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AB-700 Criminal procedure: arraignment and trial. (2021-2022)

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Date Published: 09/23/2021 10:00 AM

Assembly Bill No. 700

CHAPTER 196

An act to amend Sections 977, 1043, and 1043.5 of the Penal Code, relating to criminal procedure.

[Approved by Governor September 22, 2021. Filed with Secretary of State September 22, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

AB 700, Cunningham. Criminal procedure: arraignment and trial.

Existing provisions of the California Constitution provide a criminal defendant the right to be personally present with counsel at trial. Existing law requires a defendant to be present at a felony trial or preliminary hearing. Existing law, however, also authorizes a court to proceed, in the defendant's absence, with a trial or preliminary hearing that has commenced in the presence of the defendant, but from which the defendant is voluntarily absent or has been removed from the courtroom for disruptive behavior, as specified.

This bill would specify that a trial or preliminary hearing shall be deemed to have "commenced in the presence" of a defendant who is in custody and refuses to appear in court, if the court makes certain specified findings on the record, by clear and convincing evidence.

Existing law authorizes a court, in a misdemeanor case, to proceed in the defendant's absence, as specified, if a defendant has provided a waiver and is represented by counsel.

This bill would allow the court to proceed, with or without a waiver, in any misdemeanor case in which the defendant is in custody and refuses to appear in court, if the court makes certain specified findings on the record, by clear and convincing evidence.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 977 of the Penal Code is amended to read:

977. (a) (1) In all cases in which the accused is charged with a misdemeanor only, they may appear by counsel only, except as provided in paragraphs (2) and (3). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) If the accused is charged with a misdemeanor offense involving domestic violence, as defined in Section 6211 of the Family Code, or a misdemeanor violation of Section 273.6, the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Section 136.2.

(3) If the accused is charged with a misdemeanor offense involving driving under the influence, in an appropriate case, the court may order a defendant to be present for arraignment, at the time of plea, or at sentencing. For purposes of this paragraph, a misdemeanor offense involving driving under the influence shall include a misdemeanor violation of any of the following:

(A) Subdivision (b) of Section 191.5.

(B) Section 23103 as specified in Section 23103.5 of the Vehicle Code.

(C) Section 23152 of the Vehicle Code.

(D) Section 23153 of the Vehicle Code.

(b) (1) Except as provided in subdivision (c), in all cases in which a felony is charged, the accused shall be personally 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 proceedings unless they shall, with leave of court, execute in open court, a written waiver of their right to be personally present, as provided by paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) The accused may execute a written waiver of their right to be personally present, approved by their counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. The waiver shall be substantially in the following form:

“Waiver of Defendant’s Personal Presence”

“The undersigned defendant, having been advised of their right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and 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. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that their interest is represented at all times by the presence of their attorney the same as if the defendant were personally present in court, and further agrees that notice to their attorney that their presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of their appearance at that time and place.”

(c) (1) The court may permit the initial court appearance and arraignment of defendants held in any state, county, or local facility within the county on felony or misdemeanor charges, except for those defendants who were indicted by a grand jury, to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an arraignment on an information in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing. The defendant shall have the right to make their plea while physically present in the courtroom if they request to do so. If the defendant decides not to exercise the right to be physically present in the courtroom they shall execute a written waiver of that right. A judge may order a defendant’s personal appearance in court for the initial court appearance and arraignment. In a misdemeanor case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto.

(2) (A) A defendant who does not wish to be personally present for noncritical portions of the trial when no testimonial evidence is taken may make an oral waiver in open court prior to the proceeding or may submit a written request to the court, which the court may grant in its discretion. The court may, when a defendant has waived the right to be personally present, require a defendant held in any state, county, or local facility within the county on felony or misdemeanor charges to be present for noncritical portions of the trial when no testimonial evidence is taken, including, but not limited to, confirmation of the preliminary hearing, status conferences, trial readiness conferences, discovery motions, receipt of records, the setting of the trial date, a motion to vacate the trial date, and motions in limine, by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall not be required to be personally present with the defendant for noncritical portions of the trial, if the audiovideo conferencing system or other technology allows for private communication between the defendant and the attorney prior to and during the noncritical portion of trial. Any private communication shall be confidential and privileged pursuant to Section 952 of the Evidence Code.

(B) This paragraph does not expand or limit the right of a defendant to be personally present with their counsel at a particular proceeding as required by Section 15 of Article 1 of the California Constitution.

(d) (1) Notwithstanding any other provision in this section, the court may allow a defendant to appear by counsel on that day, at a trial, hearing, or other proceeding, with or without a written waiver, if the court finds, by clear and convincing evidence, all of the following to be true:

(A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that trial, hearing, or other proceeding.

(B) The defendant has been informed of their right and obligation to be personally present in court.

(C) The defendant has been informed that the trial, hearing, or other proceeding will proceed without the defendant being present.

(D) The defendant has been informed that they have the right to remain silent during the trial, hearing, or other proceeding.

(E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.

(F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the trial, hearing, or other proceeding lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any trial, hearing, or other proceeding in which the defendant was personally present in court at the commencement of the trial, hearing, or other proceeding.

SEC. 2. Section 1043 of the Penal Code is amended to read:

1043. (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.

(b) The absence of the defendant in a felony case after the trial has commenced in their physical presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:

(1) Any case in which the defendant, after being warned by the judge that they will be removed if they continue their disruptive behavior, nevertheless insists on acting in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with the defendant present in the courtroom.

(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

(c) Any defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) may reclaim the right to be present at the trial as soon as they are willing to act consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

(d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive the right to be present in accordance with Section 977.

(e) If the defendant in a misdemeanor case fails to appear in person at the time set for trial or during the course of trial, the court shall proceed with the trial, unless good cause for a continuance exists, if the defendant has authorized their counsel to proceed in their absence pursuant to subdivision (a) of Section 977.

If there is no authorization pursuant to subdivision (a) of Section 977 and if the defendant fails to appear in person at the time set for trial or during the course of trial, the court, in its discretion, may do one or more of the following, as it deems appropriate:

(1) Continue the matter.

(2) Order bail forfeited or revoke release on the defendant's own recognizance.

(3) Issue a bench warrant.

(4) Proceed with the trial in the defendant's absence as authorized in subdivision (f).

(f) (1) A trial shall be deemed to have commenced in the presence of the defendant for purposes of subdivision (b), or may proceed pursuant to paragraph (4) of subdivision (e), if the court finds, by clear and convincing evidence, all of the following to be

true:

- (A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that trial.
- (B) The defendant has been informed of their right and obligation to be personally present in court.
- (C) The defendant has been informed that the trial will proceed without the defendant being present.
- (D) The defendant has been informed that they have the right to remain silent during the trial.
- (E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.
- (F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the trial lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any trial in which the defendant was personally present in court at the commencement of trial.

(g) Nothing herein shall limit the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulate to the issue of identity.

SEC. 3. Section 1043.5 of the Penal Code is amended to read:

1043.5. (a) Except as otherwise provided in this section, the defendant in a preliminary hearing shall be personally present.

(b) The absence of the defendant in a preliminary hearing after the hearing has commenced in their physical presence shall not prevent continuing the hearing to, and including, holding to answer, filing an information, or discharging the defendant in any of the following cases:

(1) Any case in which the defendant, after being warned by the judge that they will be removed if they continued their disruptive behavior, nevertheless insists on acting in a manner so disorderly, disruptive, and disrespectful of the court that the hearing cannot be carried on with the defendant present in the courtroom.

(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

(c) Any defendant who is absent from a preliminary hearing pursuant to paragraph (1) of subdivision (b) may reclaim their right to be present at the hearing as soon as they are willing to act consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

(d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive the right to be present in accordance with Section 977.

(e) (1) For purposes of subdivision (b), a preliminary hearing shall be deemed to have commenced in the presence of the defendant if the court finds, by clear and convincing evidence, all of the following to be true:

- (A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that preliminary hearing.
- (B) The defendant has been informed of their right and obligation to be personally present in court.
- (C) The defendant has been informed that the preliminary hearing will proceed without the defendant being present.
- (D) The defendant has been informed that they have the right to remain silent during the preliminary hearing.
- (E) The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf.
- (F) The defendant has been informed whether or not defense counsel will be present.

(2) The court shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes.

(3) If the preliminary hearing lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent.

(4) This subdivision does not apply to any preliminary hearing in which the defendant was personally present in court at the commencement of the preliminary hearing.