Revised Code.

(Y) "Issuing public corporation" means a domestic corporation with fifty or more shareholders that has its principal place of business, its principal executive offices, assets having substantial value, or a substantial percentage of its assets within this state, and as to which no valid close corporation agreement exists under division (H) of section 1701.591 of the Revised Code.

(Z)(1) "Control share acquisition" means the acquisition, directly or indirectly, by any person of shares of an issuing public corporation that, when added to all other shares of the issuing public corporation in respect of which the person may exercise or direct the exercise of voting power as provided in this division, would entitle the person, immediately after the acquisition, directly or indirectly, alone or with others, to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of such voting power:

(a) One-fifth or more but less than one-third of such voting power;

(b) One-third or more but less than a majority of such voting power;

(c) A majority or more of such voting power.

A bank, broker, nominee, trustee, or other person that acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code shall, however, be deemed to have voting power only of shares in respect of which such person would be able, without further instructions from others, to exercise or direct the exercise of votes on a proposed control share acquisition at a meeting of shareholders called under section 1701.831 of the Revised Code.

(2) The acquisition by any person of any shares of an issuing public corporation does not constitute a control share acquisition for the purpose of section 1701.831 of the Revised Code if the acquisition was or is consummated in, results from, or is the consequence of any of the following circumstances:

(a) Prior to November 19, 1982;

(b) Pursuant to a contract existing prior to November 19, 1982;

(c) By bequest or inheritance, by operation of law upon the death of an individual, or by any other transfer without valuable consideration, including a gift, that is made in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code;

(d) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code;

(e) Pursuant to a merger or consolidation adopted, or a combination or majority share acquisition authorized, by vote of the shareholders of the issuing public corporation in compliance with section 1701.78, 1701.781, 1701.79, 1701.791, or 1701.83 of the Revised Code, or pursuant to a merger adopted in compliance with section 1701.802 of the Revised Code;

(f) The person's being entitled, immediately thereafter, to exercise or direct the exercise of voting power of the issuing public corporation in the election of directors within the same range theretofore attained by that person either in compliance with the provisions of section 1701.831 of the Revised Code or as a result solely of the issuing public corporation's purchase of shares issued by it.

The acquisition by any person of shares of an issuing public corporation in a manner described under division (Z)(2) of this section shall be deemed a control share acquisition authorized pursuant to section 1701.831 of the Revised Code within the range of voting power under division (Z)(1)(a), (b), or (c) of this section that such person is entitled to exercise after the acquisition, provided, in the case of an acquisition in a manner described under division (Z)(2)(c) or (d) of this section, the transferor of shares to such person had previously obtained any authorization of shareholders required under section 1701.831 of the Revised Code in connection with the transferor's acquisition of shares of the issuing public corporation.

(3) The acquisition of shares of an issuing public corporation in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code from any person whose control share acquisition

previously had been authorized by shareholders in compliance with section 1701.831 of the Revised Code, or from any person whose previous acquisition of shares of an issuing public corporation would have constituted a control share acquisition but for division (Z)(2) or (3) of this section, does not constitute a control share acquisition for the purpose of section 1701.831 of the Revised Code unless such acquisition entitles the person making the acquisition, directly or indirectly, alone or with others, to exercise or direct the exercise of voting power of the corporation in the election of directors in excess of the range of voting power authorized pursuant to section 1701.831 of the Revised Code, or deemed to be so authorized under division (Z)(2) of this section.

(AA) "Acquiring person" means any person who has delivered an acquiring person statement to an issuing public corporation pursuant to section 1701.831 of the Revised Code.

(BB) "Acquiring person statement" means a written statement that complies with division (B) of section 1701.831 of the Revised Code.

(CC)(1) "Interested shares" means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the corporation in the election of directors:

(a) An acquiring person;

(b) Any officer of the issuing public corporation elected or appointed by the directors of the issuing public corporation;

(c) Any employee of the issuing public corporation who is also a director of such corporation;

(d) Any person that acquires such shares for valuable consideration during the period beginning with the date of the first public disclosure of a proposal for, or expression of interest in, a control share acquisition of the issuing public corporation; a transaction pursuant to section 1701.76, 1701.78, 1701.781, 1701.79, 1701.791, 1701.83, or 1701.86 of the Revised Code that involves the issuing public corporation or its assets; or any action that would directly or indirectly result in a change in control of the issuing public corporation or its assets, and ending on the record date established by the directors pursuant to section 1701.45 and division (D) of section 1701.831 of the Revised Code, if either of the following applies:

(i) The aggregate consideration paid or given by the person who acquired the shares, and any other persons acting in concert with the person, for all such shares exceeds two hundred fifty thousand dollars;

(ii) The number of shares acquired by the person who acquired the shares, and any other persons acting in concert with the person, exceeds one-half of one per cent of the outstanding shares of the corporation entitled to vote in the election of directors.

(e) Any person that transfers such shares for valuable consideration after the record date described in division (CC)(1)(d) of this section as to shares so transferred, if accompanied by the voting power in the form of a blank proxy, an agreement to vote as instructed by the transferee, or otherwise.

(2) If any part of this division is held to be illegal or invalid in application, the illegality or invalidity does not affect any legal and valid application thereof or any other provision or application of this division or section 1701.831 of the Revised Code that can be given effect without the invalid or illegal provision, and the parts and applications of this division are severable.

(DD) "Certificated security" and "uncertificated security" have the same meanings as in section 1308.01 of the Revised Code.

(EE) "Entity" means any of the following:

(1) A for profit corporation existing under the laws of this state or any other state;

(2) Any of the following organizations existing under the laws of this state, the United States, or any other state:

(a) A business trust or association;

(b) A real estate investment trust;

(c) A common law trust;

(d) An unincorporated business or for profit organization, including a general or limited partnership;

(e) A limited liability company;

(f) A nonprofit corporation.

Effective Date: 09-16-2003; 10-12-2006

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:

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

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

SEP 11 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

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).

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

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

---

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

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

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

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

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.

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).

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.

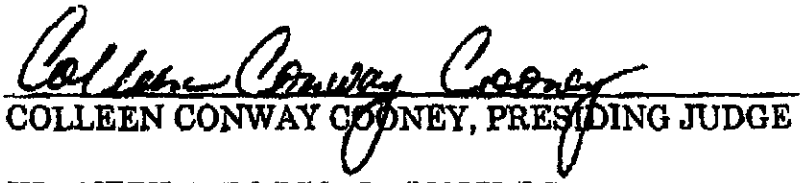
Accordingly, judgment is affirmed.

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

The Court finds there were reasonable grounds for this appeal.

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),

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.

[Cite as *Cleveland v. Washington Mut. Bank*, 2008-Ohio-6956.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91379

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

WASHINGTON MUTUAL BANK

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2007 CRB 005057

BEFORE: Rocco, J., Sweeney, A.J., and Boyle, J.

RELEASED: December 31, 2008
JOURNALIZED:

ATTORNEY FOR APPELLANT

Benjamin D. Carnahan
Shapiro, Van Ess, Phillips & Barragate, LLP
1500 West 3d Street, Suite 455
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert J. Triozzi
Director of Law

BY: Andrew A. Meyer
Assistant Director of Law
City of Cleveland Law Department
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

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).

KENNETH A. ROCCO, J.:

{¶ 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 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.

{¶ 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 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."

{¶ 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." Also see 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 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."

{¶ 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.[1] 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.

Vacated and remanded.

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

The court finds there were reasonable grounds for this appeal.

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.

---

[1]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 can provide no guidance on this issue.

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, A.J., and
MARY J. BOYLE, J., CONCUR

2901.23 Criminal liability of organizations.

(A) An organization may be convicted of an offense under any of the following circumstances:

(1) The offense is a minor misdemeanor committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of his office or employment, except that if the section defining the offense designates the officers, agents, or employees for whose conduct the organization is accountable or the circumstances under which it is accountable, such provisions shall apply.

(2) A purpose to impose organizational liability plainly appears in the section defining the offense, and the offense is committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of his office or employment, except that if the section defining the offense designates the officers, agents, or employees for whose conduct the organization is accountable or the circumstances under which it is accountable, such provisions shall apply.

(3) The offense consists of an omission to discharge a specific duty imposed by law on the organization.

(4) If, acting with the kind of culpability otherwise required for the commission of the offense, its commission was authorized, requested, commanded, tolerated, or performed by the board of directors, trustees, partners, or by a high managerial officer, agent, or employee acting in behalf of the organization and within the scope of his office or employment.

(B) When strict liability is imposed for the commission of an offense, a purpose to impose organizational liability shall be presumed, unless the contrary plainly appears.

(C) In a prosecution of an organization for an offense other than one for which strict liability is imposed, it is a defense that the high managerial officer, agent, or employee having supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission. This defense is not available if it plainly appears inconsistent with the purpose of the section defining the offense.

(D) As used in this section, "organization" means a corporation for profit or not for profit, partnership, limited partnership, joint venture, unincorporated association, estate, trust, or other commercial or legal entity. "Organization" does not include an entity organized as or by a governmental agency for the execution of a governmental program.

Effective Date: 01-01-1974

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

The People of the State of New York, Respondent, v. Vicki Parker, Appellant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

57 N.Y.2d 136; 440 N.E.2d 1313; 454 N.Y.S.2d 967; 1982 N.Y. LEXIS 3671

August 31, 1982, Argued
October 7, 1982, Decided

PRIOR HISTORY: Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered September 18, 1981, which affirmed a judgment of the Supreme Court (James H. Boomer, J.), rendered in Monroe County upon a verdict convicting defendant of two counts of criminal sale of a controlled substance in the third degree.

Defendant told her counsel that she might not be able to appear for trial due to illness and the trial court, after a hearing, determined that she had notice of a day certain for her scheduled appearance and deliberately failed to appear. The court made no finding regarding whether defendant was aware that the consequence of her absence would be that her trial would proceed without her being present. Defendant was tried *in absentia* and found guilty.

The Court of Appeals reversed the order of the Appellate Division and ordered a new trial, holding, in an opinion by Judge Wachtler, that a finding that a criminal defendant has received actual notice of the date for trial and has nonetheless voluntarily failed to appear is not sufficient, as a matter of law, to permit the court to proceed to try the defendant *in absentia*, and that the validity of any waiver of the right to be present at trial must be tested according to constitutional standards.

People v Parker, 83 AD2d 995, reversed.

DISPOSITION: Order reversed and a new trial ordered.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of an order from the Appellate Division of the Supreme Court in the Fourth Judicial Department (New York), which affirmed a judgment of the trial court that convicted her of two counts of criminal sale of a controlled substance in the third degree after a trial in absentia.

OVERVIEW: Defendant was charged with criminal sale of a controlled substance in the third degree. Defendant told her counsel that she might not be able to appear for trial due to illness, but the trial court, after a hearing, determined that she had notice of a day certain for her scheduled appearance and deliberately failed to appear. Defendant was tried in absentia and found guilty. The appellate division affirmed the conviction. In reversing the order, the court held that there was no evidence that defendant was ever apprised or otherwise aware that her trial would proceed in her absence and there was nothing in the record providing a basis for implying a waiver as a matter of law.

OUTCOME: The court reversed the order affirming defendant's conviction and directed the trial court to

afford defendant a new trial.

CORE TERMS: absentia, matter of law, waived, forfeiture, criminal trial, defense counsel, scheduled, intelligent waiver, trial date, criminal sale, constitutional standards, constitutional right, controlled substance, bench warrant, adjournment, attending, courtroom, apprised, tested, prison, warned, flee, cell, actual notice, new trial, disappearance, appearance, illness

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN1]A defendant's right to be present at a criminal trial is encompassed within the confrontation clauses of the state and federal constitutions, N.Y. Const. art I, § 6, U.S. Const. amend. VI, and the Criminal Procedure Law, N.Y. Crim. Proc. Law §§ 260.20, 340.50. The right to be present may, as a general matter, be waived under both constitutions.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN2]A waiver of the right to be present at a criminal trial may be inferred from certain conduct engaged in by the defendant after the trial has commenced.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN3]Although the right to be present at a criminal trial may be waived, the right is of a fundamental constitutional nature and therefore the validity of any waiver including one which could be implied must be tested according to constitutional standards. The key issue is whether the defendant knowingly, voluntarily, and intelligently relinquished his known right.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN4]It is true that the forfeiture of a right may occur even though a defendant never made an informed, deliberate decision to relinquish that right. While waiver requires a knowing, voluntary, and intelligent decision, which may be either express or implied, forfeiture occurs by operation of law without regard to defendant's state of mind.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN5]In order to effect a voluntary, knowing, and intelligent waiver, the defendant must, at a minimum, be informed in some manner of the nature of the right to be present at trial and the consequences of failing to appear for trial. This requires that defendant simply be aware that trial will proceed even though he or she fails to appear.

Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview
Criminal Law & Procedure > Trials > Judicial Discretion
Estate, Gift & Trust Law > Wills > Lost Wills
[HN6]Even after the court has determined that a defendant has waived the right to be present at trial by not appearing after being apprised of the right and the consequences of nonappearance, trial in absentia is not thereby automatically authorized. Rather, the trial court must exercise its sound discretion upon consideration of all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear. In most cases the simple expedient of adjournment pending execution of a bench warrant could provide an alternative to trial in absentia unless the prosecution can demonstrate that such a course of action would be totally futile.

HEADNOTES

Crimes -- Right to be Present at Trial -- Waiver

A finding that a criminal defendant has received actual notice of the date for trial and has nonetheless voluntarily failed to appear is not sufficient, as a matter of law, to permit the court to proceed to try the defendant *in absentia*; although the fundamental constitutional right to be present at a criminal trial may be waived, the validity of any waiver, including an implied one, must be tested according to constitutional standards, and accordingly, in order to effect a knowing, voluntary and

intelligent waiver, the defendant must be informed of the nature of the right to be present at trial and the consequences of failing to appear for trial, including the fact that the trial will proceed even though the defendant fails to appear.

COUNSEL: *Edward J. Nowak, Public Defender* (*Howard A. Bloch* of counsel), for appellant. I. There was no waiver of appellant's right of presence; trial *in absentia* violated her constitutional rights of confrontation and due process, as well as her statutory rights pursuant to CPL 260.20, 340.50. (*Illinois v Allen*, 397 U.S. 337; *Lewis v United States*, 146 U.S. 370; *Barber v Page*, 390 U.S. 719; *Pointer v Texas*, 380 U.S. 400; *Johnson v Zerbst*, 304 U.S. 458; *Brady v United States*, 397 U.S. 742; *People v Epps*, 37 NY2d 343; *Schneckloth v Bustamonte*, 412 U.S. 218; *Miranda v Arizona*, 384 U.S. 436.) II. Assuming, *arguendo*, a waiver of appellant's right of presence, it was an abuse of discretion to have tried her *in absentia*. (*People v Fay*, 32 NY2d 473; *Goldsby v United States*, 160 U.S. 70; *United States v Tortora*, 464 F2d 1202; *United States v Toliver*, 541 F2d 958; *People v Byrnes*, 33 NY2d 343; *People v Oskroba*, 305 NY 113; *People v Matz*, 23 NY2d 196; *People v Ballott*, 20 NY2d 600.) III. The trial court erred in sentencing appellant *in absentia*. (*United States v Behrens*, 375 U.S. 162; *Illinois v Allen*, 397 U.S. 337; *People ex rel. Lupo v Fay*, 13 NY2d 253; *Green v United States*, 365 U.S. 301; *Snyder v Massachusetts*, 291 U.S. 97; *People v Mullen*, 44 NY2d 1; *Townsend v Burke*, 334 U.S. 736; *Mempa v Rhay*, 389 U.S. 128; *People v Perry*, 36 NY2d 114; *People v Stroman*, 36 NY2d 939.)

Donald O. Chesworth, Jr., District Attorney (*Sheldon W. Boyce, Jr.*, and *Kenneth R. Fisher* of counsel), for respondent. I. By her voluntary absence after personal notification of a day certain for her trial, defendant forfeited her right to be present. (*Taylor v United States*, 414 U.S. 17; *Diaz v United States*, 223 U.S. 442; *United States v Tortora*, 464 F2d 1202, cert den *sub nom. Santora v United States*, 409 U.S. 1063; *Government of Virgin Is. v Brown*, 507 F2d 186; *People v Aiken*, 45 NY2d 394; *People v Epps*, 37 NY2d 343, 423 U.S. 999; *Matter of Whitley v Cioffi*, 74 AD2d 230; *Illinois v Allen*, 397 U.S. 337; *People v Johnson*, 37 NY2d 778.) II. By her continued absence, defendant also forfeited her right to be present at sentencing. (*Matter of Root v Kapelman*, 67 AD2d 131; *People v Montez*, 65 AD2d 777; *People v Perry*, 36 NY2d 114; *People v McClain*, 35 NY2d 483.)

JUDGES: Wachtler, J. Chief Judge Cooke and Judges Jasen, Jones, Fuchsberg and Meyer concur; Judge Gabrielli taking no part.

OPINION BY: WACHTLER

OPINION

[*138] [**1314] [***968] **OPINION OF THE COURT**

The question on this appeal is whether a finding that a criminal defendant has received actual notice of the date for trial and has nonetheless voluntarily failed to appear is sufficient, as a matter of law, to permit the court to proceed to try the defendant *in absentia*. The courts below held this finding sufficient to establish an implicit relinquishment of a defendant's right to be present at trial. We disagree and reverse.

In February, 1977 defendant was indicted for two counts of criminal sale of a controlled substance in the third degree (Penal Law, § 220.39, subd 1). On Tuesday, July 5, 1977, the trial court notified defense counsel that defendant's case was scheduled for trial on Friday, July 8, 1977. Defense counsel immediately contacted defendant by telephone to notify her of the trial date. She replied that she was seriously ill, that she might not be able to appear for trial, and that she was too ill to meet with counsel prior to the trial date.

Defendant did not appear for trial on July 8. After being informed of defendant's illness by defense counsel, the court adjourned the matter until Monday, July 11. Defendant failed to appear on that day and defense counsel indicated that he had neither heard from nor been successful in locating defendant during the adjournment.

The trial court then conducted a hearing to determine defendant's whereabouts. The prosecutor called Jeanette Harris, who had known defendant for 10 years and who posted bail for her. Mrs. Harris testified, [**1315] on direct examination, that she spoke with defendant on June 25, 1977, at which time defendant indicated an intention to leave town. Mrs. Harris also stated that defendant never mentioned that she was ill. On cross-examination, Mrs. Harris stated that about one month before the hearing defendant's sister told defendant to leave town but that defendant responded by saying she would not flee. She testified that her son, James Harris, told her defendant was "out in the street".

After Mrs. Harris testified, defense counsel told the court that defendant never told him she was planning to leave [*139] the jurisdiction. The court found that defendant's absence was voluntary and that she had voluntarily waived her right to be present at trial. Pursuant to court order and over defense counsel's objection, defendant was tried *in absentia*. No effort was made to secure the presence of the defendant through the use of a bench warrant.

At trial Officer Ruffin, of the Drug Enforcement Administration (DEA) Task [***969] Force of Monroe County, testified to purchasing cocaine and morphine from defendant. Two other DEA officers, who were observing Ruffin's vehicle from a distance of 60 feet at the time of the sale identified defendant as the individual who entered the vehicle when the transaction occurred. At the close of the People's case defense counsel called no witnesses but indicated that he would have called defendant had she not been tried *in absentia*, and that she would have rendered an exculpatory explanation of the transaction.

The jury returned a verdict finding defendant guilty on both counts of criminal sale of a controlled substance in the third degree. She was sentenced *in absentia* to an indeterminate term of two years to life in prison on each count, to run concurrently.

The Appellate Division affirmed the judgment of conviction, without opinion. We conclude that the trial court's factual finding of voluntary absence from court on the day scheduled for her appearance is alone insufficient as a matter of law to establish an implicit waiver of defendant's right to be present at trial so as to permit the court to try defendant *in absentia*.

[HN1]A defendant's right to be present at a criminal trial is encompassed within the confrontation clauses of the State and Federal Constitutions (NY Const, art I, § 6; US Const, 6th Amdt) and the Criminal Procedure Law (CPL 260.20, 340.50). Of course the right to be present may, as a general matter, be waived under both Constitutions (*Diaz v United States*, 223 U.S. 442; *People v Byrnes*, 33 NY2d 343).

More specifically, we have recently held that [HN2]a waiver of the right to be present at a criminal trial may be inferred from certain conduct engaged in by the defendant after the trial has commenced. Thus in *People v Epps* (37 NY2d 343, [*140] cert den 423 U.S. 999), we held that defendant waived his right to be present when, after attending his trial for the first two days, he refused to leave his cell and attend further proceedings as part of his participation in an inmate boycott of the courts. We noted that prison personnel had repeatedly warned the defendant of the consequences of his refusal to leave his cell. Similarly, in *People v Johnson*, (37 NY2d 778), we held that the defendant's behavior in disrupting trial proceedings and his repeated requests to leave the courtroom, along with the court's explanation of the consequence that the trial would proceed without him, were sufficient to waive the defendant's right to be present at the trial (see, also, *Taylor v United States*, 414 U.S. 17).

[HN3]Although the right to be present at a criminal trial may be waived, the right is of a fundamental constitutional nature and therefore the validity of any waiver including one which could be implied, must be [**1316] tested according to constitutional standards. Thus, in *People v Epps* (37 NY2d, *supra*, at p 350) we noted that the key issue was whether this defendant knowingly, voluntarily and intelligently relinquished his known right (*Johnson v Zerbst*, 304 U.S. 458, 464).

The People argue that a forfeiture rather than a waiver analysis should be applied in the trial *in absentia* context when the trial is commenced in defendant's absence. [HN4]It is true that the forfeiture of a right may occur even though a defendant never made an informed, deliberate decision to relinquish that right. While waiver requires a knowing, voluntary and intelligent decision, which may be either express or implied, forfeiture occurs by operation of law without regard to defendant's state of mind (see, generally, Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich L Rev 1214). The People argue that forfeiture of the right to be present at trial occurs as a matter of law whenever defendant knows of the court date and nonetheless voluntarily fails to appear.

[***970] We reject this contention and conclude that *Epps* and *Johnson* (*supra*), require the application of a constitutional waiver analysis to the facts now before us. In *Epps* and [*141] *Johnson* the defendants were present when trial commenced and were warned of the consequences of their conduct. In each of those cases the defendant's conduct represented a clear expression of a desire not to be present at trial under any circumstances and therefore it would be inaccurate to say that the

defendants in those cases renounced their right to be present. In those cases we required a voluntary, knowing and intelligent waiver of the right to be present at trial. In the case before us, considering the defendant's knowledge at the time of her disappearance, there is no less reason for applying a waiver analysis. Certainly the mere fact of her disappearance presents a far more ambiguous situation than was present in *Epps* or *Johnson* for it does not appear that she was advised at any time by anyone that if she did not appear in court on the scheduled date the trial would proceed without her.

[HN5]In order to effect a voluntary, knowing and intelligent waiver, the defendant must, at a minimum, be informed in some manner of the nature of the right to be present at trial and the consequences of failing to appear for trial (see *Schneckloth v Bustamonte*, 412 U.S. 218, 243-244; *Brady v United States*, 397 U.S. 742, 748). This, of course, in turn requires that defendant simply be aware that trial will proceed even though he or she fails to appear. As noted above, the defendants in *Epps* and *Johnson* were both expressly told that trial would proceed in their absence.

As we have previously noted, the record before us is devoid of any evidence indicating that defendant was ever apprised or otherwise aware that her trial would proceed in her absence. Defendant told her counsel that she might not be able to appear for trial due to illness and the trial court, after a hearing, determined that she had notice of a day certain for her scheduled appearance and deliberately failed to appear. However, the court made no finding regarding whether defendant was aware that the consequence of her absence would be that her trial would proceed without her being present.

Moreover, nothing in the record provides a basis for implying a waiver as a matter of law from the circumstances. In *Taylor v United States* (414 U.S., *supra*, at p 20) [*142] the defendant absented himself voluntarily after attending the opening of his trial. The Supreme Court implied a waiver from that conduct as a matter of law, stating: "It seems equally incredible to us, as it did to the [**1317] Court of Appeals, 'that a defendant who flees from a courtroom in the midst of a trial -- where judge, jury, witnesses, and lawyers are present and ready to continue -- would not know that as a consequence the trial could continue in his absence'" (citation omitted). A similar waiver was implied from mere voluntary failure to appear for trial in the multiple defendant case of *United States v Tortora* (464 F2d 1202, cert den *sub nom.* *Santoro v United States*, 409 U.S. 1063). No similar circumstances are presented in the case at bar.

We consider it appropriate to emphasize that [HN6]even after the court has determined that a defendant has waived the right to be present at trial by not appearing after being apprised of the right and the consequences of nonappearance, trial *in absentia* is not thereby automatically authorized. Rather, the trial court must exercise its sound discretion upon consideration of all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear (see *United States v Peterson*, 524 F2d 167). In most cases the simple expedient of adjournment pending execution of a bench warrant could provide an alternative to trial *in absentia* unless, of course, the prosecution can demonstrate that such a course of action would be totally futile.

[***971] Accordingly, the order of the Appellate Division should be reversed and the matter remitted for a new trial.

Order reversed and a new trial ordered.

[*1] **The People of the State of New York, against Brian M. Rosicky, Defendant.**

LV718251-2

JUSTICE COURT OF VILLAGE OF WESTBURY, NASSAU COUNTY

2008 NY Slip Op 28080; 19 Misc. 3d 557; 853 N.Y.S.2d 498; 2008 N.Y. Misc. LEXIS 916

February 21, 2008, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant filed a handwritten pro se motion to vacate his conviction and sentence pursuant to CPL 440.10.

OVERVIEW: Defendant was issued three summons by the police for violating the speed limit, not wearing a seat belt, and failure to produce proof of valid insurance. Defendant failed to appear at his initial arraignment. When defendant again did not appear at the rescheduled arraignment, and his license was suspended. Numerous new arraignment dates were scheduled, for which he again did not appear. Ultimately, defendant was tried in absentia and a 15-day sentence and a fine were imposed. Although defendant filed his motion to vacate one day late, the court nevertheless considered the motion. The court found that defendant did not provided an excuse for his nonappearance on the trial date that he specifically requested. However, because Parker warnings were not given to defendant at any time in accordance with CPL 340.50, defendant was entitled to a vacation of the conviction and sentence under CPL 440.10.

OUTCOME: The conviction and sentence were vacated, and the case was restored to the court's calendar status quo ante.

CORE TERMS: warning, arraignment, sentence, absentia, vacate, nonappearance, trial date, notice, jail, consecutive, rescheduled, scheduled, calendar, license, waived, fine, traffic violations, specifically requested

LexisNexis(R) Headnotes

Criminal Law & Procedure > Counsel > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN1]When a defendant is represented by counsel and is absent, he is deemed to have delegated to counsel decisions regarding discharge and substitutions of jurors during deliberations. The defendant's right to be present during a trial cannot be waived by defense counsel.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial
[HN2]Generally, a defendant has the right to be in court for both pretrial and trial proceedings, and a court may proceed in the defendant's absence with minor, ministerial matters only.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

[HN3]A defendant may waive the right to be present at trial. Before a waiver will be valid, the defendant must be informed on the record that the trial will proceed if he/she does not appear. These have been referred to as "Parker" warnings in criminal justice parlance.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

[HN4]The requirements of Parker warnings as a precedent to a valid waiver of a defendant's right to be present for trial applies not only to felonies, but also to misdemeanors. CPL 340.50.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

[HN5]Even when Parker warnings have been given, a defendant's failure to appear for trial does not automatically authorize a trial in absentia. Instead, the court must consider whether the defendant can be located within a reasonable period of time, the difficulty of rescheduling the trial, and the possibility that evidence will be lost or witnesses disappear if the trial is put off to locate the defendant.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Presence at Trial

[HN6]In a right to be present at trial context, Parker warnings are required in violation cases.

HEADNOTES

Crimes--Right to be Present at Trial--Waiver--Warnings Regarding Possibility of Trial in Absentia for Nonappearance Required in Traffic Violation Cases

Defendant's conviction for traffic violations and his sentence of $ 1,960 plus two consecutive 15-day jail sentences following a trial conducted in his absence due to his nonappearance on the trial date he had specifically requested was vacated and the case restored to the trial calendar, even though defendant gave no excuse for his nonappearance or for his failure to appear on numerous arraignment dates. Defendant was not specifically informed on the record that the trial would proceed in his absence if he did not appear. The warnings regarding the possibility of a trial in absentia for a nonappearance are required in violation cases and must be given prior to proceeding with a trial. In the absence of any warnings, defendant could not be deemed to have waived his right to be present for trial.

COUNSEL: *Brian Rosicky*, defendant pro se. *Dwight D. Kraemer, Village Attorney*, Westbury, for plaintiff.

JUDGES: Hon. Thomas F. Liotti, Village Justice.

OPINION BY: Thomas F. Liotti

OPINION

[**558] [***499] Thomas F. Liotti, J.

The defendant was issued three summons by the Nassau County Police Department on October 6, 2005: violating the speed limit, not wearing a seat belt, and [***500] failure to produce proof of valid insurance. Arraignment was scheduled for December 7, 2005 but the defendant failed to appear. On December 8, 2005, the Village issued a warning letter to the defendant, with a rescheduled arraignment date. On January 4, 2006, the defendant again did not appear at the rescheduled arraignment, and his license was suspended. The defendant then came to the Justice Court and requested a new arraignment date of May 3, 2006, for which he again did not appear. The defendant then requested a new date of June 7, 2006, for which he again did not appear. Notice was sent to the defendant on May 29, 2007, setting a new arraignment date of June 6, 2007, at which the defendant again failed to appear. The defendant again requested a new arraignment date of July 19, 2007, for which he did appear, was arraigned, and entered a plea of "not guilty." On September 5, 2007 the defendant requested a trial. On November 27, 2007, the trial date was set for December 12, 2007. On December 12, 2007, the defendant failed to appear and was tried in absentia. The defendant received fines totaling $ 1,960 and two consecutive 15-day sentences in jail. On December 13, 2007, notice was sent to the defendant. On [*2] December 20, 2007, the court advised the defendant to file a motion to vacate the conviction by January 10, 2008. The defendant filed his motion to vacate one day late, on January 11, 2008. On January 17, 2008, the court notified the defendant that the motion to vacate was filed late, but would nonetheless be considered. The defendant now appears, pro se, in order to attempt to vacate his conviction and sentence. (*See* CPL 440.10.) He has filed a handwritten motion in that regard, which is opposed by

the prosecution.

On the date scheduled for trial, the police officer appeared and the defendant failed to appear. After going over the notices provided to the defendant concerning the trial and his record of appearances on previous dates, the court conducted a trial in absentia of the defendant. It imposed a sentence thereon.

The court notes that the defendant has not provided an excuse for his nonappearance on the trial date. In fact, he specifically requested the trial date. Had the defendant provided an excuse such as, for example, a medical letter, the court would have [**559] been inclined to grant an adjournment or to vacate the conviction and sentence which it has imposed. Sadly, that is not the case. This court believes that the only reason that the defendant has appeared in this matter now, postconviction, is because he has been convicted.

[HN1]When a defendant is represented by counsel and is absent, he is deemed to have delegated to counsel decisions regarding discharge and substitutions of jurors during deliberations. (*See People v Cannady*, 127 Misc 2d 783, 487 NYS2d 294 [Sup Ct 1985], *affd* 138 AD2d 616, 526 NYS2d 202 [2d Dept 1988], *lv denied* 71 NY2d 1024, 526 NE2d 51, 530 NYS2d 559 [1988].) The defendant's right to be present during a trial cannot be waived by defense counsel. (*People v Pegeise*, 195 AD2d 337, 600 NYS2d 26 [1st Dept 1993].)

[HN2]Generally, a defendant has the right to be in court for both pretrial and trial proceedings, and a court may proceed in the defendant's absence with minor, ministerial matters only. (*See People v Buxton*, 192 AD2d 289, 601 NYS2d 132 [2d Dept 1993].)

[HN3]A defendant may waive the right to be present at trial. (*People v Davis*, 194 AD2d 437, 598 NYS2d 531 [1st Dept 1993].) Before a waiver will be valid, the defendant must be informed on the [***501] record that the trial will proceed if he/she does not appear. These have been referred to as "*Parker*" warnings in criminal justice parlance. (*See People v Parker*, 57 NY2d 136, 440 NE2d 1313, 454 NYS2d 967 [1982].)

[HN4]The requirements of *Parker* warnings as a precedent to a valid waiver of a defendant's right to be present for trial applies not only to felonies but to misdemeanors (CPL 340.50 *see People v Trendell*, 61 NY2d 728, 460 NE2d 1101, 472 NYS2d 616 [1984]) and to juvenile delinquency cases. (*Matter of Hand*, 129 Misc 2d 810, 494 NYS2d 642 [Fam Ct 1985].) This court could find no legal precedent determining whether *Parker* warnings are required in violation cases where a defendant may be subject to a substantial fine, points on his license and up to 15 days in jail.

[HN5]Even when *Parker* warnings have been given, it has been determined that a defendant's failure to appear for trial does not automatically authorize a trial in absentia. Instead, the court must consider whether a defendant can be located within a reasonable period of time. (*See People v Amato*, 172 AD2d 545, 567 NYS2d 873 [2d Dept 1991] [the difficulty of rescheduling the trial and the possibility that evidence will be lost or witnesses disappear if the trial is put off to locate the defendant].)

This court finds that [HN6]*Parker*warnings are required in violation cases and that this Village Justice and this court were [**560] required to give them prior to proceeding with a trial. This court has [*3] erred and on the defendant's motion now vacates his conviction and sentence and restores this case to the court's calendar status quo ante. (*See also People v Woodward*, 188 Misc 2d 7, 727 NYS2d 575 [2001], cited in *People v Forbes*, 191 Misc 2d 573, 743 NYS2d 676 [White Plains City Ct 2002].)

In the future, this court will endeavor to inform defendants of their rights to be present during trial and that if they fail to appear a trial may occur in their absence. Where this is done and the court has otherwise satisfied the procedures as outlined in *People v Amato (supra)*, trials and sentencing in absentia may indeed occur. Otherwise, they will not.

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.)

THE OHIO CONSTITUTION

(with amendments to 2006)

TABLE OF CONTENTS

Preamble 3

Article I: Bill of Rights 3

Article II: Legislative 5

Article III: Executive 15

Article IV: Judicial 19

Article V: Elective Franchise 24

Article VI: Education 25

Article VII: Public Institutions 26

Article VIII: Public Debt and Public Works 26

Article IX: Militia 55

Article X: County and Township Organizations 55

Article XI: Apportionment 57

Article XII: Finance and Taxation 60

Article XIII: Corporations 62

Article XIV: Jurisprudence [Repealed] 63

Article XV: Miscellaneous 63

Article XVI: Amendments 64

Article XVII: Elections 65

Article XVIII: Municipal Corporations 66

SCHEDULES 1851 CONSTITUTION 68

SCHEDULES 1912 CONSTITUTION 71

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

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-

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

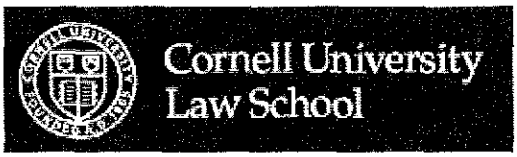
IN WHOM POWER VESTED.

§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.

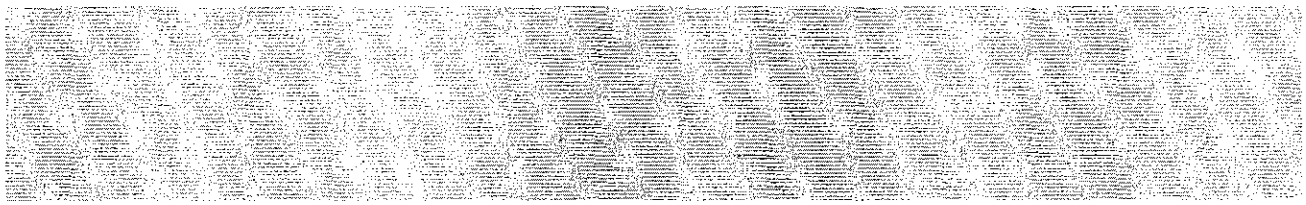
(1851, am. 1912, 1918, 1953)

INITIATIVE AND REFERENDUM TO AMEND CONSTITUTION.

§1a The first aforestated 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



United States Constitution



Bill of Rights

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

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

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

PAGE'S

OHIO GENERAL CODE

ANNOTATED

CONTAINING

ALL LAWS OF A GENERAL AND PERMANENT NATURE IN FORCE AT THE DATE OF PUBLICATION, WITH NOTES OF DECISIONS CONSTRUING THE STATUTES

WILLIAM H. PAGE

EDITOR-IN-CHIEF

AUTHOR OF PAGE ON CONTRACTS AND PAGE ON WILLS

EDITOR-IN-CHIEF, PAGE'S OHIO DIGEST, LIFETIME EDITION

Lifetime Edition

COMPLETE IN TWELVE VOLUMES

VOLUME TEN

CINCINNATI

THE W. H. ANDERSON COMPANY

COPYRIGHT, 1912, 1916, 1926, 1927, 1928, 1929, 1930, 1931,
1932, 1933, 1934, 1935, 1936, 1937, 1938

BY

THE W. H. ANDERSON COMPANY

COPYRIGHT, 1939

BY

THE W. H. ANDERSON COMPANY

In case such prisoner is convicted and sentenced upon trial, he shall be returned to the jail or workhouse to serve out the former sentence before the subsequent sentence shall be executed.

HISTORY.—113 v. 123 (172), ch. 17, § 10.

SEC. **13438-11.** [When prisoner violates parole.] When a prisoner is released on parole or probation from the Ohio penitentiary, or either of the Ohio state reformatories, and violates any of the conditions of his parole or release, it is the duty of any sheriff or other peace officer, upon being advised or knowing that such convict is in his bailiwick and has violated the conditions of his parole or release, to forthwith arrest such person and report the same to the warden or superintendent of the penitentiary or reformatory, as the case may be, from which said person was so released.

HISTORY.—113 v. 123 (172), ch. 17, § 11. For an analogous section, see former G. C. § 13606-1; 103 v. 404, § 1.

Particular instances of arrest by officer: O.JUR Arrest 9 S.

SEC. **13438-12.** Summons on 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 such 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 a copy left at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation on or before the return day of the summons duly served, shall appear by one of its officers or by counsel, and answer to the indictment or information by motion, demurrer or plea, and upon failure to make such appearance an answer, the clerk shall enter a plea of "not guilty"; and upon such appearance being made or plea entered, the corporation shall be deemed thenceforth continuously present in 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.

HISTORY.—113 v. 123 (172), ch. 17, § 12. For an analogous section, see former G. C. § 13607; R. S. § 7231; 87 v. 351.

This section differs from former G.C. § 13607 in that it forbids the arrest of any individual.

Comparative legislation

Appearance and plea by corporation:

A.L.I.	Code of Crim. Proc., § 197.
Ala.	Code 1928, § 3729.
Ariz.	Rev. Code 1928, § 5209.
Cal.	Deering's Penal Code 1931, § 1396.
Ga.	Code 1926, Penal Code, § 963.
Idaho	Code 1932, § 19-3507.
Ill.	Smith-Hurd Rev. Stat. 1933, ch. 38,
Md.	Bagby's Code 1924, art. 27, § 728.
Minn.	Mason's Gen. Stat. 1927, § 10683.
Miss.	Hemingway's Code 1927, § 1257.
Mont.	Rev. Codes 1921, §§ 12236, 12239.
Nebr.	Comp. Stat. 1929, § 29-1603.
Nev.	Comp. Laws 1929, § 11207.
N.J.	Comp. Stat. 1910, Cr. Pr., § 62.
N.Dak.	Comp. Laws 1913, § 11034.
Okla.	Stat. 1931, § 2745.
S.Dak.	Comp. Laws 1929, § 4644.
Utah	Rev. Stat. 1933, § 105-52-7.
Wash.	Remington's Comp. Stat. 1922, § 2011

Process against corporation:

Ala.	Code 1928, § 3727.
Ariz.	Rev. Code 1928, § 5208.
Ill.	Smith-Hurd Rev. Stat. 1933, ch. 38,
Ind.	Burns' Stat. 1933, § 9-1013.
Iowa	Code 1931, § 13765.
Kans.	Rev. Stat. 1923, § 62-1104.
Md.	Bagby's Code 1924, art. 27, § 727.
Minn.	Mason's Gen. Stat. 1927, § 10682.
Miss.	Hemingway's Code 1927, § 1257.
Mont.	Rev. Codes 1921, §§ 12230, 12238.
Nebr.	Comp. Stat. 1929, § 29-1608.
Nev.	Comp. Laws 1929, § 11207.
N.J.	Comp. Stat. 1910, Cr. Pr., § 61.
N.Y.	Gilbert's Cr. Code 1935, § 681.
N.Dak.	Comp. Laws 1913, § 11078.
Okla.	Stat. 1931, § 2745.
S.Dak.	Comp. Laws 1929, § 4638.
Utah	Rev. Stat. 1933, § 105-52-7.
Va.	Code 1930, § 4892.
Wash.	Remington's Comp. Stat. 1922, § 2011
W.Va.	Code 1937, § 6187.

References to Page's Digest and Ohio Jurisprud

Arrest of corporations: PAGE Arrest §§ 2, Corp. § 104; O.JUR Corp. §§ 682, 685, Law § 215, Statutes § 316.

Process against corporations: PAGE Corp. § O.JUR Process § 123 et seq.

Crimes for which a corporation may be indic see general note preceding G. C. § 12368.

There is no statutory authority in Ohio for arrest of a corporation: Reinhart & Newton v. State, 15 O. N. P. (N.S.) 92, 23 O. D. (N.P.) [affirmed, Reinhart & Newton Co. v. State, 26 O. C. (N.S.) 429, 35 O. C. D. 329].

In a criminal or quasi-criminal proceeding only way service can be obtained upon a corpo tion is by issuing and serving a summons on of its officers as provided in cases of indictm former G. C. § 13607: Reinhart & Newton Co State, 15 O. N. P. (N.S.) 92, 23 O. D. (N.P.) [affirmed, Reinhart & Newton Co. v. State O. C. C. (N.S.) 429, 35 O. C. D. 329].

If the president of a corporation is arrested a complaint against the corporation for viola of a penal statute, and if the corporation th after files a motion to quash on grounds other that of a lack of jurisdiction of the person, th a voluntary appearance of the corporation and justice has jurisdiction. A motion to quash cause the justice has no jurisdiction of the per of the defendant and of the subject matter appearance, though the defendant states it appe solely for the purpose of the motion: Reinha Newton Co. v. State, 15 O. N. P. (N.S.) 92, 23 (N.P.) 500 [affirmed, Reinhart & Newton Co State, 26 O. C. C. (N.S.) 429, 35 O. C. D. 329].

SEC. **13438-13.** Recognizance of w nesses. In any case pending in the court of

LexisNexis

LEXSEE 65 NY MISC 2D 731

The People of the State of New York, Plaintiff, v. Mineola Coal Co., Inc., Defendant

[NO NUMBER IN ORIGINAL]

District Court of New York, First District, Nassau County

65 Misc. 2d 731; 319 N.Y.S.2d 87; 1971 N.Y. Misc. LEXIS 1800

March 1, 1971

HEADNOTES

[***1] **Crimes -- default in answering information - corporation which defaulted in answering information may not have judgment taken against it under Code of Criminal Procedure (§ 681) which is applicable to indicted corporations.**

Defendant corporation failed to respond to an information charging it with violation of the Labor Law relating to unemployment insurance contributions. The Attorney-General is not entitled to judgment on such default under section 681 of the Code of Criminal Procedure, which provides for finding a corporation guilty and fining it *in absentia.* Such power is granted to the court only when the corporation has been indicted.

COUNSEL: *Louis J. Lefkowitz, Attorney-General* (*Alfred Dorf* of counsel), for plaintiff.

JUDGES: Edward J. Poulos, J.

OPINION BY: POULOS

OPINION

[*731] [**88] An information alleging the defendant violated the provisions of subdivision 1 of *section 575 of the Labor Law* and section 472.3 of the Industrial Commissioner's regulations (*12 NYCRR 472.3*) in that the defendant failed to [*732] file unemployment insurance contribution reports for certain specified periods was returnable in the arraignment part of this court at which [***2] time the defendant corporation failed to appear. The file disclosed that the defendant was served with a summons that stated a complaint had been made by a named tax auditor and advising the defendant that upon its failure to appear it would be liable to a fine "not exceeding twenty-five dollars."

On the return date the Assistant Attorney-General moved for judgment against the defendant pursuant to the provisions of section 681 of the Code of Criminal Procedure and the assessment of a fine of not less than $ 100 as provided by *section 213 of the Labor Law.*

Section 681 of the Code of Criminal Procedure is entitled "Bringing an *indicted* corporation into court" (emphasis supplied) and the first sentence begins: "When an *indictment* is filed against any corporation". Subdivision 1 of the section spells out the form of the [**89] summons to be used in a criminal proceeding against a corporation and it says the defendant is summoned to "answer an indictment filed against you by the grand jury of this county on the day of * * * and in case of your failure to so appear and answer, judgment will be pronounced against you."

Subdivision 2 of the said section [***3] specifies the manner of service and says "if the corporation does not appear in the manner and at the time and place specified in the summons, judgment must be pronounced against it." It is this subdivision upon which the Attorney-General makes his motion for judgment.

While there is some judicial discretion in the interpretation and application of statutory law it only exists when there is some ambiguity in the statute as enacted.

No such ambiguity in the statute exists here. It is abundantly clear that the power of the court to, in effect, find a corporation guilty and fine it *in absentia* is predicated on an *indictment* and not on an information. As a matter of fact the entire proceedings against a corporation in a criminal matter as set forth in chapter IX of the Code of Criminal Procedure cast doubt upon the jurisdic-

tion of a Court of Special Sessions to try such matters at all.

However, it is not necessary to make that decision in this case. Clearly the content of section 681, as well [***4] as the summons issued, in this matter, requires the denial of the motion for judgment and it is so denied.