I*n Absentia* Trials in Magisterial District Court

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It is axiomatic that a defendant has a right to be present at trial.[1] It has been held that any common law, statutory, or constitutional right to be present at trial may be waived by the defendant, either by word or by conduct. In time, the cases have found more and more ground for such waiver. It is said that it is now possible for trial courts to try *in absentia* defendants who are too ignorant, ill informed, or misinformed to be aware of the possible consequences of failing to appear for trial,[2] that trial *in absentia* is now routine, and that *in absentia* procedure is now overused.

This article examines the Pennsylvania rule of criminal procedure pertaining to trial *in absentia* of summary cases, Pa.R.Crim.P. 455.[3] The rule implies there must be a balancing test, one requiring us to weigh relevant factors. It is the purpose of this article to marshal a list of those factors and, by doing so, allow us to better administer the balancing test.

I. Rule 455.

Rule 455 states, in pertinent part:

> If the defendant fails to appear for trial in a summary case, the trial shall be conducted in the defendant's absence, *unless the issuing authority determines that there is … good cause not to conduct the trial in the defendant's absence*. If the trial is not conducted in the defendant's absence, the issuing authority *may* issue a warrant for the defendant's arrest. (emphasis added)

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[1] U.S. CONST., AMEND. V, VI, XIV; PA. CONST. ART. I, § 9; Pa.R.Crim.P. 455(A), 602(A); *Drope v. Missouri*, 420 U.S. 162 (1975); *Illinois v. Allen*, 397 U.S. 337 (1970); *Snyder v. Massachusetts,* 291 U.S. 97 (1934); *Commonwealth v. Vega*, 719 A.2d 227 (Pa. 1998); *Commonwealth v. Tizer*, 684 A.2d 597 (Pa. 1996); *Commonwealth v. Sullens*, 19 A.2d 1349 (Pa. 1992). *See* Myra L. Willis, Criminal Trials in Absentia: A Proposed Reform for Indiana, 56 IND. L. J. 103 (1980); James G. Starkey, Trial *in Absentia*, 53 ST. JOHN'S L. REV. 721 (1979); Neil Cohen, Trial *in Absentia* Re-Examined*,* 40 TENN. L. REV. 155 (1973).

[2] Myra L. Willis, Criminal Trials *in Absentia*: A Proposed Reform for Indiana, 56 IND. L. J. 103 (1980).

[3] *See also* Pa.R.Crim.P. 602(A) (relating to misdemeanor and felony cases).

The question, then, is what is "good cause?"

II. Good Cause.

It is, per the rules,[4] within the discretion of the judge to determine whether there is good cause not to conduct a trial *in absentia* but instead issue a bench warrant or continue the case. In determining whether there is good cause or not, there is guidance in the case opinions. In one notable case, *Commonwealth v. Pantano*,[5] the superior court spoke on the issue at length.

In *Pantano*, the defendant failed to appear for trial. Counsel informed the court that he had received a message on his answering machine that there had been a death in the defendant's family, but the trial judge nonetheless proceeded to conduct a trial *in absentia*. He convicted the defendant. The defendant appealed. The superior court reversed the conviction.

In its opinion, the *Pantano* court explained that there is a totality of the circumstances balancing test requiring the judge to weigh the defendant's rights against the need for efficient administration of justice.

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[4] It is important to read the rules *in pari materia* in as much as the several texts, using terms such as "should" and "may," indicate the judge has discretion to either issue a bench warrant or convene trial *in absentia*. *See* Comment, Pa.R.Crim.P. 455 ("In those cases in which the issuing authority determines that there is a … good cause not to conduct the trial in the defendant's absence, the issuing authority *may* issue a warrant for the arrest of the defendant in order to have the defendant brought before the issuing authority for summary trial; Pa.R.Crim.P. 430(B) ("The trial would then be conducted with the defendant present as provided in these rules. *See* Rule 454."); Comment, Pa.R.Crim.P. 451 ("It is intended that, when a defendant fails to appear for trial pursuant to a trial notice served by first class mail, the issuing authority need provide no further notice, but should proceed to conduct the trial in the defendant's absence *pursuant to rule 455* [requiring the judge exercise discretion in assessing "good cause not to conduct the trial in the defendant's absence."]." (emphasis added)); Pa.R.Crim.P. 452 ("Although this rule permits an issuing authority to fix collateral in an amount up to the full amount of fine and costs, the issuing authority *is not required to* fix collateral or any particular amount of collateral, and *may* set an amount less than the fine and costs. The issuing authority *may* also release the defendant on recognizance when the issuing authority has reasonable grounds to believe that the defendant will appear or the defendant is without adequate resources to deposit collateral. To request a lower amount of collateral or to be released on recognizance, the defendant *must* appear personally before the issuing authority to enter a plea, as provided in Rules 408, 413, and 423." (emphasis added)).

[5] *Commonwealth v. Pantano*, 836 A.2d 948 (Pa.Super. 2003).

In conducting that balancing test, the court discerned three factors:

> "First, Appellant did not flee the jurisdiction of the trial court. Also, this was Appellant's first request for a continuance. Thus, the case is not analogous to ones where trials in absentia were held following numerous continuances to locate the defendants. Finally, Appellant did not absent himself without explanation, but rather presented the trial court with his request for a continuance through his counsel."[6]

There is, said the court:

> "an inherent prejudice arising from trials *in absentia*. … In this regard it is noted that other remedies were available to the trial court before resort to the drastic remedy of a trial *in absentia*. For example, a bench warrant could have issued to secure … appearance. … Under the circumstances in this case, trial *in absentia* was not the appropriate remedy. Simply put, the interests of justice were not served …"[7]

In *Pantano*, the court was presented with factors relating to the defendant's interests, but what of the other side of the scales? What of the government's interests? It may be helpful to examine other cases, even if out of jurisdiction, in search of a more complete list of relevant factors.

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[6] *Id*.

[7] *Id*. *See also Commonwealth v. Marizzaldi*, 814 A.2d 249 (Pa. Super. 2002) (dismissal of summary appeal *in absentia* inappropriate where defendant was late for court when he missed a bus); *Commonwealth v. Mesler*, 732 A.2d 21 (Pa. Cmwlth. 1999) (dismissal of summary appeal *in absentia* inappropriate where defendant failed to appear but counsel was present); *Commonwealth v. Ford*, 715 A.2d 1141 (Pa.Super. 1998) (trial *in absentia* inappropriate where defendant fled the jurisdiction and counsel was allowed to withdraw days before trial, the court stating "[t]o try a defendant without counsel, however, is a completely different matter"); *Commonwealth v. Doleno*, 594 A.2d 341 (Pa.Super. 1991) (trial *in absentia* inappropriate where, following the magisterial district judge's finding the defendant guilty of a vehicle code violation, the defendant and counsel failed to appear at trial *de novo* due to counsel's calendar error). I note that the standard for issuance of a bench warrant (mere failure to appear) is different from the standard for convening a trial *in absentia* (the totality of circumstances test requiring efficient administration needs outweigh the defendant's rights). It depends upon the facts of each case, but on these facts a bench warrant was appropriate, a trial *in absentia* not.

In a landmark federal case, *United States v. Tortura*,[8] the Second Circuit Court of Appeals instructed trial judges to conduct trials *in absentia* "only when the public interest clearly outweighs that of the voluntarily absent defendant."[9]

In *Tortora*, one of five defendants failed, voluntarily, to appear in court on the day scheduled for the commencement of trial. The trial, which had been previously continued because of conflicting schedules of defense attorneys and the absence of other defendants, was begun. The absent defendant was convicted.

The *Tortora* test attempts to equitably balance the defendant's right to be present at trial against the state's interest in criminal prosecution. The test requires trial judges to make a two-pronged analysis before exercising discretion to conduct trials completely *in absentia*. First, the court must determine that the evidence before it establishes that the defendant is voluntarily absent. Second, the court must determine that the government's interest in immediately trying the defendant outweighs the defendant's right to be present at trial.[10]

The *Tortora* court noted that the factors to be considered in deciding whether to proceed included: 1.) the likelihood that the trial could soon take place with the defendant present; 2.) the difficulty in rescheduling, particularly in multiple defendant trials; and 3.) the burden on the prosecution in having to undertake two trials, again particularly in multiple defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the prosecution's witnesses in substantial jeopardy.[11]

In a footnote, the court narrowed the standards even further by noting that "[i]t is difficult for us to conceive of any case where the exercise of this discretion would be appropriate other than a multiple-defendant case."[12]

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[8] *United States v. Tortura*, 464 F.2d 1202 (2d Cir.), *cert. denied,* 409 U.S. 1063 (1972).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

III. Commonly Relevant Factors in Summary Cases.

It is suggested, as a more complete framework, that we judges weigh factors on both sides of the scales by asking at least these questions:

A. Defendant's Interests.

Among the questions to be asked to discern the interests on this side of the scales are:

1. Did the defendant flee the jurisdiction of the court?

2. Is this the defendant's first request for a continuance? If not, how many others have there been? Under what circumstances?

3. Is there an explanation for the defendant's absence? Is there an emergency? Illness? Relocation?

4. Is there defense counsel in the case?

B. Prosecution's Interests.

Among the questions to be asked to discern the interests on this side of the scales are:

1. What is the likelihood that the trial could soon take place with the defendant present?

2. Is there difficulty in rescheduling (particularly in multiple defendant cases)?

a. Is it a one affiant-witness case?

b. Does the affiant appear in the judge's court regularly?

c. Are there any special schedulings or subpoenas required of him or other witnesses?

d. If there are other witnesses, how many?

e. Where are they located?

f. Are they required to make especially burdensome travel?

g. If they are unavailable in person, may advanced communication technology be used to hear their testimony?

3. Is there a burden on the prosecution in having to undertake two trials (particularly in multiple defendant cases)?

4. Is there some urgency demanding trial now rather than later?

It is my practice, additionally, to ascertain whether the defendant has or has not paid collateral. In the no collateral cases, the judge must anticipate the possibility of a trial *in absentia*, notice of conviction, and failure to remit, the incidence rate of which is quite high. In such a circumstance, the court must issue a warrant anyway. It is the better practice to issue it initially.

It is, in the end, for each judge to be cautious, to exercise judicial restraint, to exercise that restraint by discerning, weighing, and balancing all the factors in the totality of circumstances and deciding on an individualized, *ad hoc*, case-by-case basis, whether there is good cause to conduct the trial *in praesentia* or *in absentia.*

It is, above all else, imperative that the trial judge exercise sound discretion so as to protect the defendant's interest in a fair trial. Is efficiency a consideration? Yes. It is fairness, however, that is the pillar of justice. It is only after fairness is guaranteed that we may strive to achieve some measure of efficiency. But efficiency ought never displace fairness.

It is wise to use trial *in absentia* sparingly, only as a measure of last resort. I believe overuse of trial *in absentia* is a leading cause of appeal and dissatisfaction regarding the judiciary.[13] I learned from talking to people, as a lawyer as well as a judge, that they understand a judge holding a warrant hearing. They do not, however, understand, and are deeply offended by, a judge convicting them in their absence.

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[13] *See* Cynthia Gray, "The Line Between Error and Judicial Misconduct: Balancing Judicial Independence and Accountability," 32 HOFSTRA L. REV. 1264, n. 97 (2004).