SM-23 DEFENDANT'S RIGHT TO BE PRESENT AT TRIAL AND WAIVER OF THE RIGHT

CONTENTS

Scope

This Special Material provides guidance for trial courts on proceeding through a trial without the defendant's presence. It offers direction for situations where a defendant, either expressly or through conduct, waives their right to participate in the trial, including cases where the defendant absconds after the jury is selected.

I. A defendant's right to be present at trial

A defendant has both a constitutional and a statutory right to be present at trial. State v. Anderson, 2006 WI 77, ¶37, 291 Wis.2d 673, 717 N.W.2d 74.

A. The constitutional right

A defendant's constitutional right to be present at trial stems from the due process right to be heard and confront witnesses. Anderson, 291 Wis.2d 673, ¶38. These rights are found in the Sixth Amendment and Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Id. The Confrontation Clause and the Fourteenth Amendment grant an accused the right to be present in the courtroom at every stage of their trial. State v. Haynes, 118 Wis.2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984) citing Illinois v. Allen, 397 U.S. 337, 338 (1970).

The constitutional right to be present at trial "includes the right to be present at proceedings *before trial* at which important steps in a criminal prosecution are often taken." State v. Alexander, 2013 WI 70, ¶22, 349 Wis.2d 327, 833 N.W.2d 126. Although conferences *during trial* should "rarely" be held without the defendant present, the defendant's presence is only constitutionally required to the extent that a fair and just hearing would be thwarted by their absence. State v. Alexander, 2013 WI 70, ¶¶22-25, 349 Wis.2d 327, 833 N.W.2d 126. When the court communicates with the jury, the defendant's attorney must be present. Id. at ¶25.

B. The statutory right

The defendant's statutory right to be present at trial is codified in Wis. Stat. § 971.04.[1]

II. Waiver or forfeiture of the right to be present

Forfeiture is "the failure to make a timely assertion of a right", whereas, "waiver is the intentional relinquishment or abandonment of a known right." State v. Soto, 2012 WI 93, ¶35, 343 Wis. 2d 43, 817 N.W.2d 848. Mere inaction is not sufficient to demonstrate the

defendant intended to forego the right. Id. at ¶37. Instead, there must be "some affirmative relinquishment" from the defendant. Id. A waiver of the right to be present can be express or by conduct.

One exception is Wis. Stat. § 971.04(3), where the defendant can forfeit the right to be present if they voluntarily absent themselves and the defendant was present at the beginning of trial. The statute does not mention any requirement that the action be taken knowingly, therefore, it "sets forth a way that a defendant can forfeit the right to be present—by leaving after the jury has been sworn." State v. Washington, 2018 WI 3, ¶31, 379 Wis. 2d 58, 905 N.W.2d 380.

A. Waiver of the right at misdemeanor trials

A defendant can waive the right to be present for an entire trial when the crime charged is a misdemeanor. If a defendant is charged with a misdemeanor, the defendant may authorize their attorney to act on their behalf. Wis. Stat. § 971.04(2). The defendant must first seek leave of the court. Id. For more information about instructing the jury about this waiver see Wis. JI-Criminal 380A (2024).

B. Waiver or forfeiture of the right at felony trials

A defendant can waive the right to be present throughout his or her trial by express waiver, waiver by refusal to participate in trial, waiver by disruptive conduct, and forfeiture by voluntary absence.

1. By express waiver

A defendant can waive their presence at any stage of the trial by expressly waiving the right on the record. State v. Edmunds, 229 Wis.2d 67, 83, 598 N.W.2d 290 (Ct. App. 1999).

2. Forfeiture by voluntary absence – s. 971.04(3)

A defendant may choose to be voluntarily absent from trial if after the trial commences, they fail to appear without leave of the court during the trial or before the verdict of the jury has been returned into court. Wis. Stat. § 971.04(3). Under those circumstances, the trial or return of the verdict shall not be postponed or delayed. Id. The trial and return of verdict shall proceed as though the defendant were present in court at all times. Id. Subsection (3) is "designed to prevent a defendant from stopping a trial which has commenced by absenting himself." State v. Washington, 2018 WI 3, ¶33, 379 Wis. 2d 58, 905 N.W.2d 380.

The voluntary absence provision under Wis. Stat. § 971.04(3), only applies when the defendant was present at the beginning of trial. State v. Koopmans, 210 Wis.2d 670, 678, 563 N.W.2d 528 (1997).[2] The trial does not begin until after the jury is selected. State v. Dwyer, 181 Wis.2d 826, 836–37, 512 N.W.2d 233 (Ct. App. 1994). As long as the defendant is present when the jury is selected and sworn, then the voluntary absence provision may apply. State v. Miller, 197 Wis.2d 518, 521, 541 N.W.2d 153 (Ct. App. 1995). Thus, a trial cannot commence without the defendant if the defendant is absent before the jury is selected.

Other jurisdictions have examined what constitutes a voluntary absence. A defendant who is delayed because of weather-related traffic is not voluntarily absenting themselves. United States v. Camacho, 955 F.2d 950, 955 (4th Cir. 1992). When a defendant has car trouble and calls the court to advise of the car trouble, that is not a voluntary absence. United States v. Mackey, 915 F.2d 69, 73 (2d Cir. 1990). A medical condition, illness, or injury can be enough to demonstrate that the defendant was voluntarily absent from trial. See People v. Stephenson, 165 P.3d 860, 869 (Colo. App. 2007); State v. Finnegan, 784 N.W.2d 243, 250 (Minn. 2010). However, "determining whether a defendant is 'voluntarily absent' in such a case requires a fact-specific inquiry into the type of medical condition and the circumstances surrounding his or her absence, including an inquiry into the defendant's conduct and statements." Stephenson, 165 P.3d at 870.

3. Waiver by conduct: refusal to participate

While an explicit waiver of the right to be present is preferred, one is not required. A defendant may waive the right to be present by refusing to attend after being informed of the right to be present. State v. Divanovic, 200 Wis.2d 210, 222, 546 N.W.2d 501 (Ct. App. 1996). The courts examine the waiver on a case-by-case basis. Id.

This waiver does not apply to those who flee or fail to come to court after their trial begins. Instead, waiver occurs when a defendant refuses to come to court but can be located. For example, when a defendant is present at the beginning of trial, and then he or she refuses to leave their jail cell during the trial. Under these circumstances, the voluntary absence and forfeiture rules are inapplicable.

Although the law requires waiver of the right to be present, when a defendant chooses not to attend the trial proceedings, a defendant's failure to assert the right to be present can constitute an adequate waiver and an express waiver on the record is not essential. Divanovic, 200 Wis.2d at 220.

4. Waiver by conduct: disruptive conduct

A defendant can waive their right to be present at trial by misconduct. Allen, 397 U.S. at 343. "[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Id. Trial judges who are "confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case" and "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." Id.

Examples of disruptive conduct can be extreme. In United States v. Jennings, the defendant hit his counsel in the side of the head with a closed fist causing his attorney to fall to the ground. 855 F. Supp 1427, 1432 (M.D. Pa. 1994). Jennings was removed from the courtroom after the assault and after the court warned him that he would be removed if he continued to be disruptive. Id. at 1445. The court also allowed him to listen to the proceedings and continued to check in about whether he wanted to participate, and Jennings repeatedly refused. Id.

Other jurisdictions have found defendants to have waived the right be present by acting disruptively at prior hearings. In United States v. Daniels, the defendant had been disruptive at prior hearings and at the day of trial. The court explained that he had a constitutional right to be present during trial, but also explained he could surrender that right by his conduct. When the defendant would not agree to not be disruptive, the court barred him, but allowed for him to return if he agreed to cooperate. 803 F.3d 335, 347–48 (7th Cir. 2015). Even after the warnings the defendant would not agree to not be disruptive, and the court barred him, but allowed for him to return if he agreed to cooperate. Id. In United States v. Benabe, 654 F.3d 753, 766 (7th Cir. 2011), the defendants were polite, but had frequent outbursts. They described themselves as "sovereign citizens," "secured-party creditors," and "flesh-and-blood human beings" who were outside the jurisdiction of the court. Id.

III. Responsibility of the court

A. Express waiver

The best practice is for the circuit court to engage the defendant in a colloquy. State v. Washington 379 Wis.2d 57, ¶52. A formal colloquy is by far the best practice to ensure that a defendant is knowingly, intelligently, and voluntarily waiving a right. Id.

When a defendant chooses to be absent from their trial, a formal on-the-record waiver is favored but not required. Divanovic, 200 Wis.2d 210. When the defendant is manipulative, disruptive, physically aggressive, the circuit court need not place any court staff in danger in conducting an in person waiver colloquy. Washington, 379 Wis.2d 57 ¶57.

B. Forfeiture by voluntarily absence

If the defendant, who is not exempted from attending, absconds during the trial without the court's permission, the trial can proceed without them. Wis. Stat. § 971.04(3).

A recess might be required to determine why the defendant was absent at a stage of the trial. State v. Morgen, 907 P.2d 116 (Idaho Ct. App. 1995). There is no bright-line rule on the length of the recess required. But the court should make sufficient inquiry into whether the defendant's disappearance was voluntary. State v. Kropp, 489 P.3d 859, 861–62 (Idaho Ct. App. 2021).

When a defendant absconds during trial without the court's permission, the court should examine and consider giving the instruction Wis. JI-Criminal 380C. This instruction is designed for cases in which the defendant absconds during trial. The decision to use this instruction is within the trial court's discretion. Because absconding during the trial may show consciousness of guilt, Wis. JI-Criminal 172 may also be appropriate.

C. Waiver by conduct: refusal to participate

When a defendant refuses to participate by refusing to come to court after the trial begins, the circuit court should examine and consider giving the instruction Wis. JI-Criminal 380B. This instruction is designed for cases in which an in-custody defendant refuses to appear at trial. The use of this instruction is within the trial court's discretion.

When it would be unsafe to force the defendant into court to secure a waiver of the right to appear, the defendant's refusal to return when asked can constitute waiver. State v. Washington, 2017 WI App 6, ¶15, 373 Wis.2d 214, 890 N.W.2d 592. In such a case, the trial court should periodically ask the defendant whether they want to reclaim their right to be present. Id.

D. Waiver by conduct: disruptive conduct

Sometimes a defendant will be disruptive to a point where the court concludes that the conduct constitutes a waiver of the right to be present. See Allen, 397 U.S. at 346.

1. The court should give warnings about possible removal

A court should warn a disruptive defendant that similar conduct will result in removal. Divanovic, 200 Wis.2d at 221. The court can restore the right to be present if the defendant agrees to end their disruptive behavior. Washington, 379 Wis.2d 58, ¶41. A court should periodically check to see if the defendant wants to come back to the courtroom. Id. ¶42.

2. Physical restraint is an option

A court may subject a defendant to physical restraint during trial, if the court finds that restraint was "reasonably necessary to maintain order." State v. Champlain, 2008 WI App 5, ¶22, 307 Wis.2d 232, 744 N.W.2d 889. The trial court has discretion to decide whether restraint is necessary. State v. Miller, 2011 WI App 34, ¶5, 331 Wis.2d 732, 797 N.W.2d 528. When possible, restraints should not be visible to the jury. See Deck v. Missouri, 544 U.S. 622, 630 (2005).

3. A disruptive defendant can be found in contempt.[3]

Another available course of action for a disruptive defendant is contempt. The court has the power to punish by fine, imprisonment, or other appropriate order for any misconduct which interferes with a court proceeding or conveys disrespect for the court. Wis. Stat. §§ 785.01, 785.04.

The exercise of the contempt power is largely in the discretion of the court. Bihlmire v. Hahn, 31 Wis.2d 537, 143 N.W.2d 433 (1966). The power should be used sparingly and never capriciously or arbitrarily. State ex rel. Schmidt v. Gehrz, 178 Wis. 130, 189 N.W. 461 (1922).

The court can initiate summary contempt actions for acts that occur in the presence of the court when four requirements are met.[4] Wis. Stat. § 785.03(2).

1. The misconduct must be committed in the actual presence of the court;
2. The sanction must be imposed to preserve order in the court;
3. The sanction must be imposed to protect the authority and dignity of the court; and
4. The sanction must be imposed immediately following contempt.

Wis. Stat. § 785.03(2).

When the four requirements are met, the court must make specific findings. See Oliveto v. Crawford Cty. Circuit Court, 194 Wis.2d 418, 436, 533 N.W.2d 819 (1995). The court shall make a statement that the judge decided to hold the person in contempt. Id. It should cite the factual basis for the holding. Id. The court must grant the person the right of allocution before imposition of a sanction. Id. After allocution, the court may vacate the contempt order or give a more lenient sanction. See Valadez v. Aprahamian, 2022 WL 301655, ¶29 (unpublished opinion).

The court should impose a sentence on the record. Wis. Stat. § 785.04(2)(b). The alternative sanctions are a fine not to exceed $500, confinement in county jail for up to 30 days, or both. Id.

4. Possible removal from the courtroom

If a defendant is disruptive and will not change his or her behavior, the court can remove the defendant from trial. Allen, 397 U.S. at 346. A trial court has discretion whether to remove a defendant from trial for disruptive behavior. Id. at 343.

Allowing an audio and video hookup, is an option to deal with a defendant who has been removed from trial. State v. Vaughn, 2012 WI App 129, ¶10, 344 Wis.2d 764, 823 N.W.2d 543. In Vaughn, the defendant refused to watch the video from the remote location. Id. ¶12. The court of appeals did not impose a requirement that the court offer the defendant an alternative way to participate in the trial.

5. After removal of a pro se defendant, consider whether to appoint counsel[5]

While it is best practice to require representation by counsel, there is not a constitutional requirement for the trial court to appoint counsel when it removes a pro se defendant from the courtroom. State v. Lacey, 431 P.3d 400, 406 (Or. 2018). A court should only continue a trial without the defendant and without a legal representative for the defendant if the defendant has been given specific warnings that the trial would continue without any representation if the defendant continued to be disruptive. Id.

Note that the court cannot appoint a State Public Defender staff attorney as standby counsel pursuant to Wis. Admin PD 5.03**.**

a. Requirements from Klessig and Imani

To permit a defendant to proceed pro se, a court must determine that they (1) have made a knowing, intelligent and voluntary waiver of the right to counsel; and (2) are

competent to represent himself or herself. State v. Imani, 201 WI 66, ¶21, 326 Wis.2d 179, 786 N.W.2d 40.

To meet the former of these two requirements, courts typically conduct a colloquy with the defendant to ascertain that their waiver of the right to counsel is valid. State v. Klessig, 211 Wis. 2d 194, 206, 564 N.W.2d 716. This colloquy is intended to ensure that the defendant: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." Id. When the court fails to conduct an in-court colloquy, the proper remedy is a retrospective evidentiary hearing to determine whether defendant's waiver of counsel was knowing, intelligent and voluntary. Id. at 207 (citing Keller v. State, 75 Wis. 2d 502, 511-12, 249 N.W.2d 773 (1977)).

A presumption exists of non-waiver of the right to counsel and may be overcome upon an affirmative showing that the defendant knowingly, intelligently and voluntarily waived the right to counsel. Imani, 326 Wis. 2d 179, ¶ 22.

The supreme court has summarized the standards relevant to a circuit court's determination of a defendant's competence to proceed pro se, and appellate review of that determination, as follows:

> Whether a defendant is competent to proceed pro se is uniquely a question for the trial court to determine. It is the trial judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at least a meaningful defense. In determining whether a defendant is competent to proceed pro se, the circuit court may consider the defendant's education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense. A defendant of average ability and intelligence may still be adjudged competent for self-representation, and accordingly, a defendant's timely and proper request should be denied only where the circuit court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense. While the determination of competency rests significantly upon the circuit court's judgment and experience, the determination must appear in the record. Our review is limited to whether the circuit court's determination is totally unsupported by the facts apparent in the record.

Imani, 326 Wis.2d 179, ¶37 (internal citations and quotation marks omitted).

b. Standby counsel and the right to self-representation

The Supreme Court held that "a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." Faretta v. California, 422 U.S. 806, 807 (1975). The appointment of standby counsel, even over a pro se defendant's objection, does not violate the Faretta right to self-representation. McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984). Of course, "[p]articipation by counsel with a pro se defendant's express approval is . . . constitutionally unobjectionable." Id. at 182.

The McKaskle court did not adopt per se rules limiting the scope of the standby counsel's role or the types of tasks he or she may perform. Rather, it allowed as a general matter counsel's unsolicited participation in the case so long as (1) the defendant maintains "actual control over the case he [or she] chooses to present to the jury"; and (2) counsel's participation does not "destroy the jury's perception that the defendant is representing himself." Id. at 178 (footnote omitted). The court explained that the first of these two limitations does not apply to participation by standby counsel outside the presence of the jury. Id. at 179. "[T]he appearance of a pro se defendant's self-representation will not be unacceptably undermined by counsel's participation outside the presence of the jury." Id.

"The role of standby counsel can vary over a wide spectrum, ranging from a warm body sitting beside the defendant throughout trial to participation that is tantamount to that of defense counsel." State v. Campbell, 2006 WI 99, ¶66, 294 Wis.2d 100, 718 N.W.2d 649. "Although . . . the 'chief purpose' of standby counsel in most cases is to 'serve the interests of the trial court,' . . . this is not always the case." Id. ¶76 (internal citation omitted). In Campbell, the defendant welcomed standby counsel and "heavily utilize[ed] him throughout the proceedings," effectively converting standby counsel into his co-counsel. Id. Likewise, in McKaskle, standby counsel was deeply involved in the defense, "dictat[ing] proposed strategies into the record" and "register[ing] objections to the prosecution's testimony," among other things. McKaskle, 465 U.S. at 180 (footnote omitted).

6. The court can conduct trial in absentia.

If a court removes a disruptive defendant from the trial, the trial may continue. The court may also determine that the defendant has forfeited his or her right to testify through their conduct. State v. Anthony, 2015 WI 20, ¶ 56, 361 Wis.2d 116, 860 N.W.2d 10. The court extended the logic of exclusion from the trial for misconduct, to forfeiture of the right to testify. Id. ¶59.

When a defendant's misconduct rises to the level of warranting their removal from the courtroom, the Committee recommends that the trial court conduct a formal, on-the-record admonition detailing the basis of the removal. When a court determines that a defendant has lost the right to be present at trial through forfeiture by misconduct, the court should examine and consider giving the instruction Wis. JI-Criminal 380D. Whether to use this instruction is within the trial court's discretion.

COMMENT

SM-23 was approved by the Committee in October 2024.

1. As a general rule, the defendant is required to be present personally or by telephone or live audio:

(a) At the arraignment;
(b) At trial;
(c) During voir dire of the trial jury;
(d) At any evidentiary hearing;
(e) At any view by the jury;
(f) When the jury returns its verdict;
(g) At the pronouncement of judgment and the imposition of sentence;
(h) At any other proceeding when ordered by the court.

Wis. Stat. § 971.04(1).

See Wis. Stat. § 967.08 for more information on when telephone or live audiovisual proceedings may be used. The court can utilize this type of remote access with the consent of both parties. Wis. Stat. § 967.08(2). If one party objects to the use at a critical stage of the proceedings, the court shall sustain the objection. Wis. Stat. § 967.08(4). If the proceeding is not critical and one party objects, the court should examine the following factors in sustaining or overruling the objection. Wis. Stat. § 967.08(5). The statutory factors for the circuit court to consider are as follows:

(a) Whether any undue surprise or prejudice would result.

(b) Whether the proponent of the use of videoconferencing technology has been unable, after a diligent effort, to procure the physical presence of a witness.

(c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.

(d) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.

(e) The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully.

(f) Whether a physical liberty or other fundamental interest is at stake in the proceeding.

(g) Whether the court is satisfied that it can sufficiently know and control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

(h) Whether the participation of an individual from a remote location presents the person at the remote location in a diminished or distorted sense such that it negatively reflects upon the individual at the remote location to persons present in the courtroom.

(i) Whether the use of videoconferencing diminishes or detracts from the dignity, solemnity, and formality of the proceeding so as to undermine the integrity, fairness, and effectiveness of the proceeding.

(j) Whether the person proposed to appear by videoconferencing presents a significant security risk to transport and present personally in the courtroom.

(k) Waivers and stipulations of the parties offered pursuant to s. 885.62.

(l) Any other factors that the court may in each individual case determine to be relevant.

(2) The denial of the use of videoconferencing technology is not appealable.

Wis. Stat. § 885.56.

See State v. Washington, 2018 WI 3, ¶33, 379 Wis.2d 58, 905 N.W.2d 380.

2. In State v. Koopmans, 210 Wis.2d 670 ¶15, 563 N.W.2d 528, the court concluded that a defendant cannot be voluntarily absent from sentencing and thus, vacated a sentenced imposed without the defendant's presence.

3. See the Bench Book entry CV 43: CONTEMPT for more information.

4. The Attorney General, District Attorney, or Special Prosecutor can initiate non-summary contempt proceedings through a criminal complaint, but a circuit court cannot. Wis. Stat. § 785.03(1)(b).

5. See SM-30 Waiver and Forfeiture of Counsel; Self-Representation; Standby Counsel; "Hybrid Representation"; Court Appointment of Counsel, for a comprehensive discussion on the distinction between waiving and forfeiting counsel.