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OPINION	:	No. 80-114
	:	
of	:	<u>March 7, 1980</u>
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SUBJECT: USE OF TWO-WAY VIDEO-SOUND SYSTEM IN ARRAIGNMENT—The arraignment in a municipal court of an individual defendant charged with a felony may not be conducted by means of a two-way video-sound system between the jail and the court. The arraignment in a municipal court of an individual defendant charged with a misdemeanor may be conducted by means of a two-way video-sound system between the jail and the court, where the defendant and his counsel are present at the jail, and where the system may be viewed and heard in the courtroom by the public.

The Honorable Lawrence Kapiloff, Assemblyman, Seventy-Eighth District, has requested an opinion on the following question:

May the arraignment of individual defendants in a municipal court be conducted by means of a two-way video-sound system between the jail and the court, where the defendant and his counsel are present at the jail, and where the system may be viewed and heard in the courtroom by the public?

CONCLUSION

The arraignment in a municipal court of an individual defendant charged with a felony may not be conducted by means of a two-way video-sound system between the jail and the court. The arraignment in a municipal court of an individual defendant charged with a misdemeanor may be conducted by means of a two-way video-sound system between the jail and the court, where the defendant and his counsel are present at the jail, and where the system may be viewed and heard in the courtroom by the public, provided that the right of such defendant to be personally present be effectively waived.

ANALYSIS

To “arraign” is to call a defendant into court upon the filing of an accusatory pleading. (*Cf.* Pen. Code, § 976;¹ Witkin, *California Criminal Procedure* (1963) p. 206; Webster’s Third New Internat. Dict. (1961) p. 120.)² The purpose of an arraignment is to inform the accused of the charge against him and to give him fairly the opportunity to plead to it. *In re Mitchell* (1961) 56 Cal. 2d 667, 670; *People v. Carter* (1966) 245 Cal. App. 2d 48, 50.) In this respect, section 988 of the Penal Code provides:

“The arraignment must be made by the court, or by the clerk or prosecuting attorney under its direction, and consists in reading the accusatory pleading to the defendant and delivering to him a true copy thereof, and of the endorsements thereon, if any, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the accusatory pleading; provided, that where the accusatory pleading is a complaint charging a misdemeanor triable in an inferior court, a copy of the same need not be delivered to any defendant unless requested by him.”

Essentially, the present inquiry is whether the arraignment procedure may be conducted by means of television. We first consider whether a defendant has a *right* to be *personally* present at arraignment. We next consider whether such presence is mandatory or subject to waiver.

California Constitution, article I, section 15 provides:

¹ Hereinafter, all section references are to the Penal Code, unless otherwise indicated

² While the term is sometimes used in other contexts, e.g., upon an arrest (§§ 825, 849, 858, 859), for judgment (§ 1200), this analysis is focused specifically on the arraignment for plea (§ 976 *et seq.*).

“The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant’s behalf, to have the assistance of counsel for the defendant’s defense, to be personally present with counsel, and to be confronted with the witnesses against the ‘defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant’s counsel.

“Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.” (Emphasis added.)

The term “cause,” often used synonymously with “case” or “action” (*Painter v. Berglund* (1939) 31 Cal. App. 2d 63, 70),³ is one of very broad and general application, and pertains to any question contested before a court of justice. (*Amos v. Superior Court* (1960) 182 Cal. App. 2d 343, 346.) The term imports a judicial proceeding in its entirety. (Black’s Law Dict., 4th ed. (1951) p. 279.) Thus, article I, section 15 of the Constitution and section 686 extend to the arraignment. (*Cf. In re McCoy* (1948) 32 Cal. 2d 73; and *cf. Mooney v. Superior Court* (1933) 130 Cal. App. 521, 522; *In re Dennis* (1959) 51 Cal. 2d 666, 672.)

The meaning of the term “present” or “presence” depends in each case upon the context in which it appears. The term “presence” has been defined in part as “the fact or condition of being present: the state of being in one place and not elsewhere: the condition of being within sight or call, at hand, or in a place being thought of: the fact of being in company, attendance, or association: the state of being in front of or in the same place as someone or something.” (Webster’s Third New Internat. Dict. (1961) p. 1793.) “Presence” may signify the location of a person within such parameters as would exclude any undue or improper external influence which might hinder or impair the accomplishment of defined objectives. It may be argued, in certain context, that an individual is present by sight or sound alone, or even in the thoughts of another. In other circumstances both physical proximity and consciousness may be contemplated. In our view the latter meaning was clearly contemplated in article I, section 15 of the California Constitution. Thus, the term “personally present” necessarily connotes physical or bodily presence and excludes any lesser connotation of presence by electronic imagery or transmission of sound. (*In re Dennis, supra*, (“physically and mentally present”) and *Cf. State v. Mortensen* (1903) 26 Utah 312, 73 p. 562, 572 (“personally present” at trial requires that defendant “be at the trial in court and in its presence”).) Thus, the constitutional right to be personally present at arraignment precludes the utilization of television for such purpose, unless such right

³ Section 686 provides that “[i]n a criminal action, the defendant is entitled . . . to appear and defend in person and with counsel” (Emphasis added.)

may be and is effectively waived.

We turn, then, to the question whether a defendant may effectively waive the right to be personally present at arraignment. With respect to a charge of felony, article I, section 14 of the California Constitution requires that the defendant “shall be taken without unnecessary delay before a magistrate” for arraignment. Section 977, subdivision (b) further provides:

“In all cases in which a felony is charged, the accused must be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceeding unless he shall, with leave of court, execute in open court, a written waiver of his right to be personally present, approved by his counsel, which waiver must then be filed with the court; provided, however, that the court may specifically direct that defendant be personally present at any particular proceeding or portion thereof. The waiver shall be substantially in the following: form:

“WAIVER OF DEFENDANTS PERSONAL PRESENCE

“The undersigned defendant, having been advised of his right to be present at all stages of the proceedings, including but not limited to presentation of and arguments on questions of law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause, including when the case is set for trial, when a continuance is ordered, when a motion to set aside, the indictment or information pursuant to the provisions of the Penal Code, Section 995 and following is heard, when a motion for reduction of bail or for a personal recognizance release is heard, when a motion to reduce sentence is heard, and when questions of law are presented to or considered by the court. The undersigned defendant hereby requests the court to proceed during every absence of his which the court may permit pursuant to this waiver, and hereby agrees that his interest will be deemed represented at all times by the presence of his attorney the same as if the defendant himself were personally present in court, and further agrees that notice to his attorney that his presence in court on a particular day at a particular time is required will be deemed notice to him of the requirement of his appearance at said time and place.

“ ”

Subdivision (b) expressly provides in mandatory terms that “the accused must be present at the arraignment.” (*Cf. Mooney v. Superior Court, supra*, 130 Cal. App. 521.) Moreover, the term “present” in this context does not denote anything less than “personally present.” The latter term is employed in subdivision (b) only in contradistinction to appearance or presence by counsel. This frame of reference is clarified by allusion to the statutory language prior to its amendment in 1968:

“The defendant must be *personally present* at the arraignment, except that if the accusatory pleading charges a misdemeanor only he may *appear by counsel*.” (Emphasis added.)

Nor does the term “present” connote anything less than physical presence. The requirement that the defendant be “personally present” was enacted in 1872 and must be interpreted accordingly. (*Cf. Muscolino v. Superior Court* (1959) 172 Cal. App. 2d 525.) There is no indication that the Legislature contemplated anything other than physical presence, or that it intended by virtue of any of the subsequent amendments to expand the original meaning. It is reasonable to assume that any such intention to change the established meaning of a principal term of the statute would have been expressly declared. (*Cf. 16 Ops. Cal. Atty. Gen. 6, 8* (1950).) Hence, the defendant “must” be physically present for arraignment on a charge of felony.

It is well established, however, that a statute granting a right to the accused in categorical terms may be waived by the voluntary act of the person entitled. (*People v. White* (1971) 18 Cal. App. 3d 44, 51.) In *White*, it was held that the right to be present at trial and sentencing could be waived in spite of the mandatory terms (prior to its amendment in 1970) of section 1043 (“[t]he defendant in a felony case must be personally present at the trial . . .”; and see *People O’Leary* (1955) 130 Cal. App. 2d 430, “court must order the prosecution to be dismissed” if not brought to trial within designated period; *In re Hess* (1955) 45 Cal. 2d 171, no person shall be twice put in jeopardy for the same offense.)

Nothing in the arraignment procedure prescribed under section 988, *supra*, inherently compels the actual attendance of the defendant or his counsel in open court. Nor do we perceive any constitutional impediment to the voluntary physical absence from the court of both the defendant and his counsel under the proposed procedure where defendant and counsel are in the presence of each other and in televisual communication with the court, in the absence of any suggestion that such procedure would impair a fair and just hearing. (*Cf. Snyder v. Massachusetts* (1934) 291 U.S. 97; *People v. Isby* (1947) 30 Cal. 2d 879, 894; *People v. Teitelbaum* (1958) 163 Cal. App. 2d 184, 207–208.)

Nevertheless, there are persuasive indications that the Legislature intended the language of section 977, subdivision (b), to be mandatory in effect as well as in form. Thus, subdivision (b) *expressly provides* for waiver of personal presence at certain stages of the proceedings *other than arraignment*. Second, sections 978 and 979 provide that “when his personal presence is necessary” the court may compel the attendance for arraignment of a defendant in custody, or order the issuance of a bench warrant for the arrest of a defendant who has been discharged on bail and fails to appear for arraignment. These provisions are inconsistent with the notion that the defendant is, in every case, free to waive personal presence for arraignment. Third, section 1018 provides in part that [u]nless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court.” While the plea may be technically distinguished, for certain purposes, from the arraignment, (see *Chartuck v. Municipal Court* (1975) 50 Cal. App. 3d 931; but compare *People v. Terry* (1970) 14 Cal. App. 3d Supp. 1, 4) we are compelled to view the arraignment, for purposes of the present inquiry, not in the abstract, but as an integral part of the total statutory scheme. Thus, section 1003 provides that the plea “must be put in, in open court, either at the time of the, arraignment or at such other time as may be allowed to the defendant for that purpose.” Since a defendant charged with felony is, by virtue of section 1018, required to be personally present for entry of plea, the plea could not under any circumstances be entered “at the time of the arraignment” under the proposed procedure.

The purpose of the requirement of the defendant’s presence at a felony arraignment and plea is to provide the optimum assurance that the defendant is aware of and understands the nature of the charges against him and that his response to such accusations are intelligently and voluntarily given. (*Cf. People v. Bond* (1960) 179 Cal. App. 2d 820; *People v. Martin* (1964) 230 Cal. App. 2d 62.) The demeanor and comportment of the defendant may well reflect his psychological and emotional condition and his capacity to respond intelligently and voluntarily. (*Cf. People v. Hayes* (1969) 276 Cal. App. 2d 528.) Because of the limitations in dimension, perspective, and scope which are inherent in the placement and use of electronic devices, such techniques of indirect communication are simply not the equivalent for such purposes of physical presence in the courtroom. In light of these considerations, it is concluded that a defendant charged with felony may not effectively waive the right to be personally present at arraignment, and that such arraignment may not be conducted by means of television.

We next inquire whether a defendant charged with misdemeanor may effectively waive the right to be personally present at arraignment. Section 976, subdivision (a) provides:

“When the accusatory pleading is filed, the defendant must be arraigned thereon before the court in which it is filed, unless the action is transferred to some other court for trial.”

The apparent import of this provision is simply to designate the court in which arraignment is to occur. Thus, the words “before the court” pertain to the location of the arraignment but do not, of themselves, require the defendant to be present or personally present. This interpretation is fostered by the following considerations. First, the phrase is not preceded by any word of action such as “taken” (see § 825) or “brought” (see § 858) which would contemplate the physical deliverance of the defendant to the court or magistrate. Second, section 977, subdivision (a) provides:

“In all cases in which the accused is charged with a misdemeanor only, he may appear by counsel only.”

Unlike the case of felony, the latter provision contains no mandatory language but is permissive in form even as to appearance by counsel. The term “present” or “presence” is not employed, as in subdivision (b) of the same section. Thus, it is clearly perceived that the defendant, within the meaning of section 976, need not be present. Nor does article I, section 14 of the California Constitution, requiring that the defendant “shall be taken without unnecessary delay before a magistrate” for arraignment apply to a charge of misdemeanor. Finally, the plea of the misdemeanor defendant need not be personally entered. (§ 1429.)

Another requirement of California Constitution, article I, section 15, *supra*, is the right to a speedy public trial. (See also § 686, subd. 1; U.S. Const. amend. VI.) The defendant may effectively waive his right to a public trial. (*People v. White, supra*, 18 Cal. App. 3d at p. 50; *People v. Moreland* (1970) 5 Cal. App. 3d 588; *People v. Norman* (1960) 177 Cal. App. 2d 59; *People v. Teitelbaum, supra*, 163 Cal. App. 2d at p. 207.) Moreover, the right may be waived without expressed consent of defendant or his counsel. (*People v. Hines* (1964) 61 Cal. 2d 164.)

Nevertheless, the right of the public to attend the court is well established by common law and by statute (*Kirszowski v. Superior Court* (1956) 143 Cal. App. 2d 745, 751–752; Code Civ. Proc., § 124: “. . . the sittings of every court shall be public”), and is not, therefore, subject to waiver by the defendant. *Kirstowski v. Superior Court, supra*, at p. 52.) The right of the people to attend the court is predicated upon their interest in knowing how their servants—the judge, county attorney, sheriff, and clerk—conduct the public’s business, and in seeing that such officers and jurors are kept keenly alive to a sense

of their responsibility and the importance of their functions. (*Id.*, at p. 51.)⁴ However, the public's right is clearly subject to reasonable constraints which are necessary or convenient to the proper conduct of the proceedings. (*Id.*) In our view, this right is not impaired by the proposed arraignment procedure where all of the participants may be observed and heard in the courtroom by all present.

It is concluded therefore that the personal presence at arraignment of a defendant charged with misdemeanor is not required (see *People v. Budd* (1881) 57 Cal. 349, 351; *People v. Redinger* (1880) 55 Cal. 290, 298) and may be waived. Upon such effective waiver, such arraignment may be conducted by means of television.

⁴ *Estes v. Texas* (1965) 381 U.S. 532, 539, and 588 (Harlan, J., concurring):

“Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings A fair trial is the objective, and ‘public trial’ is an institutional safeguard for attaining it.”