"THE FEDERAL CORNER"

There Will Be No More Plea Hearings
in the Federal Courts by Videoconference

Buck Files

Since I have a dislike for the conducting of judicial proceedings by videoconference, I was pleased to read the opinion of the United States Court of Appeals for the Seventh Circuit in *United States v. Bethea*, ___F.3d___, 2018 WL 1959638 (April 26, 2018). A panel of the Circuit held that a defendant (Bethea) could not affirmatively consent to a *felony plea* by videoconference; and, that the error was per se prejudicial error, warranting automatic reversal. [Panel: Circuit Judges Bauer, Flaum, and Manion. Opinion by Judge Flaum.]

When Chief Judge James D. Peterson of the United States District Court for the Western District of Wisconsin read that opinion of the United States Court of Appeals for the Seventh Circuit, he had a right to be *really* angry.

A grand jury had indicted Gregory Bethea for possessing a counterfeit access device in violation of 18 U.S.C. § 1029(a)(1). In addition to his legal problems, he had significant medical issues which are set out in Footnote 1 to Judge Flaum's opinion:

> Specifically, Bethea requires dialysis for ten hours a day, five days a week; suffers from pulmonary issues; recently had a heart stent implemented; is wheelchair-bound; and suffers from Charcot joint syndrome, which makes him highly susceptible to fractures and dislocations from even minor physical contact.

In order to accommodate Bethea, Judge Peterson conducted a plea and sentencing hearing by videoconference. The judge presided from his courtroom in Madison, Wisconsin, and the defendant appeared from a site in Milwaukee. After accepting Bethea's plea of guilty, Judge Peterson conducted a sentencing hearing and imposed a sentence of twenty-one months' imprisonment. This sentence was at the low end of the advisory Guidelines range of 21 to 27 months; nevertheless, Bethea gave notice of appeal. Although he had not raised a Rule 43 issue by pre-trial motion or during the plea colloquy, his lawyer on appeal argued successfully that Judge Peterson was not permitted to accept his guilty plea via videoconference.

Judge Flaum's opinion reads, in part, as follows:

[Bethea's Argument on Appeal]

> Bethea argues that his combined guilty plea and sentencing via videoconference violated Federal Rule of Criminal Procedure 43(a) because he was not physically present in the courtroom during his plea. He argues this was an unwaivable obligation, and the court's failure to adhere to the requirement constitutes per se reversible error. Thus, he maintains that even if he consented to the form of proceeding, we must still vacate his plea and sentence.

[Federal Rules of Criminal Procedure Rule 43]

Rule 43 of the Federal Rules of Criminal Procedure governs the circumstances under which a criminal defendant must be present in the courtroom. The Rule states that 'the defendant must be present at ... the initial appearance, the initial arraignment, *and the plea*.' Fed. R. Crim. P. 43(a) (emphasis added). The presence requirement is couched in mandatory language—'the defendant *must* be present.' *Id.* (emphasis added)*; see also In re United States*, 784 F.2d 1062, 1062–63 (11th Cir. 1986) ('The rule's language is clear; the rule does not establish the right of a defendant to be present, but rather affirmatively *requires* presence.' (emphasis added)).

[The Exceptions to the Rule]

True, the Rule's presence requirement does contain several exceptions and waiver provisions. *See* Fed. R. Crim. P. 43(b), (c). These exceptions include, for example, when a proceeding involves the correction or reduction of a sentence, *see* Fed. R. Crim. P. 43(b)(4), or when the defendant is voluntarily absent during sentencing in a noncapital case after initially attending the trial or plea, *see* Fed. R. Crim. P. 43(c)(1)(B). But none of these exceptions apply to the situation before us and are generally limited to the sentencing context. Moreover, Rule 43 was amended in 2011 to permit videoconference pleas for *misdemeanor* offenses. *See* Fed. R. Crim. P. 43(b)(2) (stating that when the offense 'is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits ... plea ... to occur by video teleconferencing or in the defendant's absence'). That the drafters did not include that option in the felony plea situation is telling.

[The Other Circuit Court Opinions]

No other circuit has addressed whether a defendant can affirmatively consent to a plea by videoconferencing. However, four circuits have addressed whether a district court can require it. All have held that Rule 43 obligates both the defendant and the judge to be physically present; the outcome is the same whether it is the judge or defendant who appeared via videoconference. *See United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) ('The text of Rule 43 does not allow video conferencing' and the 'structure of the Rule does not support it'); *United States v. Torres–Palma*, 290 F.3d 1244, 1246–48 (10th Cir. 2002) ('[V]ideo conferencing for sentencing is not within the scope of a district court's discretion.'); *United States v. Lawrence*, 248 F.3d 300, 303–05 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 238–39 (5th Cir. 1999).

[The Court's Holding]

We agree with our sister circuits' reasoning and extend it one step further. We thus hold that the plain language of Rule 43 requires all parties to be present for a defendant's plea and that a defendant cannot consent to a plea via videoconference.

[The Benefits of Physical Presence]

Our decision is supported by the unique benefits of physical presence. As the Sixth Circuit explained, '[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.' *Williams*, 641 F.3d at 764–65. Likewise, the Fourth Circuit reasoned that 'virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.' *Lawrence*, 248 F.3d at 304.

This Court has also recognized the value of the defendant and judge both being physically present. In the context of revocation of supervised release via videoconferencing, we noted that '[t]he judge's absence from the courtroom materially changes the character of the proceeding.' *Thompson*, 599 F.3d at 601. The same is true if the defendant is the person missing. 'The important point is that the form and substantive quality of the hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of a cable or satellite link.' *Id*. at 600. A 'face-to-face meeting between the defendant and the judge permits the judge to experience "those impressions gleaned through ... any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another." ' *Id.* at 599 (alteration in original) (quoting *Del Piano v. United States*, 575 F.2d 1066, 1069 (3d Cir. 1978)). 'Without this personal interaction between the judge and the defendant—which videoconferencing cannot fully replicate—the force of the other rights guaranteed' by Rule 43 is diminished. *See id*. at 600. Thus, while it might be convenient for a defendant or the judge to appear via videoconference, we conclude the district court has no discretion to conduct a guilty plea hearing by videoconference, even with the defendant's permission.

[*Per Se* Error]

In so holding, we agree with the Tenth Circuit that a Rule 43(a) violation constitutes *per se* error. *Torres–Palma*, 290 F.3d at 1248; *see also Lawrence*, 248 F.3d at 305 (automatically reversing for Rule 43 error); *Navarro*, 169 F.3d at 238–39 (same). 'Rule 43 vindicates a central principle of the criminal justice system, violation of which is *per se* prejudicial. In that light, presence or absence of prejudice is not a factor in judging the violation.' *Torres–Palma*, 290 F.3d at 1248.

[The Curse of Trying to Accommodate a Defendant]

> We are sympathetic to the government's concerns that a defendant on appeal can complain of an accommodation that was for his benefit below. We also agree with various courts that have stated it would be sensible for Rule 43 to allow discretion in instances where a defendant faces significant health problems. *See, e.g., United States v. Brunner*, No. 14–cr–189, 2016 WL 6110457, at (E.D. Wis. Sept. 23, 2016). However, Rule 43(a) simply does not allow a defendant to enter a plea by videoconference. *See Lawrence*, 248 F.3d at 305 ('[T]he rule should indeed provide some flexibility. But it does not. We cannot travel where the rule does not go.').

[Result]

> Accordingly, we remand to the district court for the plea and resentencing of Bethea in the physical presence of a judge.

My Thoughts

For the TCDLA members who have been around for a while, it would seem that I write a column about a Fed. R. Crim. P 43 issue every 19 years. The June, 1999, issue of the *Voice* included a column entitled "Hell, No! Said the Judge." In it, I reviewed *United States v. Navarro*, 169 F.3d 228 1999 WL 118338 (5th Cir. 1999).

Judge Politz announced the judgment of the Court and delivered the opinion as to Parts I through V. Judge Emilio M. Garza delivered an opinion as to Part VI – the Rule 43 issue – to which Judge Politz dissented. Each of these opinions was so well written that I would have been unable to predict the outcome of the case. The following excerpts are from that June, 1999, column:

> A divided panel of the United States Court of Appeals for the Fifth Circuit vacated the life sentence imposed against a defendant and remanded the case for re-sentencing after determining that, in the absence of a waiver, a defendant in a criminal case has a right to be physically present in the same courtroom as the judge during a sentencing hearing. An effort to generate the votes for an *en banc* review failed and *Navarro* became the law of the Circuit. [Panel: Politz, Garza and Stewart, Circuit Judges].
>
> Navarro and Edmondson were indicted for violations of Title 21 U.S.C. §§ 841(a)(1) and 846 and of Title 18 U.S.C. § 2. Trial was held in the Sherman Division of the Eastern District of Texas before Chief Judge Richard A. Schell who usually sits in Beaumont but who shares the docket of the Sherman Division with Judge Paul Brown. After the defendants were convicted, Judge Schell returned to Beaumont and the sentencing hearing was scheduled to be conducted by video-conference.

Although Navarro signed a Waiver of Rights and Consent to Proceed by Video-Conference, Edmondson refused to sign the form and objected to the procedure saying that he wanted to be sentenced in person. Judge Schell overruled his objection and, after a video-conference hearing, sentenced him to life imprisonment.

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The opinion continues, 'The first step in interpreting the Rule is to consider the plain, ordinary meaning of the language of the Rule.' After looking at the definition of 'presence' in *Black's Law Dictionary* and *Webster's Third New International Dictionary*, the Court determined, 'The plain import of the definitions is that a person must be in existence at a certain place in order to be "present," which is not satisfied by video conferencing.'

The Court then looked at the context of the words in Rule 43 noting that 'the rights protected by Rule 43 include the defendant's constitutional Confrontation Clause and Due Process rights, and the common law right to be present.'

The Court pointed out that 'the Supreme Court has interpreted the Confrontation Clause, with certain exceptions, to guarantee a defendant a face-to-face meeting with witnesses appearing before the trier of fact. *See Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 3165, 111 L.Ed.2d 666 (1990). Video conferencing would seemingly violate a defendant's Confrontation Clause rights at those other stages of trial. The scope of the protection offered by Rule 43 is broader than that offered by the Constitution, and so the term "present" suggests a physical existence in the same location as the judge. This means that, for the purposes of sentencing, a defendant must be at the same location as the judge to be "present."' The court determined that the context of the term 'present' in Rule 43(a) indicates that a defendant must be physically in the courtroom.

Finally, the Court stated, 'We conclude that sentencing a defendant by video conferencing does not comply with Rule 43 because the defendant is not "present." We refrain from interpreting Rule 43 in a matter at odds with the clear import of the language of Rule 43 and the Advisory Committee Notes. "Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the rules, [we are] not free to ignore the clear instructions of Rule [ ] ... 43." *Valenzuela-Gonzalez v. United States Dist. Court*, 915 F.2d 1276, 1281 (9th Cir.1990).'

After reading *Navarro*, I checked with the District Clerk's Office here in Tyler and found that no General Order had been entered on the procedure to be followed for video-conferencing; neither is there any local rule. Thus, there are no written guidelines for video-conferencing.

After pondering the concept of sentencing by video conference, I could not think of a single reason why a lawyer would agree to such a procedure. To get a "second opinion," I visited with one district judge who had worked as a trial lawyer in the federal system before his appointment to the bench. He himself does video-conference sentencings. I asked him to take off his judicial robe and to put on his trial lawyer's hat -- which he agreed to do on a condition of anonymity. I then asked the question, "As a lawyer, would you have ever agreed to this procedure?"

His answer: "Hell, No!"

[Note: The judges of the Circuits are not consistent when they speak of videoconferencing. Some run the two words together; some use a hyphen between the words; and, some use two separate words.]