
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: AB 700 **Hearing Date:** June 29, 2021
Author: Cunningham
Version: April 29, 2021
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Criminal procedure: arraignment and trial*

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 2397 (Frazier), Chapter 167, Statutes of 2014
AB 2102 (Lieu) not heard in SCoPS 2009-2010
AB 678 (Gaines), Chapter 747, Statutes of 2007
AB 2174 (Villines), Chapter 744, Statutes of 2006

Support: California State Sheriffs' Association

Opposition: California Attorneys for Criminal Justice

Assembly Floor Vote: 78 - 0

PURPOSE

The purpose of this bill is to allow a defendant who is in custody to appear by counsel in criminal proceedings, with or without a written waiver, if the court makes specified findings on the record by clear and convincing evidence.

Existing law provides a criminal defendant the right to be personally present with counsel at trial. (Cal. Const., Art. I, sec. 15.)

Existing law specifies in all cases in which the accused is charged with a misdemeanor only, the accused may appear by counsel only, with specified exceptions. (Penal Code § 977 (a).)

- a) States that if the accused is charged with a misdemeanor offense involving domestic violence 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. (Penal Code § 977 (a)(2).)
- b) Provides 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. (Penal Code, § 977 (a)(3).)

Existing law provides in all cases in which a felony is charged, except as specified, the accused shall be 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 present at all other proceedings unless the accused, with leave of court, executes in open court, a written waiver of their right to be personally present. If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided. (Penal Code § 977 (b)(1).)

Existing law specifies 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. (Penal Code § 977 (b)(2).)

Existing law provides 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 requested. 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. (Penal Code § 977 (c)(1).)

Existing law provides that 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. (Penal Code, § 977 (c)(2)(A).)

This bill provides that 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 are true:

- a) The defendant is in custody and is refusing, without good cause, to appear in court on that day for the 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 witnesses against them or to testify on their own behalf.
- f) The defendant has been informed whether or not defense counsel will be present.

This bill provides that 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.

This bill provides that if the trial, hearing, or other proceeding lasts more than one day, the court is required to make the required findings anew on each day.

Existing law provides that the defendant in a felony case shall be personally present at the trial. However, the absence of the defendant in a felony case after the trial has commenced in their presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:

- a) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom; or
- b) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent. (Penal Code §§ 1043 (a) & (b).)

Existing law states that any defendant who is absent from a trial because of disruptive behavior may reclaim their right to be present at the trial as soon as they are willing to conduct themselves consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (Penal Code § 1043 (c).)

Existing law specifies this provision does not limit defendant's right to waive their presence, as specified. (Penal Code § 1043 (d).)

Existing law authorizes the court to proceed with a misdemeanor trial if the defendant fails to appear and if the defendant has authorized counsel to proceed in their absence, unless good cause for a continuance exists. (Penal Code § 1043 (e).)

Existing law provides that if there is no authorization and if the defendant fails to appear, the court, in its discretion, may do one or more of the following, as it deems appropriate:

- a) Continue the matter;
- b) Order bail forfeited or revoke release on the defendant's own recognizance;
- c) Issue a bench warrant; and/or,
- d) Proceed with the trial if the court finds the defendant has absented themselves voluntarily with full knowledge that the trial is to be held or is being held. (Penal Code § 1043, subd. (e).)

Existing law states that nothing in this provision 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. (Penal Code § 1043 (e).)

This bill provides that a trial shall be deemed to have commenced in the presence of the defendant if the court finds by clear and convincing evidence, all the following 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 witnesses against them or to testify on their own behalf.
- f) The defendant has been informed whether or not defense counsel will be present.

This bill provides that 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.

This bill provides that if the trial lasts more than one day, the court is required to make the required findings anew on each day.

This bill does not apply to any trial in which the defendant was personally present in court at the commencement of trial.

This bill provides that it shall not limit the right of the court to order the defendant to be personally present for the purpose of identification unless counsel stipulate to the issue of identity.

Existing law provides that the defendant in a preliminary hearing shall be personally present, except as otherwise provided. (Penal Code § 1043.5 (a).)

Existing law states the absence of the defendant in a preliminary hearing after the hearing has commenced in his 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:

- a) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continued his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the hearing cannot be carried on with him in the courtroom; or,
- b) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent. (Penal Code § 1043.5 (b).)

Existing law provides that any defendant who is absent from a preliminary hearing because of disruptive behavior may reclaim their right to be present at the hearing as soon as they are willing to conduct themselves consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (Penal Code § 1043.5 (c).)

Existing law specifies this provision does not limit defendant's right to waive their presence, as specified. (Penal Code § 1043.5 (c).)

This bill provides that 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 the 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 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 witnesses against them or to testify on their own behalf.
- f) The defendant has been informed whether or not defense counsel will be present.

This bill provides that 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.

This bill provides that if the preliminary hearing lasts more than one day, the court is required to make the required findings anew on each day.

This bill provides that it does not apply to any preliminary hearing in which the defendant was personally present in court at the commencement of the preliminary hearing.

COMMENTS

1. Need for This Bill

According to the author:

Under the current law, defendants in felony cases are generally required to be personally present during trial or preliminary examination. However, Penal Code section 1043 provides that a trial can proceed in defendant's absence "after the trial has commenced in his presence" in any of the following cases: . . . (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent." (Pen. Code, § 1043(b).) There is comparable language in Penal Code section 1043.5, which provides that a preliminary examination can proceed in defendant's absence "after the hearing has commenced in his presence" in the same circumstances listed in the preceding paragraph.

Courts have repeatedly been running into problems with defendants in custody who refuse to come to court for the commencement of trial or preliminary examination. The sheriff's department will not physically remove the defendant from his or her jail cell to bring the defendant to court (i.e., out of fear of injury to themselves, injury to the defendant, or out of concern of enhancing the risk of contracting an illness -especially during the pandemic). And the judges will not order the defendant be physically removed. Judges will sometimes continue the case in hopes the defendant will be more amenable the next time around. Some judges will proceed in defendant's absence even though it violates the statute (and if they do, defendants may be estopped from complaining about it on appeal - see *People v. Howze* (2001) 85 Cal.App.4th 1380), but other judges will refuse to do so because it is still statutory error.

This proposal changes the language to allow a preliminary examination or trial to proceed even if the trial or preliminary examination has not commenced in the defendant's presence when the defendant is in custody and there is clear and convincing evidence that the defendant is refusing to appear in court.

A similar problem arises in felony cases when the defendant refuses to appear for "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" or at any other proceeding when no written waiver in open court has been obtained. This is because, subject to inapplicable exceptions, section 977(b) requires: "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 he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2). (Pen. Code, § 977(b)(1).)

This proposal adds language in section 977 to address the problem of the defendant who is in custody but refusing to come to court when the statute mandates the defendant's presence or a written waiver in open court.

2. Right to be present at proceedings

A criminal defendant has the right to be present at his trial under the Sixth and Fourteenth Amendments to the federal Constitution and under article I, section 15, of the California Constitution. (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1393.) The Penal Code also specifies that right. (Penal Code, §§ 977, 1043.)

However, the right to be present at trial is not absolute. It may be expressly or impliedly waived. (*People v. Espinoza* (2016) 1 Cal.5th 61, 72.) “In determining whether a defendant is absent voluntarily, a court must look at the ‘totality of the facts.’” (*Ibid.*, citing *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1205.)

For example, under Penal Code section 1043, subdivision (b)(1), after a trial has commenced, “a disruptive defendant can be removed from the courtroom without violating his right to be present.” (*People v. Howze, supra*, 85 Cal.App.4th at p. 1393.) “Under Penal Code section 1043, subdivision (b)(2), a noncapital felony trial that has commenced may continue in a defendant's absence, if the defendant was present when trial began, then later voluntarily absents himself.” (*People v. Concepcion* (2008) 45 Cal.4th 77, 79.) But the court may proceed only if ““it is clearly established that [the defendant's] absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away.” [Citations.]” (*People v. Espinoza, supra*, 1 Cal.5th at pp. 73-74.) If the trial court finds that the defendant voluntarily waived the right to be present at trial, the trial court has discretion to proceed with the trial without the defendant. (*Id.* at p. 78.) Under Penal Code section 1043.5, subdivision (b)(1) and (2), similar rights pertain to a defendant with regard to preliminary hearings.

A trial that has commenced in the defendant's presence may continue in the defendant's absence if the defendant is in custody and refusing to come to court. In these circumstances, the defendant is voluntarily absent after the trial has commenced within the meaning of Penal Code Section 1043(b)(2), which allows the absence regardless of Penal Code Section 977. (*People v. Gutierrez* (2003) 29 Cal.4th 1196.) In determining whether a defendant who is in custody and refuses to come to court is "voluntarily absent" (Pen. Code, § 1043, subd. (b)(2)), a trial court should take reasonable steps to ensure that being absent from trial is the defendant's choice. (*People v. Gutierrez, supra*, 29 Cal.4th at p. 1206.)

This bill would provide that a trial or preliminary hearing would be deemed to have commenced in the defendant's presence where the court makes the following findings by clear and convincing evidence: the defendant is in custody and is refusing without good cause to appear that day; the defendant has been informed of their rights to be present and to remain silent in court; the defendant has been informed the trial will refuse without them present; the defendant has been informed their voluntary refusal to be resent will constitute a waiver of their right to confront a witness; and the defendant has been informed whether defense counsel will be present.