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THE REQUIREMENT OF DEFENDANT'S PRESENCE— A NECESSITY FOR FAIR TRIAL?

A RE-EXAMINATION of the procedures which are largely responsible for the unnecessary expense and delay resulting from mistrials should afford a basis for improvement of the administration of criminal justice in the courts. If such procedures are found desirable for the protection of the interests of the defendant, they should be continued notwithstanding the added expense to the State; if, however, they have been retained for historical reasons only, and confer no deserved protection upon the defendant, then revision would seem to be necessary. One such factor, to which frequent mistrials in felony cases are attributable, is the requirement that the defendant shall be present at all times during the trial proper. For example, in a prosecution for murder, the trial court commits reversible error if it replies in writing to the jury's written request for further instructions without first bringing the jury into open court and making its reply in the presence and hearing of the accused. This is true even though the court had discussed proper procedure with counsel for the defense and has been assured that the question will not be raised in event of conviction.[1] It is also reversible error for the court to permit the reproduction of testimony upon the request of the jury in the absence of a defendant at liberty on bail, even though the defense counsel has waived the client's presence at such proceedings.[2] The defendant is the only party who may waive his right to be present,

[1] White v. State, 195 S. W. (2d) 141 (Tex. Crim. App. 1946).

[2] Stroope v. State, 72 Ark. 379, 80 S. W. 749 (1904); Strasheim v. State, 294 N. W. (Neb. 1940); Lee v. State, 144 Tex. Crim. Rep. 135, 161 S. W. (2d) 290 (1942); Onderdonck v. State, 139 Tex. Crim. Rep. 296, 139 S. W. (2d) 589 (1940); Schafer v. State, 118 Tex. Crim. Rep. 500, 40 S. W. (2d) 147 (1931); Derden v. State, 56 Tex. Crim. Rep. 396, 120 S. W. 486 (1909); Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117 (1908).

and then only by appearing in open court and expressly stipulating that he desires to do so.[3]

Article 580 of the Texas Code of Criminal Procedure[4] governing the requirement of the defendant's presence is more effective than comparable provisions in most other jurisdictions in eliminating this basis for reversal, inasmuch as it creates a presumption of the defendant's presence throughout the trial from a showing in the record of his presence at any time during the trial, in the absence of a showing in the record that the defendant was not present. And it is held that where the record shows the defendant was absent, but that such absence was voluntary, he is deemed to have waived his right to be present.[5] However, Article 679 of the Code[6] provides

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[3] Crow v. State, 89 Tex. Crim. Rep. 149, 230 S. W. 148 (1921); Smith v. State, 61 Tex. Crim. Rep. 328, 135 S. W. 154 (1911); Mapes v. State, 13 Tex. App. 85 (1882); Shipp v. State, 11 Tex. App. 46 (1881). In Georgia, it is held that if counsel waives the defendant's right in the presence of the defendant, this operates to estop the defendant from denying later that said counsel did so without authority. Crymes v. State, 182 S. E. 856 (Ga. 1935); Cawthon v. State, 119 Ga. 395, 46 S. E. 897 (1903). One Texas case has held that upon a motion for new trial, where the record showed that defendant's presence was waived by counsel, it would be presumed that counsel had such authority. Escareno v. State, 16 Tex. App. 85 (1884). Rule 43 of the new FEDERAL RULES OF CRIMINAL PROCEDURE provides that although the defendant may waive his right to be present at felony trials carrying less than a possible death penalty, in those cases where there is a possible death penalty, his presence is mandatory and cannot be waived. New York follows a similar procedure. People v. La Barbera, 274 N. Y. 339, 8 N. E. (2d) 884 (1937). West Virginia, however, declares the presence of the defendant to be an inalienable right which is not subject to waiver. W. VA. CODE (1931 c. 62, art. 3, § 2. For a discussion of the application of this statute by the courts of that state see (1938) 45 W. VA. L. Q. 82.

[4] TEX. CODE CRIM. PROC. (1925) art. 580, provides that "In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanors when the punishment or any part thereof is imprisonment in jail. When the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, it shall be presumed in the absence of all evidence in the record to the contrary that he was present during the whole trial." Missouri is the only state having a comparable provision. Mo. REV. STAT. (1919) § 4008. All other states indulge no such presumption that correct procedure was followed by the lower court.

[5] Some of the types of voluntary behavior which the courts have held to be a voluntary absence amounting to a waiver of the defendant's right to be present are: where the defendant's misconduct during trial necessitated his removal so that trial could proceed, United States v. Davis, 25 Fed. Cas. 773, No. 14,923 (S. D. N. Y. 1869); where the defendant's absence was due to voluntary intoxication, *Ex parte* Cassas, 112 Tex. Crim. Rep. 100, 13 S. W. (2d) 869 (1929); where the defendant has escaped or forfeited his recognizance, ARK. STAT. (Pope, 1937) § 3972; COLO. STAT. ANN. (1935) c. 48, § 486; MISS. CODE (1942) § 2519; OHIO CODE (Baldwin, 1940) § 13442-10; where the de-

that his presence is mandatory at certain times during the proceedings, with reference to which occasions, a voluntary absence will not operate as a waiver.[7] The questions which are thus presented by the Code provisions and the decisions thereunder are: (1) whether defense counsel should not be permitted to waive the requirement of defendant's presence at any time during the trial, and (2) whether a defendant who avails himself of bail should not be held to have waived thereby his right to be present at any time during the trial.

The provisions of the Code were based upon the common law of England;[8] yet the Legislature and the courts seem to have lost sight of the reasons for the requirement of the defendant's presence at common law. It has been pointed out that formerly in England, a prisoner might be represented by counsel only in a trial for treason or for a misdemeanor, but that in a felony case the accused was required to defend himself without the aid of counsel.[9] For this reason, it was necessary that in the latter situation the defendant be present at every phase of the case. Because of practical

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fendant was absent eating supper when the verdict was returned, Streich v. State, 78 Tex. Crim. Rep. 155, 180 S. W. 266 (1915); and where the defendant voluntarily left the room during proceedings without the knowledge of the court, Garcia v. State, 128 Tex. Crim. Rep. 6, 79 S. W. (2d) 133 (1935); Ballou v. State, 113 Tex. Crim. Rep. 493, 22 S. W. (2d) 666 (1929); Whitehead v. State, 66 Tex. Crim. Rep. 482, 147 S. W. 583 (1912).

[6] TEX. CODE CRIM. PROC. (1925) art. 679, provides that "In felony, but not in misdemeanor cases, the defendant shall be present in the court when any such proceeding is had as mentioned in the three preceeding articles and his counsel shall also be called." The preceding articles referred to are: article 676 which provides the procedure to be followed when the jury desires to communicate with the court, article 677 providing the procedure to be followed when the jury desires to ask further instructions, and article 678 which provides the procedure whereby the jury may have a witness re-examined.

[7] See cases cited *supra* notes 1 and 2.

[8] The Supreme Court of the United States in Frank v. Mangum, 237 U. S. 309 (1914), and Lewis v. United States, 216 U. S. 611 (1914), declared that state statutes requiring the presence of the accused are mere declarations of the common law. For an excellent article tracing the adoption of the common law in Texas see Butte, *Early Development of Law and Equity in Texas* (1917) 26 YALE L. J. 699.

[9] See Lehman, *Criticism of Criminal Trial Procedure* (1915) 63 U. OF PA. L. REV. 609, 619.

control over the defendant's case now exercised by counsel in criminal trials, the early English requirement is certainly no longer necessary for the reason which justified its adoption. Indeed, the defendant, unless himself a lawyer, is at such a disadvantage in attempting to participate in the conduct of proceedings in a modern prosecution that there is very little he could do to affect proceedings which could not better be done by counsel. It is likely to be far more detrimental to the defendant for his counsel to be absent in view of his greater competence in understanding the significance of each development during the trial; yet it is held not to be error for defense counsel to be absent,[10] although the statute would seem to require his presence at such proceedings also.[11]

The presence of the defendant, not in itself an inalienable right, is not guaranteed by either the United States or the Texas Constitutions. It is, however, held by Texas courts to be a privilege necessary for the enjoyment of the right of trial by jury guaranteed by the Texas Constitution.[12] As such, it has been held to be expressly waivable,[13] like all other privileges. It is rather the question of implied waiver by reason of the defendant's voluntary absence with which the Code fails to deal adequately.

Although Article 679 makes mere absence of the defendant at the portions of the trial prescribed therein sufficient ground for rereversal, decisions of the Texas courts have tended to eliminate

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[10] Baker v. State, 58 Ark. 513, 25 S. W. 603 (1894); Onderdonck v. State, 139 Tex. Crim. Rep. 296, 139 S. W. (2d) 589 (1940); McClellan v. State, 118 Tex. Crim. Rep. 473, 40 S. W. (2d) 87 (1931); Wesley v. State, 67 Tex. Crim. Rep. 507, 150 S. W. 197 (1912); Clemens v. State, 185 N. W. 209 (Wis. 1921); *cf.* Hart v. State, 95 Tex. Crim. Rep. 566, 255 S. W. 414 (1923) (both defendant and counsel were absent).

[11] TEX. CODE CRIM. PROC. (1925) art. 679, provides that " . . . and his counsel shall also be called." Complete citation is found in *supra* note 6.

[12] The right of the accused to a speedy public trial by an impartial jury in all criminal prosecutions is provided for in the TEXAS CONSTITUTION of 1876, Article I, Section 10. The court pointed out in Onderdonck v. State, 139 Tex. Crim. Rep. 296, 139 S. W. (2d) 589 (1940), that article 679 was intended to give effect to the provision of the Bill of Rights of the Texas Constitution guaranteeing a public trial.

[13] TEX. CODE CRIM. PROC. (1925) art. 11, provides that "the defendant in a criminal prosecution for any offense, may waive any right secured him by law except the right of trial by jury in a felony case when he enters a plea of not guilty." For decisions holding that the defendant may waive his right to be present, see cases cited *supra* note 3.

absence without resulting prejudice as a basis for reversal, and to reverse only when the defendant's absence is shown to be actually prejudicial to his cause when such absence occurred at other phases of the trial.[14] Earlier Texas cases had taken the view, as at common law, that the defendant should be present at all times no matter how inconsequential the proceedings at the moment in question.[15] Later, the courts conceded that the defendant's presence should be required only during the trial proper, reversal being based on whether the absence was during such a part of the trial as affected his substantive rights,[16] and such things as selection of

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[14] Where talesmen were examined during defendant's absence, there being no showing of prejudice, the court held there was no reversible error in Boatright v. State, 118 Tex. Crim. Rep. 547, 42 S. W. (2d) 422 (1931); Speegle v. State, 102 Tex. Crim. Rep. 500, 278 S. W. 427 (1926); Cartwright v. State, 97 Tex. Crim. Rep. 230, 259 S. W. 1085 (1924); O'Toole v. State, 40 Tex. Crim. Rep. 578, 51 S. W. 244 (1899); Powers v. State, 23 Tex. App. 42, 5 S. W. 153, 156 (1887). Where there was no showing of prejudice, the court has refused, in the following cases, to grant reversals merely because defendant was absent from other phases of the proceedings: Frank v. Mangum, 237 U. S. 309 (1914) (absence at verdict); Snyder v. Massachusetts, 291 U. S. 97 (1933); State v. Moore, 199 La. 564, 44 So. 299 (1907) (absence at a jury view); Ray v. State, 207 Ind. 370, 192 N. W. 751 (1934); Hair v. State, 16 Neb. 601 (1884) (absence during the testimony of a witness); State v. Nardella, 108 N. J. Law 148, 154 Atl. 834 (1931); Commonwealth v. Kelly, 292 Pa. 418, 141 Atl. 246 (1928) (absence at re-reading of instructions); State v. McHaffa, 110 W. Va. 266, 157 S. E. 595 (1931) (absence at motion for acquittal).

[15] In Gibson v. State, 3 Tex. App. 437 (1878), the court defined a trial as the "whole or any part of the procedure which the law provides for bringing offenders to justice." Stating that a trial is not complete until the accused has had an opportunity, if desired, to avail himself of his statutory right to present a motion for new trial in arrest of judgment, the court granted a reversal because of the defendant's absence, and the court further stated that after indictment nothing should be done in the cause in the absence of the prisoner. Other phases of the trial, at which defendant's presence was formerly held to be essential, but which are no longer considered to be substantive parts of the trial are indicated by the following cases: Crow v. State, 89 Tex. Crim. Rep. 149, 230 S. W. 148 (1921) (excusing juror for sickness); Upchurch v. State, 36 Tex. Crim. Rep. 624, 38 S. W. 206 (1896); Rudder v. State, 29 Tex. App. 262, 15 S. W. 717 (1890) (discharge of jury); Madison v. State, 17 Tex. App. 479 (1885) (entering judgment); Mapes v. State, 13 Tex. App. 85 (1882) (pronouncement of sentence).

[16] FED. RULES CRIM. PROC. (1946) Rule 52(a), provides that "any error, defect, irregularity or variance which does not affect substantive rights shall be disregarded." "Substantive rights" has been defined in Massachusetts Bonding and Insurance Co. v. Novotny, 200 Iowa 227, 202 N. W. 588 (1925), as "those rights enjoyed under the legal system before disturbance of normal relations"; that is to say, those rights the enjoyment of which are secured to a person by law. The AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 287, sets down the following seven phases of the trial as being of a nature requiring the presence of the defendant: (1) the arraignment, (2) when a plea of guilty is made, (3) at the calling, examination, challenging, impanelling

special venire,[17] motions for change of venue,[18] and ministerial acts of recording by the court clerks[19] are no longer considered substantive portions of the trial. A practical solution to the difficulty created by defendant's absence in prosecutions in Texas has been the staying of proceedings upon discovery of his absence until his return at which time he is given an opportunity to waive that part of the proceedings which took place during his absence, or in the alternative, of having that part of the trial repeated;[20] thus a reversal based upon absence alone can be precluded if there is no showing that proceedings during his absence were prejudicial.

Serious difficulty has been created by the conflict between the requirement of defendant's presence and the right of bail guaranteed to the defendant by the Texas Constitution.[21] This difficulty, moreover, will continue so long as absence on bail is not held to be a voluntary absence of the defendant operating as a waiver of

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and swearing of the jury, (4) at all proceedings before the court when the jury is present, (5) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury, (6) at a view by the jury, and (7) at the rendition of the verdict. This section further provides that, where the defendant is voluntarily absent, all but the first two phases mentioned may proceed in his absence. Although most states have more or less adopted this procedure in the event of the defendant's absence during a substantive portion of the trial, Texas continues to treat the motion for new trial as being a basic part of the trial. For a more complete discussion of defendant's presence during particular portions of the trial see (1944) 20 IND. L. J. 181; (1941) 20 NEB. L. REV. 47; (1943) 41 MICH. L. REV. 966; (1939) 25 VA. L. REV. 852.

[17] Oliver v. State, 70 Tex. Crim. Rep. 140, 159 S. W. 235 (1913).

[18] Littleton v. State, 91 Tex. Crim. Rep. 205, 239 S. W. 202 (1922); Rothschild v. State, 7 Tex. App. 519 (1880).

[19] People v. Johnson, 140 Cal. App. 729, 35 P. (2d) 1074 (1934); Powers v. State, 23 Tex. App. 42, 5 S. W. 153 (1887).

[20] People v. LaMunion, 62 Mich. 709 (1887); State v. Spotted Hawk, 22 Mont. 33, 55 P. 1026 (1899); Hair v. State, 16 Neb. 601, 21 N. W. 464 (1884); State v. Paylor, 89 N. C. 539 (1883); Garcia v. State, 128 Tex. Crim. Rep. 547, 42 S. W. (2d) 422 (1935); Sullivan v. State, 90 Tex. Crim. Rep. 170, 233 S. W. 986 (1921); Cason v. State, 52 Tex. Crim. Rep. 220, 106 S. W. 337 (1907); O'Toole v. State, 40 Tex. Crim. Rep. 580, 51 S. W. 244 (1899).

[21] TEX. CONST. (1876) Art. I, § 11, provides that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law."

his right to be present.[22] One at liberty on bail is not required to be remanded to jail during the trial but is permitted to remain at large until a verdict of guilty is returned;[23] nevertheless, it is reversible error for the proceedings specified in Article 679 to be conducted in the defendant's absence even though the defendant has availed himself of this encouragement to his absence from the trial. A "voluntary" absence, as defined by the Court of Criminal Appeals, is one which results "from choice or exercise of the will."[24] Can it not be said that a defendant availing himself of bail during trial has voluntarily absented himself therefrom? After having exercised his choice, he should not thereafter be heard to complain of anything which takes place during his absence, especially if his counsel is present. Certainly, if the defendant is voluntarily absent on bail, his counsel should be allowed to waive the defendant's right to be present, as it may be said that by reason of his being absent, the defendant has given implied authority for the making of such waiver. The new Federal Rules of Criminal Procedure[25] allow proceedings to continue through the rendition of the verdict in all cases except those involving a possible death penalty, if the defendant voluntarily absents himself after the trial has commenced. Moreover, the American Law Institute in its proposed Model Code of Criminal Procedure[26] also approves the continuation of proceedings through the verdict in

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[22] Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117 (1908).

[23] TEX. CODE CRIM. PROC. (1925) art. 582, provides that "where the accused is on bail when the trial commences, such bail shall not thereby be considered as discharged until the jury shall return into court a verdict of guilty or not guilty. He shall have the same right to have and remain on bail during the trial of his case and up to the return into court of such verdict as under the law he has before the trial commences; but immediately upon the return into court of a verdict of guilty, he shall be placed in the custody of the sheriff, and his bail considered discharged. Where the accused is convicted in a misdemeanor case and is on bail when the trial commences, such bail shall not thereby be considered discharged until the defendant's motion for a new trial has been overruled by the court."

[24] Derden v. State, 56 Tex. Crim. Rep. 396, 403, 120 S. W. 486, 488 (1909).

[25] FED. RULES CRIM. PROC. (1946) Rule 43.

[26] AMERICAN LAW INSTITUTE, CODE CRIM. PROC. (1930) § 287.

defendant's voluntary absence, his presence being mandatory under the Code only at the arraignment, at the time of a plea of guilty, and at pronouncement of sentence, though his presence may also be required for purposes of identification.[27]

In Texas in a prosecution for a misdemeanor not punishable by a jail sentence, the defendant is not required to appear in person at any part of the trial but is permitted to appear by counsel only, with the consent of the State's attorney.[28] The federal courts and the vast majority of the states now have similar provisions. While it is true that more severe consequences face the unsuccessful defendant in a felony prosecution than in one for a misdemeanor, the requirement of presence no longer bears any practical relation to the effectiveness of the case presented by the defense, if the defendant is represented by counsel.

It may be suggested that Article 580 of the Code should be revised to read:

> In all prosecutions for felonies or for misdemeanors where the punishment or any part thereof is imprisonment in jail, the defendant shall be personally present *at the arraignment and when a plea of guilty is made, and if after trial has commenced, he voluntarily leaves or absents himself, then trial shall proceed as if he were present at all times.*

This should be supplemented by a revision of Article 679 of the Code as follows:

> In felony, but not in misdemeanor cases, *where the defendant remains in custody,* the defendant shall be present in the court when any such proceeding is had as mentioned in the three preceeding articles, and his counsel shall be called also, *if immediately available. In all cases where the defendant is on bail, his presence shall not be required, but the presence of his counsel shall be deemed sufficient.*

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[27] *Id.*, § 290.

[28] TEX. CODE CRIM. PROC. (1925) art. 581, provides that "in other misdemeanor cases (than those involving a jail sentence), the defendant may, by consent of the State's attorney, appear by counsel and the trial may proceed without his personal presence."

If such changes are incorporated into the Code or rules of procedure, the defendant will be adequately protected by his being apprised upon arraignment of the crime with which he is charged, and, thus, put upon notice as to the occasion for his presence at trial; moreover, the state will be saved the expense of unnecessary and costly prosecution resulting from a merely technical requirement which is not necessary for insuring to the defendant a fair and just trial.

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