

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

SCOTTY JOSEPH BYERS,

Petitioner.

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Supreme Court No.: 20-0706
Case No. 19-F-125
Circuit Court of Wood County



PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

a. The trial court committed reversible error by refusing to honor Petitioner's request to appear in person at his felony sentencing as guaranteed by W.Va. R. Crim. P. 43(a).

b. The trial court's refusal to allow Petitioner to appear in person for his felony sentencing was a denial of due process as guaranteed by the Fifth Amendment of the United States Constitution and Article III Section 10 of the West Virginia Constitution.

STATEMENT OF THE CASE

Petitioner was indicted on two counts of Failure to Register, Second Offense W.Va. Code 15-12-8(c) and one count of Failure to Appear W.Va. Code 62-1C-17(a)&(b).¹ At his plea hearing on February 28, 2020, Petitioner entered a plea to two counts of Failure to Register, First Offense W.Va. Code 15-12-8(c) as a lesser included offense.² He further agreed to plead guilty to one count of Failure to Register, First Offense W.Va. Code 15-12-8(c) and one count of misdemeanor Fleeing from a Police Officer W.Va. Code 61-5-17(d) by way of Information.³ His sentencing hearing was originally scheduled for April 22, 2020,⁴ however, Petitioner was not sentenced until June 4, 2020 because the COVID pandemic necessitated an emergency shutdown of all state courts.⁵

After being informed of the COVID risks and the ability to conduct his sentencing hearing over SKYPE, Petitioner requested to be physically present at his sentencing

¹ A.R. 74-75.

² A.R. 35.

³ A.R. 35-36; A.R. 113-14

⁴ A.R. 53; Supreme Court of Appeals of West Virginia, *Administrative Order Supreme Court of Appeals of West Virginia, RE: Judicial Emergency Declared, Second Amended Order*, <http://www.courtswv.gov/covid19/JudicialEmergencyDeclaredSecondAmendedOrder4-22-20.pdf>.

⁵ A.R. 56; Id.

hearing.⁶ The trial court refused to honor Petitioner's request. The trial court noted counsel's objection and proceeded with Petitioner's sentencing hearing over Skype.⁷ During the hearing, Petitioner appeared over Skype from North Central Regional Jail.⁸ Petitioner's counsel and the State also appeared by Skype.⁹ Another inmate was on the same Skype call with Petitioner, appearing on the screen during Petitioner's sentencing.¹⁰ He was scheduled to appear for sentencing over SKYPE immediately after Petitioner. The trial judge analogized this to the other inmate sitting in the back of the courtroom and assured Petitioner the other inmate would not participate in his sentencing hearing.¹¹ The trial court further explained to petitioner that if he needed to speak privately with counsel during the hearing that he should alert the court and they could make that happen.¹²

Petitioner and counsel planned to seek alternative sentencing in lieu of prison time at Petitioner's sentencing hearing.¹³ Petitioner came close to losing his life at the time of his arrest due to an overdose.¹⁴ He was saved by the use of NARCAN.¹⁵ Petitioner's recent overdose made him realize that he needs to fight for his sobriety. During sentencing, counsel detailed for the trial court Petitioner's lengthy struggle with substance abuse.¹⁶ Substance abuse has been an issue Petitioner's entire life.¹⁷ In fact,

⁶ A.R. 59.

⁷ Id.

⁸ A.R. 57.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ A.R. 194

¹⁴ A.R. 61.

¹⁵ Id.

¹⁶ A.R. 59.

¹⁷ A.R.60.

alcohol was a factor in the offense that resulted in Petitioner's obligation to register as a sex offender.¹⁸

Counsel informed the trial court that he had successfully secured Petitioner's acceptance in The Anchor Program, a 28-day substance abuse program. Petitioner was eighth in line awaiting a bed at the time of his sentencing.¹⁹ Counsel further explained that Petitioner expressed great interest in treatment for his addictions and had many reasons to fight for his sobriety. Counsel requested that the trial court place Petitioner on probation or home confinement as an alternative sentence that would allow Petitioner to begin his pursuit of sobriety through attendance of The Anchor Program.²⁰ The State agreed that Petitioner has a substance abuse problem but argued that Petitioner was not a good candidate for alternative sentencing. The State recommended that Petitioner seek the substance abuse treatment offered by the Department of Corrections.²¹ Petitioner was sentenced to serve a 2 to 15 year sentence, and it is from that sentence he now appeals.²²

SUMMARY OF THE ARGUMENT

The trial court's refusal to hold the Petitioner's sentencing hearing in person constitutes reversible error.²³ Petitioner was advised of the possibility of a SKYPE sentencing hearing due to the COVID pandemic.²⁴ Petitioner considered his options and elected to have his sentencing hearing in person. Over counsel's objection, Petitioner's

¹⁸ Id.

¹⁹ Id.

²⁰ A.R. 60-61.

²¹ A.R. 64-65.

²² A.R. 157-159.

²³ W.V. R. Crim. P. 43 (a), W.Va. Code 62-3-2; U.S. Const. Amend. V; accord W.Va. Const. Art. III, §10.

²⁴ Supreme Court of Appeals of West Virginia, *Administrative Order Supreme Court of Appeals of West Virginia, RE: Judicial Emergency Declared, Second Amended Order*, [http://www.courtswv.gov/covid19/Judicial Emergency Declared Second Amended Order 4-22-20.pdf](http://www.courtswv.gov/covid19/Judicial%20EmergencyDeclaredSecondAmendedOrder4-22-20.pdf).

sentencing hearing was conducted remotely over SKYPE. The virtual sentencing hearing denied Petitioner his right to be physically present and constitutes reversible error.

STATEMENT REGARDING ORAL ARGUMENT

The right to physical presence at all critical stages of trial is well settled in law. Therefore, Petitioner would request a Rule 19 argument and a written opinion.

ARGUMENT

Petitioner accepted responsibility for his actions, entered a plea agreement with the State,²⁵ and with counsel's assistance developed a plan to request alternative sentencing at his sentencing hearing.²⁶ Petitioner's overdose was an eye-opening realization that he needed to address his life-long struggle with addiction.²⁷ Counsel and Petitioner successfully utilized the time between his plea and sentencing to gain Petitioner's admission into a treatment program.²⁸ Petitioner requested his sentencing hearing take place in person as guaranteed by W.Va. Rule Crim. P. 43(a), W.Va. Code 62-3-2, the Fifth Amendment of the United States Constitution, and Article III, Section 10 of the West Virginia Constitution.²⁹ The trial court's refusal to allow Petitioner the opportunity to appear in person for sentencing, over counsel's objection, constituted reversible error.³⁰

²⁵ A.R.51-53.

²⁶ A.R. 194; A.R. 59-62.

²⁷ A.R.60-61.

²⁸ A.R. 60.

²⁹ "When the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute the appellate court applies a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

³⁰ A.R. 59; "[B]efore an accused will be entitled to count his absence at a critical stage of the trial proceeding as reversible error, he must demonstrate a possibility of prejudice in the occurrence." *State ex. rel. Grob v. Blair*, 158 W.Va. 647,659, 214 S.E. 2d 330, 337 (1975).

- a. **The trial court committed reversible error by refusing to honor Petitioner's request to appear in person at his felony sentencing as guaranteed by W.Va. R. Crim. P. 43(a).**

One of the most basic tenets of the criminal proceeding is the right of a criminal defendant to be present in all critical stages.³¹ This right can be traced to its common law roots.³² “A critical stage of a criminal proceeding is where the defendant’s right to a fair trial will be affected.”³³ W.Va. Rule Crim. P. 43(a) specifically provides “The defendant shall be present ...at the imposition of sentence, except as otherwise provided by this rule.”³⁴ West Virginia also guarantees this right by statute: “one accused of a felony shall be present at every stage of the trial during which his interest may be affected; and if anything is done at trial in the accused’s absence which may have affected him by possibly prejudicing him, reversible error occurs.”³⁵

This Court has addressed presence as contemplated by W.Va. Rule Crim P. 43 and W.Va. Code 62-3-2, however, it has not addressed the specific issue of presence that Petitioner raises: whether appearing virtually at sentencing satisfies the right to be present.³⁶ Because W.Va. Rule Crim. P. 43 is substantially the same as Fed. R. Crim. P. 43, federal opinions can offer guidance on whether a sentencing hearing conducted

³¹ Syl. Pt. 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E. 2d 710 (1977).

³² Syl. Pt. 2, *State ex. rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

³³ Syl. Pt. 2, *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981); Syl. Pt. 1, *State v. Conley*, 168 W.Va. 694, 285 S.E. 2d 454 (1981); Syl. Pt. 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E. 2d 710 (1977).

³⁴ W.Va. Rule Crim. P. 43 (a); *See Also State v. Barker*, 176 W.Va. 553, 556, 346 S.E. 2d 344, 347 (1986) (“The right of an accused to be present at every stage of a criminal trial is also protected by W.Va.R. Crim. P. 43.”).

³⁵ W.Va. Code 62-3-2; Syl. Pt. 3, *State ex. rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975); *State ex. rel. Redman v. Hedrick*, 185 W.Va. 709, 408 S.E.2d 659 (1991).

³⁶ *See* Syl. Pts. 2 and 3, *State ex. rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975); *State v. Hicks*, 198 W.Va. 656, 662-67, 482 S.E.2d 641, 646-52 (1996); *State ex. rel. Redman v. Hedrick*, 185 W.Va. 709, 408 S.E.2d 659 (1991); Syl. Pt. 5, *State v. Crabtree*, 198 W.Va. 620, 428 S.E.2d 605 (1996); Syl. Pt. 5, *State v. Sites*, 241 W.Va. 430, 825 S.E. 2d 758 (2019).

remotely over a defendant's objection satisfies presence as guaranteed by W.Va. Rule Crim P. 43.³⁷

Several federal circuit courts that have been called on to address whether video presence satisfies "presence" as contemplated in Federal Rule Crim P. 43(a) and all held that it does not.³⁸ The circuit courts strictly interpreted the plain language of Federal Rule Crim P. 43(a) and found it requires actual physical presence.³⁹

To begin their analysis some federal courts looked to a dictionary in order to define presence.⁴⁰ The Fourth Circuit opined that the context and structure of Rule 43 itself lends further support to presence meaning "physical presence" because the rule crafts several reasons to justify exclusion or removal of a defendant.⁴¹ The Sixth Circuit in *United States v. Williams* explained that "[b]eing physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference."⁴² If there was any doubt left as to whether Federal Rule Crim P. 43(a) required physical presence, the recently drafted Corona Virus Aid, Relief, and Economic Security Act (CARES Act)⁴³ should resolve it. The Cares Act

³⁷ See *State v. Hedrick*, 204 W.Va. 547, 554, 514 S.E.2d 397, 404 (1999) ("Consequently, because the relevant portions of W.Va. R. Crim. P. 46 are substantially the same as Rule 46 of the Federal Rules, we look to the Federal Courts for guidance.")

³⁸ There is a split as to what standard is used once it is determined that a defendant has been denied the right of presence in the circuit courts. Most apply a harmless error standard requiring the government to "demonstrate to the court with *certainty* that the error at sentencing did not cause the defendant to receive a more severe sentence." *U.S. v. Williams*, 641 F.3d 758, 765 (6th Cir. 2011). (Internal citation omitted.) In *U.S. v. Torres-Palma*, the circuit court found that because "Rule 43 vindicates a central principle of the criminal justice system, violation of which is *per se* prejudicial." 290 F.3d at 1248.

³⁹ See *U.S. v. Bethea*, 888 F.3d 864 (7th Cir. 2018), *U.S. v. Williams*, 641 F.3d 758, 764-65 (6th Cir. 2011), *U.S. v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002), *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001), *U.S. v. Navarro*, 169 F.3d 228 (5th Cir. 1999).

⁴⁰ *U.S. v. Navarro*, 169 F.3d at 236; *U.S. v. Torres-Palma* at 1247; *U.S. v. Lawrence*, 248 F.3d at 303.

⁴¹ *U.S. v. Lawrence*, 248 F.3d at 303-304; Compare *W.Va. R. Crim. P. 43* (Rule 43 is constructed in the same manner allowing for the removal of a defendant.).

⁴² *U.S. v. Williams*, 641 F.3d at 764-65.

⁴³ CARES Act. 18 U.S.C. §15002(b)(4) (2020)

states that use of teleconferencing and video proceedings “may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.”⁴⁴

In attempt to justify the use of video conferencing the government suggested that the circuit courts should be free to exercise discretion when interpreting presence as required by Federal Rule Crim P. 43(a).⁴⁵ The government further argued that video sentencing was adequate because the video conferencing worked well and all parties were able to clearly see and hear each other. The district court refused this argument, explaining that the quality of the video conference is irrelevant as Rule 43 requires the defendant to be present and only physical presence will satisfy the requirement.⁴⁶ In a further attempt to justify the use of video hearings the United States argued that the time and cost savings of not having to travel or transport prisoners should be considered. In refusing to consider this argument the circuit court held “we do not and cannot, perform such a balancing with a criminal defendant’s rights. Until such time as the drafters of the Rule instruct us otherwise, district courts may not conduct sentencing hearings by video conference.”⁴⁷

The plain language of W.Va. Rule Crim. P. 43 and W.Va. Code 62-3-2 guaranteed Petitioner the right to be physically present in the courtroom when he made his request for alternative sentencing to the trial court on June 4, 2020. Petitioner understood the risks of the COVID Pandemic and still desired to be physically standing before the trial court during his sentencing hearing. He wanted to be physically present

⁴⁴ *Id.*

⁴⁵ *U.S. v. Lawrence*, 248 F.3d at 303.

⁴⁶ *Id.*

⁴⁷ *U. S. v. Williams*, 641 F. 3d at 764. *See Also United States v. Lawrence*, 248 F.3d at 305 (Defendant’s previous outburst of violence was not enough to overcome his right to be physically present at sentencing.).

when the judge handed down his sentence. Petitioner's sentencing was set after this Court held that it was safe to resume hearings in person.⁴⁸ The trial court's refusal to conduct petitioner's sentencing hearing in person was reversible error.⁴⁹ Petitioner requests that this court remand his case back to the trial court for a new sentencing.

b. The trial court's refusal to allow Petitioner to appear in person for his felony sentencing was a denial of due process as guaranteed by the Fifth Amendment of the United States Constitution and Article III Section 14 of the West Virginia Constitution.

Petitioner's constitutional right to presence as guaranteed by both the United States Constitution and the West Virginia Constitution was violated when the trial court conducted Petitioner's felony sentencing hearing over SKYPE despite being informed that Petitioner wished to appear in person.⁵⁰ The trial court proceeded with the virtual hearing over counsel's objection and assertion that Petitioner objected to the use of SKYPE and wanted to be physically present during his sentencing hearing.

The right to be physically present is constitutionally guaranteed by the Due Process Clause in situations where the defendant is not confronting witnesses or evidence.⁵¹ This Court has acknowledged that the right of presence is broader in scope than the right to confrontation.⁵² A criminal defendant has the right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness

⁴⁸ Supreme Court of Appeals of West Virginia, *Administrative Order Supreme Court of Appeals of West Virginia, RE: Judicial Emergency Declared, Second Amended Order*, <http://www.courtswv.gov/covid19/JudicialEmergencyDeclaredSecondAmendedOrder4-22-20.pdf>.

⁴⁹ Syl. Pt. 5, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 210 S.E.2d 641 (1974) ("When it is not necessary in the decision of a case to determine a constitutional question, this Court will not consider or determine such question."); W.Va. Rule Crim. P. 43 and W.Va. Code 62-3-2.

⁵⁰ U.S. Const. Amend V; accord W.Va. Const. Art. III, §10.

⁵¹ *U. S. v. Gagnon*, 470 U.S. 522, 526 (1985).

⁵² *State ex. rel. Grob v. Blair*, 158 W.Va.647,653, 214 S.E 2d 330,334(1975). (The Blair Court reversed the Defendant's conviction holding that his due process right under Article III, Section 14 of the West Virginia Constitution was violated because he was absent from an in-camera hearing that involved the State's principal witness.)

of his opportunity to defend against the charge...[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.”⁵³

Presence is a basic tenet of the criminal justice system and is constitutionally guaranteed. Petitioner properly requested to be present in the courtroom and he was entitled to be physically present when the trial court handed down his sentence on June 4, 2020. The trial court’s refusal to honor Petitioner’s request to be physically present at sentencing denied him Due Process as guaranteed by both the United States Constitution and the West Virginia Constitution. The sentencing hearing that proceeded over SKYPE was not a fair and just hearing that is guaranteed to every criminal defendant. Petitioner requests that this Court reverse his case and remand for a new sentencing hearing before the trial court.

CONCLUSION

Sentencing was Petitioner’s last opportunity to convince the trial court he was serious about his recovery. Petitioner requested and was guaranteed a sentencing hearing in which he was physically present in the courtroom. Petitioner and counsel developed a plan to request alternative sentencing and Petitioner was very motivated to fight for his sobriety. He should have had this opportunity in person. The trial court committed reversible error when it refused to hold Petitioner’s sentencing hearing in person and instead sentenced Petitioner over SKYPE. Petitioner requests that this court remand his case to the trial court for a proper sentencing hearing.

⁵³ Snyder v. Massachusetts, 291 U.S. 97, 105-108 (1934).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Crystal L. Walden, counsel for Petitioner, Scotty Joseph Byers, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying "*Petitioner's Brief*" and "*Appendix Record*" to the following:

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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 18th day of December, 2020.



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