Criminal Law—Trial—Presence of Accused During Trial

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RECENT CASE COMMENTS

Criminal Law — Trial — Presence of Accused During Trial. — The accused, after arraignment upon indictment and plea of not guilty, was absent from the courtroom during the time the clerk called a panel of twenty jurors, swore them on their voir dire, and examined them at some length. When his absence was noticed, he was brought into the courtroom, and the jurors were re-examined in his presence. Held, that under the statute providing that a person indicted for felony shall be personally present during the trial, it is reversible error to examine jurors in absence of the accused. State v. Martin.

In this case our court continues its strict construction of the statute involved. Such has been the policy of the court since the beginning as well as the policy of the Virginia court both now and prior to the separation of the states. This has led to some reversals on what appear to be technical grounds, such as absence upon entering of plea of not guilty, upon argument on a motion to strike out testimony of a witness even though the accused declined to make the motion again later, upon argument on instructions by the court, during questioning of a witness, during cross-examination of a witness, upon swearing the jury, and while the crime was being re-enacted before the jury at the scene of the crime. The court, moreover, has repeatedly held that the accused's right to be present at his trial when anything is done affecting him is an inalienable right and a right which he cannot waive. The record must show his presence at the trial. The court has even gone so far as to hold it reversible error to hear testimony from witnesses in the absence of the accused after a plea of guilty.

2 197 S. E. 727 (W. Va. 1938).
3 State v. Conk, 16 W. Va. 736 (1880).
6 State v. Detwiler, 60 W. Va. 583, 55 S. E. 654 (1906).
7 State v. Sheppard, 49 W. Va. 582, 39 S. E. 676 (1901); State v. Greer, 22 W. Va. 800 (1883).
9 State v. McCausland, 82 W. Va. 525, 96 S. E. 938 (1918).
10 State v. Grove, 74 W. Va. 702, 82 S. E. 1019 (1914).
11 State v. McCausland, 82 W. Va. 525, 96 S. E. 938 (1918).
The court has held in a few instances that the absence of the accused was not reversible error, as where the accused was not in the courtroom when the clerk called the names of the jurors who had been selected,\(^\text{14}\) and where the court, having denied a motion for a new trial, asked counsel for the accused if he desired to make any further argument on the motion,\(^\text{15}\) the court holding in both instances that such matters were not part of the trial as contemplated by the statute. In the case of State v. McHaffa,\(^\text{16}\) where court and counsel discussed in the absence of the accused a motion to direct an acquittal of a first degree murder charge, it was not reversible error because clearly not prejudicial.

The Virginia court has held that where the accused was absent when motion for new trial was made and denied, but was afterwards given the opportunity to make the motion again when present, it was not reversible error.\(^\text{17}\) On similar facts, however, the West Virginia court has held that this was error.\(^\text{18}\)

In other jurisdictions the rule is generally not as strict as in West Virginia, some holding that the accused may waive his right to be present,\(^\text{19}\) and others that it is not reversible error to proceed in the absence of the accused unless actual prejudice is shown.\(^\text{20}\)

It would seem that the West Virginia rule is the better rule because, while it occasionally puts the state to the expense of a new trial, it assures the accused of a fairer and more impartial trial by eliminating the possibility of anything prejudicial happening while he is absent, where under the other rules it would be necessary to prove the prejudice or that he had waived his right to be present.

J. C. A.

\textbf{Divorce — Desertion — Pendency of Suit as Affecting Continuity of Desertion Period. —} \textit{W} and \textit{H} married in 1909. \textit{W} left the family home March 29, 1934, because of alleged cruel treatment by \textit{H}. On July 25, 1935, \textit{W} sued \textit{H} for separate maintenance. \textit{H} filed a cross bill for absolute divorce on the ground of desertion. The court sustained a demurrer to the cross bill be-

\(^{14}\) State v. Lucas, 103 W. Va. 793, 138 S. E. 393 (1927).

\(^{15}\) State v. Parsons, 89 W. Va. 464, 19 S. E. 876 (1894).

\(^{16}\) 110 W. Va. 266, 157 S. E. 595 (1931).

\(^{17}\) Bond v. Commonwealth, 83 Va. 581, 3 S. E. 149 (1889).

\(^{18}\) State v. Grove, 74 W. Va. 702, 82 S. E. 1019 (1914).

\(^{19}\) Hill v. State, 17 Wis. 675 (1864).

\(^{20}\) State v. Pierce, 123 N. C. 745, 31 S. E. 847 (1898).