Washington and Lee Law Review

Volume 21 | Issue 2 Article 19

Fall 9-1-1964

# Presence Of Accused At Trial

# VIRGINIA COMMENTS

## PRESENCE OF ACCUSED AT TRIAL

The right of an accused to be present at his trial is well-recognized.[1] A recent federal case originating in Virginia, *Near v. Cunningham*,[2] involves this right. During the course of the trial the Commonwealth's Attorney, the trial judge, and counsel for the accused, Near, went into the judge's chambers and agreed that the jurors should not be kept together during recesses or adjournments. The formal record showed that Near was present at every stage of the trial, but he denied that he was present at the conference. The jury found Near guilty of murder and sentenced him to death. Near moved for a new trial on the ground, among others, that the jurors had been prejudiced by remarks made by spectators during recesses when the jury was free to mingle with the crowd. The court denied the motion. The Supreme Court of Appeals of Virginia affirmed the conviction,[3] and the United States Supreme Court denied certiorari.[4]

Near then petitioned for a writ of habeas corpus in the Supreme Court of Appeals on the grounds that he was denied due process of law in that he was in fact absent when the decision was made to allow the jury to separate during recesses, and that the jury was prejudiced by remarks heard during the recesses. The petition was denied.[5] The Supreme Court of the United States denied certiorari.[6] Near then petitioned for habeas corpus in the United States States District Court for the Eastern District of Virginia, which also denied the petition. He then appealed to the United States Court of Appeals

---

[1]Various factors have been suggested as the basis for this right of an accused to be present at his trial. They are: (a) to enable the accused to face the jury and poll it, see Annot., 23 A.L.R.2d 456, 468 (1952) (b) the interest of the public in the life and liberty of the citizen, Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679 (1923); (c) the right to a trial by an impartial jury, People v. Medcoff, 344 Mich. 108, 73 N.W.2d 537 (1955); (d) the right of an accused to be heard, Garver v. Commonwealth, 256 S.W.2d 375 (Ky. 1953); and (e) the right of confrontation, Hooker v. Commonwealth 54 Va. (13 Gratt.) 763 (1855).

[2]313 F.2d 929 (4th Cir. 1963).

[3]Near v. Commonwealth, 202 Va. 20, 116 S.E.2d 85 (1960).

[4]Near v. Virginia, 365 U.S. 873 (1961).

[5]Near v. Cunningham, 203 Va. lxxxii (1961).

[6]Near v. Cunningham, 369 U.S. 862 (1962).

for the Fourth Circuit, which in a 2-1 decision,[7] reversed and remanded the case to the District Court for a hearing.[8]

Although there were several factors involved in the court's decision, it did indicate that if Near was not present when the decision to let the jury separate was made, then Near's constitutional right of due process was violated.[9] The Court of Appeals also observed that the Virginia law closely guards the due process guarantee of the right of an accused to be present at every stage of his trial. The District Court has previously said that not every error in state procedure constitutes a violation of federal due process.[10] The question is thus raised as to whether Near's absence was a violation of either Virginia law or due process.

The right of an accused to be present at his trial for a felony[11] has long been regarded as fundamental. Historically, it was a ques-

---

[7]District Judge Paul dissented on the ground that the allegations in the petition had been considered and decided by the Virginia state courts. Near v. Cunningham, 313 F.2d at 934.

[8]The District Court, after hearing on the petition, ordered the conviction "vacated and set aside" because of a violation of due process. Near v. Cunningham reported in Richmond Times-Dispatch, Sept. 11, 1963, p. 3 col. 1. When Near was brought to trial again, this time without a jury, he pleaded guilty and was sentenced to life imprisonment. Thus, Near's successful battle to escape the electric chair stretched from May 27, 1959, when he was originally convicted, to March 2, 1964, when he was sentenced to life imprisonment. Near spent the five years on Death's Row, during which time he was granted 19 stays of execution. Commonwealth v. Near (Cir. Ct. Powhatan County, March 2, 1964) in Richmond Times-Dispatch, March 4, 1964, p. 3, col. 4.

[9]The Supreme Court of Appeals of Virginia, in denying the petition, stated that the formal entries on the record indicated that the accused was present at every stage of the trial, and that under the rules of the court the formal record must be accepted. Near v. Cunningham, 313 F.2d at 930. The United States Court of Appeals stated in the present case that had the Supreme Court of Appeals of Virginia gone behind the formal record of the trial and held a hearing on Near's claim, that Near might have convinced the Court that he was not present when the decision was made, and "if the Court were so convinced, Near would have been entitled to his writ." Near v. Cunningham, Id. at 931.

[10]Owsley v. Cunningham, 190 F. Supp. 608, 611 (E.D. Va. 1961). There the court stated, "Assuming, arguendo, that petitioner was entitled to be present at the time of the presentation and argument of the motions and assuming further, but without deciding, that the action by the state court on said motions affected the interest of the petitioner, which is apparently the test for determining whether the statute has been violated, this does not bring into focus the due process clause of the Fourteenth Amendment. There may have been some error in the state court practice and procedure, but the federal court is only interested in whether there has been a denial of due process as guaranteed by the federal constitution."

[11]This comment is limited to a discussion of the presence of the accused at a trial for a felony. For misdemeanors, see Va. Code Ann. § 19-1-180, 19.1-184 (Repl. Vol. 1950).

tion of absolute necessity,[12] and the principle existed at common law as a necessary requisite to jurisdiction.[13]

In Virginia the right of an accused to be present at his trial is insured by a statute, which provides in part:

> "A person tried for a felony shall be personally present during the trial.... But for the purpose of this section a motion for a continuance, whether made before or after arraignment, shall not be deemed to be part of the trial."[14]

This right cannot be waived,[15] because unless the accused is present, the court has no jurisdiction. Thus, in Virginia the accused not only has a *right* to be present, he *must* be present.

In cases involving this right two questions must be considered: (1) whether the accused was absent, and if so, (2) whether the proceeding was a part of the "trial" referred to in the statute.

The rule in Virginia is that the accused must be present at any time his interests are affected,[16] from arraignment to sentence.[17] The

---

[12]The early methods in England for determining the accused's innocence or guilt include trial by ordeal and trial by battle and would seem to require the presence of the defendant. With the development of the jury system the accused's presence was still necessary to present a case, to give the jury control over him, and in order that he might elect to wage battle or to defend by oath with helpers. Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases, 16 Colum. L. Rev. 18 (1916).

[13]"[F]rom the outset the common law courts have looked upon this as a necessary prerequisite to jurisdiction. Without his presence a common law court had no jurisdiction to commence a trial against a defendant, and it has become the settled practice to regard the presence of the accused at every step of the trial as necessary to the courts jurisdiction." Goldin, supra note 12, at 20. See also Noell v. Commonwealth 135 Va. 600, 115 S.E. 679 (1923); Clark, Criminal Procedure § 148 (2d ed. 1918).

[14]Va. Code Ann. § 19.1-240 (Repl. Vol. 1960). It has been stated that this statute is merely declaratory of the common law. Williams v. Commonwealth, 188 Va. 583, 50 S.E.2d 407 (1948); Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679 (1923).

[15]Noell v. Commonwealth, 135 Va. at 609, 115 S.E. at 681; Shelton v. Commonwealth, 89 Va. 450, 16 S.E. 355 (1892); Bond v. Commonwealth, 83 Va. 581, 3 S.E. 149 (1887); Jackson v. Commonwealth, 60 Va. (19 Gratt.) 656 (1870).

[16]"[T]he test to be applied in determining whether or not the statute has been violated is: Has the interest of the defendant been affected by the action of the Judge?" Rogers v. Commonwealth, 183 Va. 190, 194-95, 31 S.E.2d 576 (1944); see also Carpenter v. Commonwealth, 193 Va. 851, 71 S.E.2d 377 (1952); Thomas v. Commonwealth, 183 Va. 501, 32 S.E.2d 711 (1945); Noell v. Commonwealth, 135 Va. 600 115 S.E. 679 (1923); Gilligan v. Commonwealth, 99 Va. 816, 37 S.E. 962 (1901).

[17]Palmer v. Commonwealth, 143 Va. 592, 130 S.E. 398 (1925); Fetters v. Commonwealth, 135 Va. 501, 115 S.E. 692 (1923); Noell v. Commonwealth, 135 Va. 600, 115 S.E. 697 (1923); Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923). "Generally stated, the rule is that he must be present on his arraignment, when any

courts have been called upon to apply the rule to various situations. These decisions have established certain guidelines in determining when and under what circumstances the presence of the accused is essential.

The Virginia court, in applying the rule, has determined that the presence of the accused is essential at the time of entering a plea,[18] at the selection of the jury,[19] at the giving of testimony,[20] at a jury viewing of the scene of the crime,[21] at the charge to the jury,[22] at the rendition of the verdict,[23] at a motion to set aside the verdict,[24] and at various other proceedings.[25]

Conversely, Virginia has held that the presence of the accused is not essential at proceedings before arraignment,[26] at the making of a motion for a continuance,[27] at the giving of extra-judicial or caution-

---

evidence is given or excluded, when the jury is charged, when the trial court wishes to communicate with the jury in answering questions by them, and when the jury receives further instructions. He must be present at every stage of the trial proper." 143 Va. at 605, 130 S.E. at 402.

[18]Palmer v. Commonwealth, 143 Va. 592, 130 S.E. 398 (1925); Sperry v. Commonwealth, 36 Va. (9 Leigh) 623 (1838).

[19]Hampton v. Commonwealth, 190 Va. 531, 58 S.E.2d 288 (1950) (it is held that the record did not show that the defendants were absent when the court ruled on the qualifications of the jurors).

[20]Jackson v. Commonwealth, 60 Va. (19 Gratt.) 656 (1870).

[21]Crockett v. Commonwealth, 187 Va. 687, 47 S.E.2d 377 (1948); Fetters v. Commonwealth, 135 Va. 501, 115 S.E. 692 (1923); Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679 (1923); ;Pierce v. Commonwealth, 135 Va. 653, 115 S.E. 686 (1923).

[22]Clinton v. Commonwealth, 161 Va. 1048, 172 S.E. 272 (1934); Hagood v. Commonwealth, 157 Va. 918, 162 S.E. 10 (1932); Palmer v. Commonwealth, 143 Va. 592, 130 S.E. 398 (1925).

[23]Gilligan v. Commonwealth, 99 Va. 816, 37 S.E. 962 (1901); Jackson v. Commonwealth, 60 Va. (19 Gratt.) 656 (1870); Sperry v. Commonwealth, 36 Va. (9 Leigh) 623 (Gen. Ct. 1938).

[24]Staples v. Commonwealth, 140 Va. 583, 125 S.E. 319 (1924); Bond v. Commonwealth, 83 Va. 581, 3 S.E. 149 (1887); Hooker v. Commonwealth, 54 Va. (13 Gratt.) 763 (1855.).

[25]Slater v. Commonwealth, 182 Va. 579, 29 S.E.2d 853 (1944) (in absence of the accused the court examined clerk and had him sign writ of venire facias); Bowles v. Commonwealth, 193 Va. 816, 48 S.E. 527 (1904) (accused absent when instructions and indictment sent to jury room. The Supreme Court of Appeals said, "the correct practice is that the indictment... instructions... other writings... should be delivered to them in presence of the prisoner and his counsel, that objection may be made at that time, if there be objection.") 103 Va. at 837, 48 S.E. at 534; Sperry v. Commonwealth, 36 Va. (9 Leigh) 623 (Gen. Ct. 1838) (accused absent during one day of trial).

[26]Kibler v. Commonwealth, 99 Va. 804, 26 S.E. 858 (1897); Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860 (1871).

[27]The statute itself provides that a motion for a continuance is not a part of the trial requiring the presence of the accused. Va. Code Ann. §19.1-240 (Repl. Vol.

ary communications by the judge to the jury,[28] and at various "administrative" proceedings.[29] Also, the accused does not have to be present at a conference in the judge's chambers regarding instructions to be given the jury[30] or admissibility of proposed questions.[31]

The situation in the *Near* case, assuming the absence of the accused when an agreement was made in the judge's chambers to allow the jury to separate, has never been passed upon by the Virginia courts. However, it seems so closely analogous to the situations previously considered and decided involving out-of-court conferences,[32] that no meaningful distinction can be made.

Firstly, in *Near,* as in the other out-of-court conference cases, the conference took place in the judge's chambers, and so was not within the hearing or presence of the jury, and was not a part of the "trial proper." The court in *Williams v. Commonwealth,*[33] in considering the absence of the accused from a conference in the judge's chambers, stated, "We do not consider this conference in the judge's chambers

---

1960). See also Seymour v. Commonwealth, 133 Va. 775, 112 S.E. 806 (1922) (decided under statute); O'Boyle v. Commonwealth, 100 Va. 875, 40 S.E. 121 (1901) (decided before statute adopted); Kibler v. Commonwealth, 94 Va. 804, 26 S.E. 858 (1897) (decided before statute adopted); Coleman v. Commonwealth, 90 Va. 653, 19 S.E. 161 (1894) (decided before statute adopted).

[28]Thomas v. Commonwealth, 183 Va. 501, 32 S.E.2d 711 (1945) (accused absent momentarily when judge admonished jury); Rogers v. Commonwealth, 183 Va. 190, 31 S.E.2d 756 (1944) (judge told jury, while accused absent, that if any of them wanted pajamas or anything to see sergeant, but not to telephone); Jones v. Commonwealth, 79 Va. 213 (1884) (accused absent when jury called in morning and sent to jury room); Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 845 (1878) (court stated it wasn't necessary for accused to be present when jury was brought in, in the morning and sent to the jury room.)

[29]Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 319 (1950) (accused absent when judge sent letter to counsel of his decision to overrule motion in arrest of judgment); McClain v. Commonwealth, 189 Va. 847, 55 S.E.2d 49 (1949) (accused absent when Sheriff measured map during a recess of court to determine proper venue); Zimmerman v. Commonwealth, 167 Va. 578, 189 S.E. 144 (1937) (accused absent from judge's chambers when prosecuting attorney discussed renewing his motion to introduce previously excluded testimony); Thurman v. Commonwealth, 107 Va. 912, 60 S.E. 99 (1908) (convicted accused absent when bill of exceptions presented to the court and made a part of the record); Gilligan v. Commonwealth, 99 Va. 816, 37 S.E. 962 (1901) (accused absent when counsel announced that he had no bill of exception to offer); Weatherman v. Commonwealth, 91 Va. 796, 22 S.E. 349 (1895) (accused absent when judge signed order book).

[30]Carpenter v. Commonwealth, 193 Va. 851, 71 S.E.2d 377 (1952); Clinton v. Commonwealth, 161 Va. 1084, 172 S.E. 272 (1934); Hagood v. Commonwealth, 157 Va. 918, 162 S.E. 10 (1932); Palmer v. Commonwealth, 143 Va. 592, 130 S.E. 398 (1925).

[31]Williams v. Commonwealth, 188 Va. 583, 50 S.E.2d 407 (1948).

[32]See cases cited supra notes 30 and 31.

[33]188 Va. 583, 50 S.E.2d 407 (1948).

to have been a part of the actual trial, and find no denial of any right of the accused or error in the procedure adopted."[34]

Secondly, the decision made in conference in the *Near* case, in the accused's absence, was communicated to the jury in the accused's presence. In *Palmer v. Commonwealth*[35] the court, in considering the absence of the accused from a conference in the judge's chambers on instructions to be given the jury, stated:

> "What the accused was entitled to was to be present when the jury was instructed, not when the trial court judge was considering and preparing the instructions.... His rights can only be affected after the trial judge has determined the legal questions so raised, and when he communicates the instructions to the jury, or refuses to grant any instructions which are prayed for."[36]

In addition to these analogies between the *Near* situation and other conference situations, there are other factors which make the *Near* situation an even stronger one for not requiring the accused's presence. In *Near* no decision was made in the conference without the consent or agreement of the accused. There was no objection to the court allowing the jury to separate, and the decision was made with the agreement of the accused's counsel. And, as mentioned previously, the accused was present when the jury was told it could separate, and there was no objection raised then. In the previous conference situations, decisions were made in the accused's absence which were without his consent and over his objections, and still the accused's presence was not deemed essential.[37]

Furthermore, in the conference cases where the presence of the accused was held not to be essential, the decisions reached in con-

---

[34]188 Va. at 593, 50 S.E.2d at 412. Further support of the view that the presence of an accused at a proceeding in the judge's chamber is not essential is given by the court in Hagood v. Commonwealth: "He has no more constitutional right to be present then, than he would have the right to be present at the judge's home, should he continue the investigation and consideration of this matter there." 157 Va. at 928, 162 S.E. at 14.

[35]143 Va. 592, 130 S.E. 398 (1925).

[36]143 Va. at 606, 130 S.E. at 402.

[37]In the cases where instruction to the jury were decided upon in the accused's absence, instructions were granted or denied against the wishes of the accused and over his counsel's objection. See cases cited supra note 30. See also Williams v. Commonwealth, supra note 31, where in a conference in the accused's absence the judge heard argument on the admissibility of a question sought to be asked by the prosecution. The judge decided the question was admissible against the contention of the accused's counsel, and over his objection.

ference were expected and intended[38] to influence the jury's decision.[39] A fortiori in the *Near* case, where the decision to allow the jury to separate was not expected or intended to have any effect on the jury's decision it would seem the presence of the accused would not be essential.

The Court of Appeals inferred that Near's absence from the conference would constitute a violation of due process if it were established that the jury was thereafter prejudiced. This reasoning would require the courts, when considering the accused's absence from such a conference, to first determine whether the jury had actually been prejudiced. However, the question of the jury being prejudiced is a separate issue to be determined in its own right; if the jury has been prejudiced, then the accused is entitled to a new trial. So, if the court's reasoning was followed to its logical conclusion, the question of the accused's absence would never be reached.[40] It would seem, therefore, that the question of the accused's absence should be considered independently of the question of whether the jury was thereafter prejudiced.

The court further pointed out that the conference was more than a legal discussion to which the accused could not be expected to contribute, that the decision to allow the jury to separate was a surrender of one of the accused's fundamental rights,[41] and that Near's absence was therefore not a mere technicality. However, the accused was present in the court when the judge informed the jury it could

---

[38]"Whether we regard the proceeding jury view of scene of crime as the taking of evidence or merely as an explanation and illumination of the testimony given or to be given to the court, no one can doubt that it is expected and intended to have a material bearing upon the conclusions reached by the jury." 135 Va. at 618, 115 S.E. at 684.

[39]In the cases, where instructions to the jury were determined in conference, the selected instructions were certainly intended to influence the jury in its decision. See cases cited in note 30. See also Williams v. Commonwealth, supra note 31, where the admissibility of a question was determined in a conference in the accused's absence. There too, the question was expected and intended to have an influence on the jury's decision, and the presence of the accused was still held not to be essential.

[40]Under the court's reasoning, if the jury was found not to have been prejudiced, the consideration of the question ends because the accused's absence would not violate due process. If it is found that the jury had been prejudiced, then the court would need to go no further because this in itself is a violation of due process. Thus, the question of the accused's absence is never reached.

[41]However, it does not appear that under the Virginia statute the accused has a right to keep the jury together, but rather it is a matter within the judge's discretion. The statute provides: "In any case of a felony the jury shall not be kept together unless the court otherwise directs." Va. Code Ann., § 19.1-213 (Repl. Vol. 1960).