



STATE OF KANSAS

*Office of the Attorney General*

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CURT T. SCHNEIDER  
*Attorney General*

March 5, 1975

Opinion No. 75-105

Mr. Philip E. Winter  
Assistant County Attorney  
Lyon County Courthouse  
• Emporia, Kansas 66801

Dear Mr. Winter:

You have inquired whether K.S.A. 22-3405 or any other statutory or constitutional provision mandates the presence of a defendant during a hearing on post-trial motions in felony cases.

Section 22-3405(1) attempts to set forth in statutory form the constitutional confrontation clause requirement found in the Sixth Amendment of the United States Constitution and in §10 of the Bill of Rights of the Kansas Constitution. This section provides:

"The defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes."

The plain terminology of the statute requires the presence of an accused only during the stages of his trial, and additionally at the imposition of sentence. That the criminal trial process

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does not include post-trial motions has been well-established by precedent, see citation, *infra*, p.2 and the statutory phraseology evinces no intent to depart from these holdings. Therefore, it can not be concluded that 22-3405 meant to mandate the defendant's presence under the rationale that a post-trial motion constituted a stage of the trial proceedings. Thus, since 22-3405 does not itself impose a presence requirement during post-trial motions, such a requirement, if it exists, must be discovered elsewhere.

The Sixth Amendment's confrontation clause does not compel the presence of a defendant during post-trial motions and the courts that have considered this contention have uniformly so held. Responding to a defendant's assertion that his constitutional rights had been infringed by his absence during a motion for a new trial, the Court in Council v. Clemmer, 177 F.2d 22, 24-25 (D.C. Cir. 1949), declared:

"The argument upon that motion was not part of the trial, it was an effort to get another trial. It dealt with questions of law and alleged errors in the trial. There was no constitutional requirement that the defendant be present."

Similar resolutions of this issue were also reached in Barber v. United States, 142 F.2d 805 (4th Cir. 1944); Bell v. United States, 129 F.2d 290 (5th Cir. 1942); Epps v. State, 192 N.E.2d 459 (Ind. 1963); Ash v. State, 208 A.2d 691 (Md. Ct. App. 1965); State v. Smith, 150 A.2d 769 (N.J. 1959); and in State v. Peters, 405 P.2d 642 (Mont. 1965).

The only decision of the Kansas Supreme Court to consider the question of the defendant's absence during a post-trial motion occurred in Kenreck v. State, 198 Kan. 21, 442 P.2d 894 (1967). However, since the defendant there had escaped from jail and was therefore voluntarily absent from the hearing on his motion for a new trial, the Court had no occasion to consider whether it would have been necessary to produce him at the hearing had he been available. However, there appears no reason to believe that the Kansas Court would not follow the solid trend of authority on the question in interpreting the relevant federal and state constitutional provisions.

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The rationale of these decisions proceeds from a recognition that the confrontation clause governs only the trial process itself and is not directed to ancillary proceedings. As the Supreme Court stated in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L. Ed. 674 (1934), in explaining the scope of the clause;

"The defendant has the privilege under the 14th Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."

Clearly, such a situation is not presented by the post-trial motions prescribed by the particular statutes in question.

The relevant Kansas statutes governing post-trial motions in criminal cases, i.e. K.S.A. 22-3501 (new trial); K.S.A. 22-3502 and 3503 (arrest of judgment); and K.S.A. 22-3504 (correction of sentence) are, with the exception of 22-3504, silent on the question of the necessity of the defendant's presence during their hearing and resolution. Section 3504, however, unequivocally provides a defendant with the right to be personally present during his motion to correct sentence. Since these statutes were enacted together, it seems reasonable to assume by negative implication that legislative silence on the subject in the companion statutes demonstrates an intent to not require the defendant's presence at any hearing that might be held on these other motions.

Finally, it must be determined if a presence requirement exists under the Kansas post conviction remedy, K.S.A. 60-1507. Section 60-1507 expressly declares that, "The court may entertain and determine such motion without requiring the production of the prisoner at the hearing." Subsequent decisions of the Kansas Supreme Court have held that where a petition raises no contested issue of fact and where the petitioner's testimony would not assist the court in its resolution of the motion, the personal presence of the prisoner is unnecessary. See, for example, Byrd V. State, 196 Kan. 466, 413 P.2d 61 (1966).

In conclusion, it is the opinion of this office that no provision of either the state or federal constitution mandates

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the defendant's presence during a hearing on a post-trial motion and that under relevant statutory law, only those statutes which specifically so require may be interpreted as compelling physical presence.

Very truly yours,

A handwritten signature in cursive script that reads "Curt Schneider".

CURT T. SCHNEIDER  
Attorney General

CTS:en