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Presence of Accused during Rereading of Instructions

CRIMINAL LAW

PRESENCE OF ACCUSED DURING REREADING OF THE INSTRUCTIONS

After the jury had deliberated five or six hours over its verdict on a rape charge, the judge, proposing to reread the instructions, called

16. 313 U. S. 299 (1941), cited supra note 5.
17. Id. at 318. The Classic decision was considered pertinent only ". . . because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." Instant case at 660.
18. Instant case at 663. It was found that certain committees of the party or its state convention would certify the party's candidates to be included on the official ballot for the ensuing general election. A name not so certified could not appear on that ballot. This statutory method of selection of party nominees required the party which adhered to these directions to be ". . . an agency of the State in so far as it determines the participants in a primary election." Ibid. The Court said further that "the party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." Ibid.
19. "If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state officers, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment." Id. at 664.
20. Instant case at 661.
21. Id. at 665.
22. See note 1 supra.

the appellant's attorney to the courtroom and asked if he desired that appellant be brought from the jail to the courtroom so as to be present when the instructions were again read. The attorney expressly waived appellant's presence, whereupon the judge read to the jury for the second time all the written instructions; then he once more directed the jury to retire and attempt to agree upon a verdict. Held, reversed and motion for new trial sustained. There was no showing that appellant authorized such waiver by his attorney. In overruling the case of Ray v. State,[1] the court stated, in regard to the statute requiring the presence of accused during trial,[2] that the appellant's presence could be waived but only by his express authorization. Miles v. State—Ind. —, 53 N.E. (2d) 779 (1944).

The state statutes requiring the presence of the accused during trial of a felony are mere declarations of the common law.[3]

It is generally recognized that a prisoner has the "right"[4] to be present during all stages of his trial for a felony.[5] There is direct conflict among the authorities as to whether one accused of a felony can waive his "right" to be present at the trial or at any part of the trial.[6] The majority view seems to be that one accused of a felony can waive his "right" to be present at any stage of the trial.[7]

In Indiana, the question arises as to whether the statute,[8] which requires the presence of the accused at the trial, is mandatory at every step of the trial or whether it can be waived, and if so, in what manner. In Hopt v. United States,[9] the United States Supreme Court interpreted

1. 207 Ind. 370, 192 N.E. 751 (1934).
2. Acts 1905, c. 169, Sec. 222, Ind. Stat. Ann. (Burns, 1942 Replacement) Sec. 9-1801. "No person prosecuted for any offense punishable by death or confinement in the state prison or county jail shall be tried unless personally present during trial."
3. Frank v. Mangrum, 237 U.S. 309 (1914); Lewis v. United States, 216 U.S. 611 (1914); Am. Jur., Criminal Law, Sec. 189; Ewbank, "Criminal Law" (2d ed. 1929) Sec. 445.
4. We must realize that this is not referring to a "right" in the strict contract sense, as it is commonly held that one can not waive such a "right." Willis, "Promissory and Non-Promissory Conditions" (1941) 16 Ind. L. J. 349, 366. Using the word "right" in this sense carries the interpretation of being a privilege; otherwise, it could not be waived. Several states have allowed waivers of such a "right." See, Lowman v. State, 80 Fla. 18, 85 So. 166 (1920); Frank v. State, 142 Ga. 741, 83 S.E. 645 (1914); State v. Bragdon, 136 Minn. 348, 162 N.W. 465 (1917); State v. O'Neal, 197 N.C. 548, 149 S.E. (2d) 968 (1934); People v. La Barbera, 274 N.Y. 339, 8 N.E. (2d) 884 (1937).
5. State v. Wilson, 50 Ind. 487 (1875). In Indiana this is a statutory right: See note 2 Supra.
6. 8 R. C. L., Criminal Law, Sec. 53; 14 Am. Jur., Criminal Law, Sec. 199.
7. Diaz v. United States, 223 U.S. 442 (1912); State v. Way, 76 Kan. 928, 93 Pac. 159 (1907); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918).
8. See note 2 supra.
9. 110 U.S. 574 (1884).

a statute[10] similar to the one in question to mean in substance that it was essential to the protection of one whose life or liberty was involved in a prosecution for a felony that he should be personally present at the trial, that is, at every stage of the trial when his substantial rights might be affected by the proceedings against him.[11] It is questionable whether rereading the same instructions is such a substantial right.[12] In the case of Ray v. State,[13] the Supreme Court of Indiana held that the statute concerned is mandatory in favor of the prisoner when it appears that any substantial part of the trial is had in his absence and without his consent. However, the principal case expressly overrules this case thereby leaving it possible for a defendant to waive his presence at a substantial part of his trial.

It seems that the principal purpose of requiring the accused to be present at the trial of a felony was to protect his "right" of due process of law.[14] If this be so, then it would seem justifiable that the accused should be allowed to expressly waive such a "right." "He can waive a trial altogether, and plead guilty. He can waive the constitutional and legal privilege of trial by jury. He can waive the . . . privilege of being a second time put in jeopardy."[15] Then logically why should he not be permitted to waive his privilege of being present at a substantial part of the trial?

Next there arises the question as to the manner of waiving the presence of the accused. The voluntary absence of accused during a trial waives his "right" of being present.[16] This certainly is not an express waiver but an implied one. If we can imply a waiver from the voluntary absence of accused, then can we also imply that his attorney can waive his presence during the rereading of instructions to the

10. This statute (Code of Criminal Procedure of Utah, Sec. 218) provided that, "If the indictment is for a felony, the defendant must be personally present at the trial. . . ." Id. at 576.

11. The court went on to say that if he had been deprived of his life or liberty without being so present, such deprivation would be without the due process of law required by the constiution. Id. at 579.

12. The settlement of instructions is not a part of the trial necessitating the presence of accused at the trial of a felony. State v. Hall, 55 Mont. 182, 175 Pac. 267 (1918). It was not error for the judge in the absence of the defendant to urge the jury to agree after it had deliberated for twenty hours. Sevilla v. People, 65 Colo. 437, 177 Pac. 135 (1918).

13. 207 Ind. 370, 192 N.E. 751 (1934), cited supra note 1.

14. Hopt. v. People of Utah, 110 U.S. 574 (1884); People v. McGrane, 336 Ill. 404, 168 N.E. 321 (1929); State v. Blackwelder, 61 N.C. 51 (1886); Andrews v. State, 34 Tenn. 550 (1885). The Indiana Supreme Court has said, "The constitution and laws provide that a defendant in a criminal case shall be present at his trial. This is for a two-fold object—1. That the defendant may have the opportunity of meeting the witnesses and jury face to face, and of directing the course of his trial. 2. That the state may be in possession of his person so that judgment may be executed thereon." McCorkle v. State, 14 Ind. 39, 44, 45 (1859).

15. McCorkle v. State, 14 Ind. 39, 45 (1859).

16. Southerland v. State, 176 Ind. 493, 96 N.E. 583 (1911); State v. Smith, 183 Wash. 136, 48 P. (2d) 581 (1935); McCorkle v. State, 14 Ind. 39 (1859); State v. Wamire, 16 Ind. 357 (1816).

jury? The majority of states hold that in the physical absence of the defendant, his counsel cannot waive his "right" to be present.[17] One state has clear-cut decisions holding the exact opposite: that is, an attorney may waive a defendant's presence.[18] However, the prevailing view seems to be that the defendant must expressly relinquish a "right" before he can be understood to waive it and no presumption will be made in favor of a waiver.[19] Indiana follows this latter rule in the case at hand by refusing to accept a waiver of the accused's presence without his express consent.

CONSTITUTIONAL LAW

INSURANCE DECLARED INTERSTATE COMMERCE

Nearly 200 private stock fire insurance companies formed a combination, operating in six southern states, to fix agents' commissions and to fix non-competitive premium rates, to be effected by boycotts against persons purchasing insurance from non-members, by refusing to allow agents representing non-member insurance companies to represent them, and refusing the opportunity of re-insurance to non-member companies. Members of the association were indicted for alleged violation of the Sherman Anti-Trust Act.[1] The District Court dismissed the indictment.[2] The Supreme Court, in reversing this action held that "fire insurance transactions which stretch across state lines constitute 'commerce among the several state'." United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944).

In Paul v. Virginia,[3] the Supreme Court announced that "the business of insurance is not commerce,"[4] and in the intervening years

17. Waller v. State, 40 Ala. 325 (1865); Stroope v. State, 72 Ark. 379, 80 S.W. 749 (1904); Bonner v. State, 67 Ga. 510 (1881); State v. Wilcoxen, 200 Iowa 1250, 206 N.W. 260 (1925); State v. Myrick, 38 Kan. 238, 16 Pac. 330 (1888); State v. Grisafulli, 135 Ohio St. 87, 19 N.E. (2d) 645 (1939); Schafer v. State, 118 Texas Cr. R. 500, 40 S.W. (2d) 147 (1931).

18. In Davidson v. State, 108 Ark. 191, 195, 158 S.W. 1103, 1107 (1913) the court said, "It is not essential to a valid waiver that defendant should make the agreement in his own person. He may do so through his own counsel, and, as before stated, in the absence of a showing to the contrary, authority to perform an act in the progress of the trial, which counsel assume to do, will be presumed." Accord, Nelson v. State, 190 Ark. 1027, 82 S.W. (2d) 619 (1935); Durham v. State, 179 Ark. 507, 16 S.W. (2d) 991 (1929); Schruggs v. State, 131 Ark. 320, 198 S.W. 694 (1917).

19. Biggs v. Lloyd, 70 Cal. 447 (1886); Commonwealth v. Andrews, 3 Mass. 126 (1807); French v. State, 85 Wis. 400, 55 N.W. 566 (1893).

1. 26 Stat. 209 (1890), 15 U. S. C. A. §§ 1-2.

2. 51 F. Supp. 712 (194) See Legis. Note (1943) 32 Geo. L. J. 66.

3. 8 Wall. (U.S.) 168 (1869).

4. See also, Liverpool and L. Life and F. Ins. Co. v. Massachusetts, 10 Wall. (U.S.) 566, (1870); Hooper v. California, 155 U.S. 648, (1894). Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918); Colgate v. Harvey, 296 U.S. 404 (1935). For a general collection of cases, see Gavit, The Commerce Clause