The Right to Be Present at Sentencing

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A North Carolina defendant has a common law right to be personally present when a criminal sentence is pronounced. That right is separate from the constitutional right to be present at trial, State v. Pope, 257 N.C. 326 (1962), and a waiver of the sentencing right should not be inferred from the defendant's absence at trial. When a defendant is tried and found guilty in absentia (because he or she fled in the middle of the trial, or perhaps behaved in a disorderly fashion), we generally recommend that prayer for judgment be continued until the defendant can be brought before the court for sentencing. *See* Jessica Smith, N.C. Superior Court Judges' Benchbook: Trial in the Defendant's Absence. In one case the court of appeals held that a trial judge did not err by proceeding to sentence a defendant after he fled the courthouse, primarily because his lawyer remained and did not ask for a continuance. State v. Miller, 142 N.C.App. 435 (2011). But in light of earlier cases, the better practice is to wait. *See*, *e.g.*, State v. Stockton, 13 N.C. App. 287 (1971) (citing several supreme court cases deeming sentences entered in a defendant's absence to be defective).

The right to be present at sentencing is also violated when a later-completed written judgment is substantively different from the sentenced pronounced before the defendant in open court. In State v. Crumbley, 135 N.C. App. 59 (1999), for example, the trial judge erred by indicating in a written judgment that two sentences would run consecutively when he had said in court that they would run concurrently.

In general, the right to be present at sentencing applies in all felony and misdemeanor cases. A limited exception exists for defendants who do not receive "corporal punishment" at sentencing. State v. Cherry, 154 N.C. 624 (1911). *See generally* Julie Ramseur Lewis & John Rubin, N.C. Defender Manual, Vol. 2, Trial (2d ed. 2012), at § 21.1E. One case indicates that a fine and costs are not "corporal," and may therefore be entered in the defendant's absence. State v. Ferebee, 266 N.C. 606 (1966). A more recent case confirms that costs need not be expressly reviewed or pronounced in the defendant's presence; they are not actually a part of the defendant's punishment, but are rather a "necessary byproduct of the sentence." State v. Arrington, 215 N.C. App. 161 (2011).

A waiver of the right to be present at sentencing will not be implied, but a defendant may expressly waive it—at least in some cases. Under G.S. 15A-1011(a), a defendant may, through a written waiver of personal appearance, plead guilty to a misdemeanor through counsel with the approval of the presiding judge. Under G.S. 15A-1011(d), a defendant may, if allowed by the trial judge, execute a written waiver of appearance, plead not guilty, and be tried in absentia for a misdemeanor or non-capital felony. Both statutes appear to be written with the understanding that the appearance waiver will extend to sentencing. A capital defendant's right to presence cannot be waived; he or she must be present for the court to proceed. State v. Huff, 325 N.C. 1 (1989).

There is no exception to the right to presence at sentencing for a defendant who successfully appeals or collaterally attacks a sentence. That is true even if the new sentence will be less severe than the initial sentence. Absent an express waiver from the defendant, he or she must be present in court for the resentencing hearing—which, for an imprisoned inmate, means obtaining a writ to have the defendant brought back to court. My sense is that most of the time, the imprisoned defendant does not waive, as he or she does not mind the opportunity be away from prison for a day or two. Even if the defendant were inclined to waive, there's no clear statutory process describing how to do it.

I am sometimes asked whether the right to be present at sentencing also applies to a sentence activated upon

revocation of probation. State v. Hanner, 188 N.C. App. 137 (2008), indicates that it does—at least when the revoking judge tinkers with the sentence in any way, such as by ordering (as a judge is permitted to do) that two sentences initially set to run concurrently instead run consecutively. By statute, a hearing at which probation is merely extended or modified (but not revoked) "may be held in the absence of a defendant who fails to appear for the hearing after reasonable effort to notify the defendant." G.S. 15A-1344(d).