

## CRIMINAL TRIAL IN THE DEFENDANT'S ABSENCE

Source: Jessica Smith, UNC School of Government (June 2009)

- I. **The right to be present at trial.** A criminal defendant has a constitutional right to be present at every stage of his or her trial. *State v. Braswell*, 312 N.C. 553 (1985); *State v. Daniels*, 337 N.C. 243 (1994); *State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). The right applies once the trial has begun. *See, e.g., State v. Golphin*, 352 N.C. 364 (2000) (no violation when defendants were not present for pre-trial meetings regarding change of venue); *State v. Hyde*, 352 N.C. 37 (2000) (the defendant had no right to be present during the preliminary qualification of prospective jurors since the jurors were excused before the trial began).
- II. **Waiver of the right to be present at trial.**
  - A. **General rule.** The right to be present at trial is a personal right, which may be waived in all cases except capital cases. *Daniels*, 337 N.C. 243; *Braswell*, 312 N.C. 553; *Huff*, 325 N.C. 1; *State v. Hayes*, 291 N.C. 293 (1976). This means that non-capital cases may be held *in absentia*, when the defendant has waived the right to be present.
  - B. **Types of waivers.** A waiver of the right to be present may be express or implied.
    1. **Express waiver.** The best practice before proceeding in the defendant's absence is to obtain an express waiver. *Braswell*, 312 N.C. 553. G.S. 15A-1011(d) provides the relevant procedure.<sup>1</sup> However, in some circumstances this is not possible or appropriate, such as where the defendant flees mid-trial. As discussed below, a waiver may be implied in these circumstances. *See, e.g., Braswell*, 312 N.C. 553 (although there was no express waiver, a waiver could be implied when the defendant did not show up for a voir dire hearing). It is not an abuse of discretion to deny a motion to waive the right to be present when the motion is not in compliance with G.S. 15A-1011. *State v. Forrest*, 168 N.C. App. 614 (2005) (trial court did not abuse its discretion by denying the defendant's oral motion to waive presence).
    2. **Waiver implied through flight or absence.** A waiver of the right to be present may be implied when the defendant voluntarily absents him- or herself from court after the trial has begun. *State v. Tedder*, 169 N.C. App. 446 (2005); *State v. Skipper*, 146 N.C. App. 532 (2001). This typically occurs when the defendant flees, shows up late to court, or leaves for some portion of the trial.

---

<sup>1</sup> G.S. 15A-1011 provides in relevant part:

(d) A defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his behalf in the following circumstances:

- (1) The defendant agrees in writing to waive the right to testify in person and waives the right to face his accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case; and
- (2) The defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and
- (3) The judge allows the absence of the defendant because of distance, infirmity or other good cause.

(e) In the event the judge shall permit the procedure set forth in the foregoing subsection (d), the State may offer evidence and the defendant may offer evidence, with right of cross-examination of witnesses, and the other procedures, including the right of the prosecutor to dismiss the charges, shall be the same as in any other criminal case, except for the absence of defendant.

- a. **Absence must be voluntary.** In order to support a waiver in these circumstances, a defendant's absence must be voluntary. *Hayes*, 291 N.C. 293 (new trial ordered when the district attorney told the defendant and his counsel that they could leave the courtroom and would be given a half day's notice before the case was called; however, the trial began after only two hours' notice to defense counsel and in the defendant's absence); *State v. Shackelford*, 59 N.C. App. 357 (1982) (new trial ordered when the defendant was not present for jury selection because of "some misinformation that he received from his attorney and from the District Attorney's office as to when his case was going to be called").
  - b. **Trial must have begun.** In order for waiver to apply in this context, the trial must have begun. For these purposes, calling prospective jurors into the jury box as part of jury selection constitutes the beginning of the trial; the jury need not have been impanelled. *State v. Richardson*, 330 N.C. 174 (1991) (finding that the defendant waived the right to be present when he failed to appear in court after the jury was selected but had not yet been impanelled); see also *State v. Russell*, 188 N.C. App. 625 (2008) (the defendant waived his right to be present when he disappeared during jury selection).
  - c. **Burden on defendant.** Once the trial has begun and the defendant fails to appear, the defense bears the burden of explaining that the absence is involuntary. *Richardson*, 330 N.C. 174 (defendant's burden was not satisfied by (1) defense counsel's speculation that defendant's absence might be explained by a back problem; (2) defendant's call reporting that he was at the hospital when defense counsel could not confirm that fact and defendant was seen at two other locations; or (3) a call to the Clerk by an unidentified person stating that he was the defendant's friend and that the defendant was absent due to back problems); see also *Russell*, 188 N.C. App. 625 (defendant failed to explain his absence); *State v. Davis*, 186 N.C. App. 242 (2007) (same); *Skipper*, 146 N.C. App. 532 (same).
  - d. **Capital cases.** As noted above, the right to be present may not be waived in a capital case. When a defendant voluntarily fails to appear in a capital case, the options seem to be: (1) declare a mistrial after making detailed findings of fact and conclusions of law; (2) continue the case, if it appears that the defendant can be brought back to court without undue delay; or (3) for the prosecutor to declare the trial non-capital and proceed in the defendant's absence. See *State v. Mulwee*, 27 N.C. App. 366 (1975) (prosecutor declared case non-capital when the defendant failed to appear after the trial had begun).
3. **Waiver implied through disorderly conduct requiring removal.** A defendant can waive the right to be present by engaging in disruptive behavior in the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970); *State v. Ash*, 169 N.C. App. 715 (2005).
    - a. **Procedure for removal.** G.S. 15A-1032 provides a procedure for the removal of disruptive defendants.
      - i. **Warning required.** Before ordering a defendant removed from trial, the trial judge must warn the defendant. G.S. 15A-1032(a). The warning should be issued out of the presence of the jury. *Id.*
      - ii. **Extent of disruption.** Removal may be ordered if the defendant "continues conduct which is so disruptive that the trial cannot proceed in an orderly manner." *Id.*
      - iii. **Order.** When removing the defendant, the trial judge must enter in the record the reasons for the removal. G.S. 15A-1032(b)(1). The judge's removal order should be issued out of the presence of the jury. G.S. 15A-1032(a).

- iv. **Jury instructions.** When removing a defendant, the trial judge must instruct the jury “that the removal is not to be considered in weighing evidence or determining the issue of guilt.” G.S. 15A-1032(b)(2). At least one case has upheld a conviction when the judge did not give this instruction after it was waived by the defense out of a desire not to bring undue attention to the defendant’s absence. *Ash*, 169 N.C. App. 715.
- v. **Duty to inform the defendant of proceedings.** G.S. 15A-1032 provides that a removed defendant “must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court.” One device for allowing the defendant to observe the trial in these circumstances is an audio-video hookup to the location where the defendant is being held.
- vi. **Duty to allow the defendant’s return.** G.S. 15A-1032 provides that the defendant “must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior.”
- b. **Pro se defendants.** When a *pro se* defendant’s disruptions require removal, the judge should consider appointing counsel. The United States Supreme Court has recognized that the right to proceed *pro se* is not absolute and may be terminated if the defendant engages in serious and obstructionist misconduct. *Farretta v. California*, 422 U.S. 806 (1975). Although a judge is advised to be cautious when terminating *pro se* representation on this basis, there may be no other option when removal is required. When terminating the right to proceed *pro se*, the trial judge should ensure that the record reflects the defendant’s conduct, and the judge’s findings of fact and conclusions of law.
- c. **Capital defendants.** As discussed above, a capital trial may not be held in the defendant’s absence. The N.C. Supreme Court has not ruled on whether “there can be ‘constructive’ presence made necessary by reason of defendant’s disruptive conduct.” *Huff*, 325 N.C. at 28 n.2. Thus, when a capital defendant refuses to cease disruptive behavior, the judge may need to consider physical restraints that allow the defendant to see and hear the trial and communicate with counsel.

### III. Sentencing

- A. **General rule.** Although a defendant may be tried *in absentia* in the circumstances described above, a defendant may not be sentenced *in absentia* when “corporal punishment” is imposed. *State v. Stockton*, 13 N.C. App. 287 (1971) (citing *State v. Pope*, 257 N.C. 326 (1962)); *State v. Brooks*, 211 N.C. 702 (1937); *State v. Cherry*, 154 N.C. 624 (1911)). *But see State v. Miller*, 142 N.C. App. 435 (2001) (the trial court did not err by holding the sentencing hearing in the defendant’s absence when the defendant had absconded before the jury reached a verdict; not citing any of the case law listed above; relying on counsel’s failure to request a continuance or offer evidence of good cause to support a postponement of sentencing). This right is a common law right, separate and apart from the right to be present at trial, *Pope*, 257 N.C. 326, and extends to the entire sentencing hearing, not just pronouncement of the sentence. *Id*; *Davis*, 186 N.C. 242.
- B. **Corporal punishment.** Corporal punishment is generally understood to include punishment that is inflicted on the body, including imprisonment. Thus, a sentence can be imposed in the defendant’s absence if it involves only payment of costs and a fine. *State v. Ferebee*, 266 N.C. 606 (1966) (upholding such a sentence imposed in the defendant’s absence).

- C. Rule covers changes to a judgment.** The rule that a defendant may not be sentenced *in absentia* means that it is error for the trial court to change a judgment rendered in open court without the defendant being present when the change is made. See *State v. Mims*, 180 N.C. App. 403 (2006) (defendant was not present when written judgment was entered deviating from judge's rendering of judgment in open court); *State v. Davis*, 167 N.C. App. 770 (2005) (same); *State v. Crumbley*, 135 N.C. App. 59 (1999) (same); *State v. Beasley*, 118 N.C. App. 508 (1995) (trial court erred by adding a nonstatutory aggravating factor after the sentencing hearing was concluded and outside of the defendant's presence); see also *State v. Hanner*, 188 N.C. App. 137 (2008) (improper, in the defendant's absence, to make concurrent suspended sentences run consecutively upon revocation of probation).
- D. Prayer for judgment continued.** When a guilty verdict is returned after a trial *in absentia*, the trial judge should enter a prayer for judgment continued, until the defendant can be brought before the court for sentencing. For more information about continuing judgment, see the section entitled "Prayer for Judgment Continued."