
No.

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019**

**DAVID L. SHANKS JR.
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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August 3, 2020

QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 43 and a criminal defendant's Fifth and Sixth Amendment rights are violated when a Federal Judge appears at a defendant's cell in a local county jail and indicates that the trial is commencing there and then, and then recesses the proceedings only to later begin jury selection at the Federal courthouse in the defendant's absence when the defendant was never initially present at the actual commencement of his trial at the courthouse and he did not voluntarily absent himself from his actual trial.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David L. Shanks Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which was entered in the above-entitled case on June 16, 2020.

PROCEEDINGS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entitled *United States v. Shanks*, No. 18-3628, slip opinion, decided June 16, 2020, is reported at 962 F.3d 317 (7th Cir. 2020) and included in the appendix attached hereto at page A-1.

This matter originated in the United States District Court for the Eastern District of Wisconsin as *United States -v- David L. Shanks Jr.* 18 CR 00018. The judgment order was entered on the docket on December 6, 2018.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). On June 16, 2020, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court as to David L. Shanks Jr. in *United States v. Shanks*, 18-3628 and is reported at 962 F.3d 317 (7th Cir. 2020) and included in the appendix attached hereto at page A-1. No petition for rehearing was filed. The jurisdiction of the United States Court of Appeals for the Seventh Circuit was invoked pursuant to 28 U.S.C.1291 and 1294.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution

No person shall be held to answer for a capital , or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. 1111

Rule 43 of the Federal Rules of Criminal Procedure

(a) WHEN REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea.
- (2) every trial stage, including jury impanelment and the return of the verdict.
- (2) sentencing.

(b) WHEN NOT REQUIRED. A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. 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 arraignment, plea, trial and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.

(4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. 3582©.

© Waiving Continued Presence.

(1) In General. A defendant who initially was present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial.

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

© when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing during the defendant's absence.

STATEMENT OF THE CASE

David L. Shanks Jr, was charged in a superseding indictment with conspiracy to distribute fifty (50) grams or more of methamphetamine, heroin, fentanyl and cocaine which resulted in the death of one (1) victim and serious bodily injury to two (2) victims in violation of 21 U.S.C. 846, 841(a)(1) and 2 (count one (1)). David L. Shanks Jr. was also charged: in counts two and six (2 and 6) with distribution of methamphetamine in violation of 21 U.S.C. 841(a)(1), (b)(1)(C); in count three (3) with distribution of methamphetamine, heroin and fentanyl and that death resulted from the use of those drugs in violation of 21 U.S.C. 841(a)(1), (b)(1)(C); in count four and five (4 and 5) with distribution of methamphetamine, heroin and fentanyl and that serious bodily injury death resulted from the use of those drugs in violation of 21 U.S.C. 841(a)(1), (b)(1)(C); in count seven (7) with distribution of cocaine in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), as well as a forfeiture allegation. (R. 47).

Prior to the arraignment on the second superseding indictment David L. Shanks Jr. sent a letter to Judge Griesbach advising that he did not understand the charges against him and questioning the Court's jurisdiction. (R. 45).

At the August 15, 2018 arraignment David L. Shanks Jr. advised the Magistrate Judge that he "did not accept the jurisdiction of the court" that he does not understand the charges, citing the Bill of Rights and Uniform Commercial Code and that Attorney Hunt no longer speaks for him. (Tr. Aug. 15, 2018 at 2). The Magistrate Judge read the Second Superseding Indictment and the Assistant United States Attorney stated the potential penalties. When Mr. Shanks did not respond to the Magistrate Judge's request for his plea, a not guilty plea was entered on his behalf. (Tr. Aug. 15, 2018 at 3-13).

Attorney Hunt filed a motion to withdraw as counsel . A hearing was held on that motion and David L. Shanks Jr. re-iterated that Attorney Hunt does not speak for him, he speaks for

himself. In response to Judge Griesbach's inquiry as to whether he wanted to represent himself, Mr. Shanks responded that he did not understand how he could because "he does not understand the jurisdiction he is being charged under to defend himself". (R. 50; Tr. Aug. 23, 2018 at 4, 7).

Judge Griesbach explained to David L. Shanks Jr. that he had the right to represent himself, but that the decision to do so has to be knowingly and voluntarily made. Judge Griesbach then explained the risks of representing himself versus having Attorney Hunt represent him. Mr. Shanks responded that he "don't know what jurisdiction I'm under so how can I know the defense to prepare for?" Judge Griesbach responded: "You're in federal court. You're under the jurisdiction of the federal court. You're in a federal jurisdiction. You're charged with crimes involving drugs. This should be no mystery. You've been through the system before; don't tell me you don't know what jurisdiction you're in." (Tr. Aug. 23, 2018 at 4-7).

In response to the Judge's inquiry into whether he wished to waive his right to counsel Mr. Shanks replied that "Mr. Hunt doesn't speak for me I speak for myself". The Judge explained that unless he waived his right to counsel Attorney Hunt will speak for him,. Mr. Shanks replied, "I just ask what jurisdiction I'm charged under so I can know the defense I want to prepare for myself." The Judge explained that he was in federal court being charged with federal criminal violations. Mr. Shanks said, "I choose to remain silent". (Tr. Aug. 23, 2018 at 7-9).

Judge Griesbach thereafter denied Attorney Hunt's motion to withdraw as counsel for Davis Shanks. (R. 55; Tr. Aug. 23, 2018 at 9-11, 28;).

The United States Attorney filed an information pursuant to 21 U.S.C. 851 stating prior felony-controlled substance convictions. (R. 56). The effect was to increase the mandatory minimum sentence from twenty (20) years to life to mandatory life imprisonment. (R. 56; Tr. Aug. 23, 2018 at 31-33).

A final pre-trial conference was held at which time David L. Shanks Jr. was not present, his having advised the Deputy Marshall that he did not intend to attend his trial. Judge Griesbach set forth his understanding of the law as set forth in Rule 43 of the Federal Rules of Criminal Procedure and *United States -v- Benabe*, 654 F. 3d 753 (7th Cir. 2011) to the effect that a defendant can waive his right to attend his trial but that he must be present at the beginning of the trial and warned that certain conduct, including voluntarily absenting himself from trial can amount to a waiver of the right to be present. (R. 58, Tr. Aug. 28, 2018 at 2-4).

Judge Griesbach thereafter pondered the alternatives, including the use of force to bring David L. Shanks Jr. to court the day of trial, but decided against it. The court also considered an audio/video hook up, but rejected the concept if Mr. Shanks refused to come to the courthouse because an audio/video hook up could not be accomplished at the Brown County Jail. Continuing the trial was also considered but rejected. Judge Griesbach made it clear that Mr. Shanks was free to change his mind and attend the trial at any time he wished and that he would make sure Mr. Shanks understood that. (R. 58; Tr. Aug. 28, 2018 at 8-13, 17).

On August 29, 2018 Judge Griesbach entered an order requiring David L. Shanks Jr. to appear for his September 10, 2018 trial, advising Mr. Shanks that he must be present for the beginning of his trial and setting forth amongst other issues his understanding of the law as set forth in Rule 43 of the Federal Rules of Criminal Procedure and *United States -v- Benabe*, 654 F. 3d 753 (7th Cir. 2011). The order set forth the procedures that would be followed, including potentially a video of the trial that could be watched in a holding cell if Mr. Shanks came to the courthouse but refused to come to the courtroom. The order stated that Mr. Shanks was free to change his mind and attend the trial at any time. (R. 59).

On September 7, 2018 Judge Griesbach re-iterated his understanding of the law as set forth in Rule 43 of the Federal Rules of Criminal Procedure and *United States -v- Benabe*, supra

Judge Griesbach again stated that he was not going to authorize the use of force to bring Mr. Shanks to court but would instead begin the trial at the Brown County Jail “for the limited purpose of inquiring as to his intent” Judge Griesbach noted that the Seventh Circuit in *United States -v- Benabe*, supra said that “initially present at trial” means the day of jury selection not the precise moment the jury enters the courtroom. The Judge stated that if Mr. Shanks refuses to come to court, he will consider that as a waiver of his right to be present, but that Mr. Shanks could change his mind and he would be brought to court. (R. 73; Tr. Sept. 7, 2018 at 3-7, 15-16).

On September 10, 2018, Judge Griesbach commenced proceedings at the Brown County Jail. When asked if he still refused to attend the trial David L. Shanks Jr. replied: “I never refused anything. I don’t understand these proceedings” and “I don’t understand what I have to come to trial for”. (Tr. 3-4). Mr. Shanks advised the Court he had not gone over the second superseding indictment with his attorney and while the Magistrate Judge read it to him, he did not understand it. After Judge Griesbach explained the charges and potential penalties including a mandatory life sentences, Mr. Shanks again reiterated that he did not understand the charges and why he has to come for trial and asked that the “nature and cause of this action” be explained to him. (Tr. 3-5).

The Judge advised Mr. Shanks he was charged with criminal violations of federal law to which Shanks replied that he does not “Understand the nature and cause of this action or what jurisdiction you operate in” and “I don’t understand what I have to come to court for.”. Mr. Shanks refused to answer Judge Griesbach’s questions about coming to court. (Tr. 5-8).

After speaking with Attorney Hunt who spoke with the Assistant United States Attorney, Mr. Shanks continued to respond that he did not understand why he had to go to court. The Court ordered that the process of preparing Mr. Shanks for court to begin, but stated if Mr. Shanks did not cooperate, he would deem that as a waiver of his right to attend his trial. The Judge indicated he would not require a team to physically force Mr. Shanks to attend his trial. (Tr. 9-14).

Judge Griesbach explained to Mr. Shanks the dangers of not attending his trial and that his refusal to come to court is a waiver of his rights, Mr. Shanks responded “I have given up nothing. And I don’t understand, again, why I have to go to Court”. (Tr. 9-14).

Judge Griesbach found that “Mr. Shanks has refused by his conduct, his disruptive conduct, his refusal to obey the Court’s direct order, he’s waived his right to appear at his trial.”. Judge Griesbach explained to David L. Shanks Jr. that he could change his mind at any time, and he would be transported to the courthouse so that he can attend his trial. (Tr. 15-19).

David L. Shanks Jr. advised the Judge that he never received the Court’s order requiring him to attend the trial. Judge Griesbach again found that David Shanks waived his right to appear at his trial and “This matter then at this point will be concluded and we’ll return to the courthouse to commence the trial of David Shanks”. (Tr. 15-19).

At the courthouse jury selection began. Judge Griesbach advised the jury “One thing is very unusual; the defendant is not here. And the defendant has elected not to appear at his trial. He’s refused to attend. That’s very unusual.” “I can tell you that Mr. Hunt will represent Mr. Shanks. And you are not to consider the fact that he’s failed to appear as evidence against him. It doesn’t raise any inference. It’s still the government’s burden, as in any criminal case”. (Tr. 20).

On each day of the trial Judge Griesbach advised that he had a memo from the Brown County Jail stating that a Deputy Marshal Haven called the Brown County Jail to determine if David L. Shanks Jr. wanted to go to court. Each time Mr. Shanks responded something to the effect “I don’t know why I have to go to court.” “I don’t understand the charges” or not responding. (Tr. 254-256, 512, 521, 718-720, 736-737).

Without David L. Shank’s Jr. presence, the jury returned a verdict of guilty as to counts one (1) thru six (6) and not guilty as to count seven (7). (R. 78, Tr. 793-795).

Judge Griesbach thereafter imposed the concurrent mandatory life imprisonment sentences on counts one (1), three (3), four (4) and five (5) and concurrent thirty (30) year sentences on counts two (2) and six (6) not only concurrent with one another but also concurrent to the life sentences on counts one (1), three (3), four (4) and five (5) three (30) years supervised release on counts two (2) and six (6) to run consecutive to each other and a six hundred dollar (\$600.00) special assessment. (Tr. Dec. 3, 2018 at 44-46; R. 90, 92).

David L. Shanks Jr. appealed his conviction to the United States Court of Appeals for the Seventh Circuit, arguing that he District Court violated Federal Rule of Criminal Procedure 43 and David L. Shanks Jr.'s Fifth and Sixth Amendment rights when it proceeded to trial in his absence when he was never initially present at the commencement of his trial and he did not knowingly and voluntarily absent himself from his trial and that the errors were not harmless.

The United States Court of Appeals for the Seventh Circuit affirmed David L. Shank's Jr's conviction finding that David L. Shank's Jr's physical presence before Judge Griesbach the day scheduled for jury selection at the Brown County Jail satisfied Rule 43's "initially present" requirement despite his initial presence not being at the federal courthouse. Having determined that Rule 43 was complied with the Seventh Circuit did not feel the need to consider the Fifth and Sixth Amendment issues. The Seventh Circuit affirmed the Judge's conclusion that Mr. Shanks by his conduct impliedly waived his right to attend his trial. The Seventh Circuit having found that no error had been committed found that harmless error analysis was not necessary, but that if any technical Rule 43 error had been committed and that his absence from his trial was harmless. *United States v. Shanks*, 18-3628 and is reported at 2020 WL 3168516 (7th Cir. June 15, 2020)

REASONS FOR ALLOWING THE WRIT

This Court should grant a writ of certiorari to review the question presented for several important reasons. This Court should clarify where a federal criminal trial may commence and when a federal criminal trial has commenced for purposes of Federal Rule of Criminal Procedure 43 and the Fifth and Sixth Amendments to the Constitution of the United States.

The Opinion Below thus involves an important question of federal law that has not been but should be settled by this Court. Supreme Court Rule 10(c).

I. This Court should grant a writ of certiorari to review the question presented to clarify where a federal criminal trial may commence and when a federal criminal trial has commenced for purposes of Federal Rule of Criminal Procedure 43 and the Fifth and Sixth Amendments to the Constitution of the United States.

This Honorable Court has never directly answered the question of where and when a federal criminal trial can and has commence for purposes of Rule 43 of the Federal Rules of Criminal Procedure and Amendments Five and Six to the Constitution of the United States.

In fact, prior to this case no Circuit Court of Appeals has directly addressed these specific questions, although the Eleventh Circuit in *United States -v- Sterling*, 738 F.3d 228 (11th Cir. 2013) upheld a Rule 43 challenge to the commencement of a trial in an interview room outside of the courtroom in the Federal Courthouse.

Specifically, neither this Honorable Court, nor any Circuit Court of Appeals has directly answered the question of whether a federal criminal trial can commence at a location, here outside a cell in a local county jail, other than a federal courthouse.

It is respectfully submitted that this is the appropriate case to answer all of these questions.

Rule 43 of the Federal Rules of Criminal Procedure requires that before a trial can proceed in the defendant's absence, the defendant must be initially present at the commencement of his trial and thereafter voluntarily absent himself from trial.

The Seventh Circuit acknowledged that it had not previously addressed the question of where a defendant must be physically present to satisfy Rule 43's "initially present" requirement and noted that Rule 43 does not specify whether a defendant must be in a courtroom to be "initially present" at trial. The Seventh Circuit acknowledged however that Advisory Committee Note to the 2011 amendments to Rule 43, notes that "intangible benefits" come from requiring a defendant to appear before a federal judicial officer in a federal courtroom. 962 F.3d 317 at 321.

David L. Shanks Jr. was never present at the courthouse for commencement of his trial. Therefore, he could not and did not effectively waive his right to be present at trial.

The District Court issued an order on August 29, 2018 stating that David L. Shanks Jr. must appear at the Green Bay Federal Courthouse on September 10, 2018 at 8:30 a.m.. With no notice to David L. Shanks Jr. and providing Mr. Shanks no opportunity to comply with that order the District Court chose to convene at the Brown County Jail prior to the time and place of the scheduled trial "for the limited purpose of inquiring as to his intent" . (R. 59; Tr. 1-19).

When the District Court and his entourage (court reporter, Assistant United States Attorney and defense counsel, but no jury venire or witnesses, arrived on September 10, 2018 at 8:05 a.m., David L. Shanks Jr. had been given no opportunity to appear at the courthouse and discuss in open court whether he wanted to waive his right to be present for his trial. Instead, the District Court without any notice or opportunity to consider his options or consult in advance with his counsel asked David L. Shanks Jr. if he would appear at trial, (R. 59; Tr. 1-19).

At 8:12 a.m., the District Court informed David L. Shanks Jr. that his trial would proceed without his presence and explained the rights he was giving up by refusing to appear. Mr. Shanks responded that he had "given up nothing." The District Court found that the David L. Shanks Jr. had waived his right to appear. The District Court before leaving the Brown County Jail stated, "We will return to the courthouse to commence the trial" (Tr. 16).

The aforementioned exchange did not take place in a courtroom in the Green Bay Federal Courthouse or anywhere within the Green Bay Federal Courthouse, but at the Brown County Jail and it surely must have surprised Mr. Shanks to see Judge Griesbach, the court reporter, Assistant United States Attorney and his counsel outside his jail cell. Presence in a courthouse, in a courtroom, is relevant to a voluntary and knowing waiver, in that the defendant has the opportunity to see the government, judge, and jury ready to proceed and understand that they will do so in his absence. *See Crosby -v- United States*, 506 U.S.255, 262 (1993).

In the instant case, there was no possibility of the trial proceeding at Brown County Jail without jurors, witnesses or evidence present and the purpose of obtaining a knowing waiver from a defendant who is initially present at trial cannot have been accomplished. The District Court acknowledged such when he stated ” “This matter then at this point will be concluded and we’ll return to the courthouse to commence the trial of David Shanks”. (Tr. 15-16).

At the courthouse jury selection began without David L. Shanks Jr.. The District Court advised the jury “One thing is very unusual; the defendant is not here. And the defendant has elected not to appear at his trial. He’s refused to attend. That’s very unusual.” “I can tell you that Mr. Hunt will represent Mr. Shanks. And you are not to consider the fact that he’s failed to appear as evidence against him. It doesn’t raise any inference. It’s still the government’s burden, as in any criminal case”. (Tr. 20).

In short, the rule commands that the defendant must appear in person in the courtroom on the day of the start of trial. As the Fourth Circuit pointed out *United States -v- Lawrence*, 248 F.3d 300 (4th Cir. 2001), while finding that a re-sentencing via video conference violated Rule 43, it is possible that Rule 43 “should indeed provide some flexibility. But it does not. We cannot travel where the rule does not go. The rule's general requirement of physical presence in in the courthouse is clear, and the exceptions in 43(b) do not apply here.”

The Seventh Circuit found no violation of Rule 43 despite David L. Shanks Jr. not being initially present at the Federal Courthouse for the commencement of his trial, finding that the District “Court thus created at the jail - the only place that it could reliably meet Mr. Shanks – the features of in person presence in a federal courtroom”. 962 F.3d 317 at 321.

The United States Court of Appeals for the Seventh Circuit deemed it immaterial that David L. Shanks Jr. did not appear in the Federal Courthouse, despite that being the case in *United States -v- Sterling*, 738 F.3d 228 (11th Cir. 2013), the only case it cited and the only other case to address the precise issue. 962 F.3d 317 at 321.

In the present case, the United States Court of Appeals for the did “travel where the rule does not go.” *United States -v- Lawrence*, 248 F.3d at 305. By its decision The Seventh Circuit approved of then attempt to avoid the physical presence required by Rule 43, by giving its stamp of approval to the District Court’s decision that the trial was going to commence place at a different address and a different time than that for which it was scheduled and with which David L. Shanks Jr. was advised it would, with full knowledge that no trial could actually take place at that location or time. As the District Court stated before leaving the Brown County Jail “This matter then at this point will be concluded and we will return to the courthouse to commence the trial” (Tr. 16;). The David L. Shanks Jr. did not appear in person at the courthouse on the day his trial started. Therefore, he could not have waived his right to appear under Rule 43.

Conducting David L. Shanks Jr’s trial in absentia was not harmless error. His right to be present at the trial is structural because the absence of the defendant from a trial affects the fundamental nature of the proceeding, just as a trial without a defense lawyer or judge would. Moreover, there is no meaningful way of measuring the effect on the jury of the absence of the defendant from the trial. Consequently, David L. Shanks Jr.’s .not being initially present in the courthouse for the commencement of the trial is not subject to harmless error analysis.

CONCLUSION

For the reasons noted herein, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on June 16, 2020 and reported at 962 F.3d 317.

Respectfully submitted,

/s/ Kent R. Carlson
Counsel of Record
For David L. Shanks Jr.

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APPENDIX ITEM A-1

United States v. Shanks, 962 F.3d 317 (7th Cir. 2020)

APPENDIX

962 F.3d 317

United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

David L. SHANKS, Jr., Defendant-Appellant.

No. 18-3628

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Submitted June 9, 2020 *

|

Decided June 15, 2020

Synopsis

Background: Defendant, who did not attend his jury trial, was convicted in the United States District Court for the Eastern District of Wisconsin, [William C. Griesbach](#), Senior District Judge, of drug-distribution offenses. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] as a matter of first impression, the procedure in which district judge went to the jail, with counsel and court reporter, constituted initial presence at trial, for purposes of voluntary waiver of right to be present at trial after trial has begun;

[2] finding that defendant, through his conduct, knowingly and voluntarily waived his constitutional right to be present at trial was not clearly erroneous; and

[3] district court's conclusion, that there was a controlling public interest in proceeding with trial in defendant's absence, was not an abuse of discretion.

Affirmed.

West Headnotes (9)

[1] **Criminal Law** 🔑 Review De Novo

Legal questions are reviewed de novo.

[2] **Criminal Law** 🔑 Voluntary or temporary absence

Defendant was initially present at trial, for purposes of federal criminal procedure rule providing that a defendant who is initially present at trial may waive his right to be present by voluntarily being absent after trial has begun, where district judge came to the jail, with counsel and a court reporter present, when defendant refused to come to the courtroom for jury trial in prosecution for drug-distribution offenses, and later on the same day, jury selection began in the courtroom. [Fed. R. Crim. P. 43\(c\)\(1\)\(A\)](#).

[3] **Criminal Law** 🔑 Voluntary or temporary absence

“Initially present at trial,” within meaning of federal criminal procedure rule providing that a defendant who is initially present at trial may waive his right to be present by voluntarily being absent after trial has begun or by persisting in disruptive behavior after being warned by the court, refers to the day that jury selection begins, not to the precise moment that the first prospective juror enters the courtroom. [Fed. R. Crim. P. 43\(c\)\(1\)](#).

[4] **Criminal Law** 🔑 Presence of Accused

Criminal Law 🔑 Voluntary or temporary absence

Protections to a criminal defendant's right to be present at trial, that are more expansive than those of the Constitution, are offered in the federal criminal procedure rule providing that a defendant who is initially present at trial may waive his right to be present by voluntarily being absent after trial has begun or by persisting in disruptive behavior after being warned by the court; the rule builds on, and is more demanding than, protections in the Constitution. [Fed. R. Crim. P. 43\(c\)\(1\)\(A\)](#).

[5] **Criminal Law** 🔑 Presence of Accused

The Constitution allows criminal defendants to waive, through their conduct, their right to remain present at trial.

- [6] **Criminal Law** 🔑 Presence of accused
Criminal Law 🔑 Course and Conduct of Trial
Criminal Law 🔑 Absence of accused

The Court of Appeals reviews deferentially a district court's finding that a defendant, through his conduct, impliedly waived his constitutional right to attend his trial, reviewing for clear error a district court's factual finding that waiver was knowing and voluntary, reviewing for abuse of discretion a district court's conclusion that there was a controlling public interest to proceed with trial in defendant's absence, and reviewing for harmlessness any error in those two decisions.

- [7] **Criminal Law** 🔑 Voluntary or temporary absence

Finding that defendant, through his conduct, knowingly and voluntarily waived his constitutional right to be present at trial was not clearly erroneous, in prosecution for drug-distribution offenses; before trial, defendant, while in jail, refused to accept the order compelling his attendance at trial, then, after trial started at jail, defendant repeatedly refused to tell the district judge if he would attend trial cooperatively, instead protesting that he did not understand the charges, and when district judge explained that defendant did not need to understand the charges to say if he would come to court, defendant still refused to answer and tried to resurrect a dead plea offer.

- [8] **Criminal Law** 🔑 Presence of Accused

District court's conclusion, that there was a controlling public interest in proceeding with trial in defendant's absence, was not an abuse of discretion, for purposes of defendant's constitutional right to be present at trial, in prosecution for drug-distribution offenses; more than 50 witnesses were waiting to testify at trial,

so the burden of rescheduling was high, and the chance that defendant would cooperate, by coming from the jail to the courtroom, was very low.

- [9] **Criminal Law** 🔑 Absence of accused

Any error was harmless, assuming that there was a technical violation of the federal criminal procedure rule providing that a defendant who is initially present at trial may waive his right to be present by voluntarily being absent after trial has begun, where district judge came to the jail, with counsel and a court reporter present, when defendant refused to come to the courtroom for jury trial in prosecution for drug-distribution offenses, and later on the same day, jury selection began in the courtroom; defendant received a live, face-to-face encounter with the judge, who assessed defendant's demeanor before finding that defendant waived his right to be present at trial, and jury was instructed not to draw any inferences from defendant's absence. *Fed. R. Crim. P. 43(c)(1)(A)*.

***319** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 18-CR-18 — **William C. Griesbach**, *Judge*.

Attorneys and Law Firms

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Before **KANNE**, **SYKES**, and **BRENNAN**, Circuit Judges.

Opinion

PER CURIAM.

David L. Shanks, Jr. did not attend his trial for drug-distribution offenses, for which a jury found him guilty and the district court entered a judgment of conviction. Shanks

challenges the judgment on two bases. First, he contends that the district court did not comply with [Rule 43 of the Federal Rules of Criminal Procedure](#), which he argues requires a defendant's presence in a courtroom at the start of trial. Shanks's trial began before the judge and counsel at a jail, not in a courtroom. Second, he argues that the court clearly erred in finding that, through his disruptive conduct, he knowingly and voluntarily waived his right to attend trial. Because the district court permissibly began trial at the jail and reasonably found that Shanks waived his right to attend the remainder of his trial, we affirm.

I. BACKGROUND

While on supervised release for a prior drug crime, Shanks was charged in January 2018 with participating in a drug-distribution conspiracy. The government charged that the conspiracy led to overdoses that resulted in a death and the serious bodily injury of two others. At an arraignment in February, counsel for Shanks reported that Shanks pled not *320 guilty and understood the charges. But a few days later, while detained at Brown County Jail, Shanks fired that lawyer, and attorney Edward Hunt was appointed to serve as his new counsel. Later, when the government filed a superseding indictment, Shanks refused to enter a plea before a magistrate judge. Instead, he challenged the court's jurisdiction, denied understanding the charges against him, and said that he wished to be silent.

After his next arraignment, Shanks continued to question the legitimacy of the criminal process. First, Shanks refused to talk with Hunt and told him that Hunt did not speak for Shanks, prompting Hunt to move to withdraw. Shanks told the judge: "Mr. Hunt does not speak for me, I speak for myself." The judge asked Shanks if he wanted to represent himself. Shanks responded, "I don't understand how," so the judge did not grant Hunt's motion to withdraw. At this hearing, Shanks also demanded to know "what jurisdiction I'm charged under." The judge explained that he was in federal court and charged for federal criminal violations, adding, "You've been through the system before, don't tell me you don't know what jurisdiction you're in." (In 2013, the same judge imposed a 66-month sentence on Shanks for crack-cocaine crimes.) After this hearing, a deputy U.S. marshal told the judge that Shanks had said that he did not intend to attend the trial. Shanks did not appear in federal court again.

At the final pretrial conference (which Shanks did not attend), the judge anticipated that Shanks might refuse to behave at or attend trial. He noted that, under [Federal Rule of Criminal Procedure 43](#), Shanks could waive his right to remain in court if he became disruptive. The judge also considered matters of public interest: if Shanks said that he did not want to attend trial, or threatened to disrupt proceedings if brought to court, the judge would not order the U.S. marshals to forcibly bring Shanks to court, for fear of injuring Shanks or the marshals. Likewise, the judge decided against postponing the trial. The government had gathered over 50 witnesses, including experts, from across the country for the trial to start the next week, and the judge doubted that Shanks would improve his attitude if trial were delayed.

To assess Shanks's intentions, the judge issued an order for Shanks to appear at trial. When a marshal attempted to serve it on Shanks, Shanks refused to accept it.

Because Shanks refused to accept the trial summons, the judge decided to come to Shanks to start the trial. The judge understood [Rule 43](#) to require a defendant's initial presence at trial before the defendant could waive the right to attend. Therefore, the judge, counsel, and a court reporter planned to begin the trial outside Shanks's cell at the Brown County Jail. It began on the morning of September 13, 2018, at the jail. After the judge put on the record his efforts to bring Shanks to court, Shanks denied understanding whatever the judge said to him:

THE COURT: Mr. Shanks, you have indicated that you refuse to come to your trial; is that still your position?

THE DEFENDANT: I never refused anything. I don't understand these proceedings.

THE COURT: So you will come to your trial and attend your trial; is that right?

THE DEFENDANT: I don't understand what I have to come to trial for.

THE COURT: You're tried on a superseding indictment. We've had the arraignment, you've gone over it with your attorney, we've given you a copy of it.

THE DEFENDANT: I haven't went over it with my attorney. The magistrate *321 judge read the indictment, but I did not understand it. And I told the magistrate judge this at the time he read it.

THE COURT: Well, there's no mystery. These are charges similar to others you've faced. You're charged with conspiracy to distribute controlled substances, multiple delivery of controlled substances and possession with intent to deliver a controlled substance.

You're also alleged to have—or it's alleged that a death resulted from one of the deliveries within the conspiracy and that serious bodily injury or harm occurred as a result of other deliveries.

Those are the charges you face. You understand that several of the counts

you're facing carry mandatory life sentences. Your attorney has been prepared to represent you.

After the judge explained the charges and possible penalties, he asked Shanks, "Are you willing to come to court to attend your own trial?" Shanks refused to answer that question, no matter how many times the judge rephrased it:

THE DEFENDANT: I don't understand those charges or the allegations in the indictment.

THE COURT: Regardless of whether you understand them or not, are you coming to your trial?

THE DEFENDANT: I don't understand what I have to come to trial for, sir.

THE COURT: You don't need to understand them. If you want to profess your lack [of] understanding, just come to trial, we will take you to trial. Are you ready to go?

THE DEFENDANT: Your Honor, can someone please explain to me the nature of and cause of this action?

THE COURT: We've already explained it. It's very clear. You are charged with criminal violations of the

federal law. If you do not [] come to your trial, we will put shackles on you and you will proceed to have a jury decide whether the government has proven guilt beyond a reasonable doubt.

THE DEFENDANT: I don't understand those crimes. I never hurt anyone.

Finally, Shanks would not say if he would forcibly resist attending court:

THE DEFENDANT: I still don't understand the nature and cause of this action or what jurisdiction you operate in.

THE COURT: Are you going to fight us if we bring you to court?

THE COURT: Okay. I'm not concerned—if you want to profess your lack of understanding, that's your right. No one believes that you do not understand it. The question I'm asking is, will you come to court? Can we bring you to court?

THE DEFENDANT: I don't understand these charges, Your Honor.

THE DEFENDANT: I don't understand what I have to come to court for, sir.

THE COURT: Okay. Let the record reflect that—well, the record will reflect the defendant's insistence that he doesn't understand and his refusal to answer the question of whether he will willingly come to court and cooperate in his trial. Will you come to court and cooperate in your trial?

THE COURT: You have to come to court for your trial.

THE DEFENDANT: I don't understand what I have to come to court for, Your Honor.

THE DEFENDANT: My trial for what, sir?

THE COURT: For the crimes that I've already repeated to you.

***322** In total, the judge asked Shanks more than ten times if he would attend trial cooperatively and received no reply. In light of this behavior, and knowing that Shanks refused to accept the judge's order to attend trial, the judge found that by "disruptive conduct" Shanks had waived his right to attend trial. To avoid harm to Shanks or others, the judge did not use force to extract Shanks. The judge warned Shanks that by refusing to come to court, he would be giving up his right to testify on his own behalf, to which Shanks replied: "I have given up nothing." The judge also told Shanks that, though

the judge could not provide him with live video or audio of the trial while he was in jail, if he changed his mind about coming to court, the marshals would transport him there. Before this exchange ended, Shanks spoke off the record with his counsel, Hunt. Hunt then met with the prosecutor, who later told the court on the record that Shanks wanted to “resurrect a previously withdrawn offer” that the government had made, but the government declined to do so.

Jury selection began later that day, and after his four-day trial, Shanks was convicted of all but one charge. During the trial, outside of the jury’s presence, the judge regularly asked the marshals to report whether Shanks had changed his mind. Each time, when jail staff asked Shanks if he was willing to attend his trial, Shanks responded that he did not understand why he needed to go to court. The judge instructed the jury not to draw any inference from Shanks’s absence or his decision not to testify. At Shanks’s sentencing hearing, which Shanks also did not attend, the judge sentenced him to multiple life terms in prison.

II. ANALYSIS

On appeal, Shanks makes three arguments. We address each in turn.

A. Criminal Rule 43

[1] Shanks argues that the district court violated Rule 43 by starting trial without his physical presence in a courtroom. The government responds that Rule 43 was satisfied because it does not require that a criminal trial start in a “courtroom.” This court reviews legal questions such as these *de novo*. See *United States v. Bethea*, 888 F.3d 864, 865–66 (7th Cir. 2018).

Rule 43 sets forth requirements about a defendant’s presence at trial and when he may waive that requirement. The defendant “must be present” at “every trial stage,” Fed. R. Crim. P. 43(a)(2), but one “who was initially present at trial” may waive his right to be present “when the defendant is voluntarily absent after the trial has begun” or “when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom,” Fed. R. Crim. P. 43(c)(1), (c)(1)(A), (c)(1)(C). The Rule does not specify whether a defendant must be *in a courtroom* to be “initially present” at trial. Notes to the Rules, however, observe that “intangible benefits” come from “requiring a

defendant to appear before a federal judicial officer in a federal courtroom.” Fed. R. Crim. P. 43 advisory committee’s note to 2011 amendments.

[2] [3] The district court complied with Rule 43. After Shanks refused to come to court, the federal judge came to him, with counsel and a court reporter present. The judge thus created at the jail—the only place that he could reliably meet Shanks—the features of in-person presence in a federal courtroom. We have not previously addressed the question of *where* a defendant must be physically present to satisfy Rule 43’s “initially present” requirement, *323 but we have decided *when* he must be present. “[T]he phrase ‘initially present at trial’ in a jury trial must refer to the day that jury selection begins,” not to the precise moment that the first prospective juror enters the courtroom. *United States v. Benabe*, 654 F.3d 753, 771 (7th Cir. 2011). Shanks’s trial started (at the jail) earlier the same day that jury selection began in court, so timing was satisfied.

On the issue of where a trial may start, one circuit has held that a trial may start where a defendant is initially present, even if it is not a courtroom. In *United States v. Sterling*, 738 F.3d 228, 236 (11th Cir. 2013), Sterling, a combative defendant, refused to enter the courtroom on the day of jury selection, so the judge met him in an interview room. Citing *Benabe*, the Eleventh Circuit ruled that the trial started in the interview room (where Sterling had waived his right to attend trial any further) on the same day that jury selection began later. *Sterling*, 738 F.3d at 236–37. The court deemed it “absurd” to require a district court “to bring a combative defendant” into the courtroom where he might create predictable problems “with his own disruptive behavior.” *Id.* at 236.

We agree with our sister circuit’s reasoning and conclude that Shanks’s physical presence before the judge at the jail satisfied Rule 43’s “initially present” requirement. Although Sterling came to a courthouse, and Shanks did not, that difference is immaterial. Both Shanks and Sterling received an informed, face-to-face encounter with the trial judge, and they both risked disrupting proceedings by entering the courtroom.

Thus, the judge adequately complied with Rule 43.

B. Constitutional Challenge

[4] Shanks next argues that in two respects the district court violated his Fifth and Sixth Amendment rights. First, he contends that those amendments prohibited the court

from starting his trial at the jail. The Constitution says nothing about whether trial must start in a courtroom. And, as already discussed, the district court complied with [Rule 43](#), which “builds on,” is “more demanding” than, and sets forth protections that are “more expansive” than those of the Constitution. [Benabe](#), 654 F.3d at 771 (citing [United States v. Gibbs](#), 182 F.3d 408, 436 (6th Cir. 1999)). Thus, because we conclude that the judge complied with [Rule 43](#) when he started the trial at the jail, we need not conduct additional analysis to determine whether the relevant constitutional requirements were met. See generally [United States v. Vargas](#), 915 F.3d 417, 420 (7th Cir. 2019) (federal courts should consider statutory and rule-based arguments ahead of constitutional ones); see also [Rehman v. Gonzales](#), 441 F.3d 506, 508 (7th Cir. 2006) (“[C]onstitutional contentions must be set aside until their resolution is unavoidable.”).

[5] [6] Shanks’s second argument is fact-based. He contends that the district court violated his constitutional rights to attend trial by unreasonably concluding, based on Shanks’s conduct, that he impliedly waived his right to appear at trial. But, as [Rule 43](#) reflects, the Constitution allows criminal defendants to waive—through their conduct—their right to remain present at trial. See [Benabe](#), 654 F.3d at 768. And this court reviews deferentially the district court’s finding that through his conduct, Shanks impliedly waived his right to attend his trial. See [id.](#) at 769. Specifically, we review for clear error the court’s factual finding that waiver was knowing and voluntary; we review for abuse of discretion the court’s conclusion that there was a controlling public interest to proceed with trial in the defendant’s absence; and [*324](#) we review for harmlessness any error in those two decisions. [Id.](#)

[7] Given the deferential standard of review, the court’s conclusion that Shanks waived his right to attend trial must be upheld. To begin, before trial, Shanks refused to accept the order compelling his attendance. Then, after trial started at the jail, Shanks repeatedly refused to tell the judge if he would attend trial cooperatively, instead protesting that he did not understand the charges. And when the judge explained that Shanks did not need to understand the charges to say if he would come to court (where he could argue his lack of understanding), he still refused to answer and tried to resurrect a dead plea offer.

[8] The judge also considered the public interest before proceeding in Shanks’s absence. [Id.](#) (“The court must consider the likelihood that the trial could take place with the defendant present, the difficulty of rescheduling, the

inconvenience to jurors, and the burden on the government and others of having to undertake two trials.”) The judge knew that more than 50 witnesses were waiting to testify, so the burden of rescheduling was high, and the chance that Shanks would cooperate was very low. In light of this and Shanks’s prior experience as a federal criminal defendant, the judge properly found an implied waiver of the right to attend trial. Cf. [id.](#) at 768–71 (defendants’ “campaign of obstreperous interruptions and frivolous legal arguments,” and refusal “to confirm that they would behave respectfully in front of the jury” constituted waiver).

C. Harmlessness

[9] Finally, Shanks argues that his absence from the courtroom during the trial affected the “fundamental nature” of the proceeding and is not subject to harmless-error review. The government counters that any error was not structural and was harmless. Because no error occurred, we need go no further. But even if a technical [Rule 43](#) violation occurred by starting the trial at jail rather than at court, we agree with the government that that error would be subject to harmless-error review. See [Benabe](#), 654 F.3d at 773–74.

Shanks relies on [United States v. Thompson](#), 599 F.3d 595 (7th Cir. 2010), to contend that his absence from the jury altered the fundamental nature of the trial, just as if a judge had been absent from trial. [Thompson](#) involved a hearing to revoke supervised release, and everyone was physically present in court, except for the judge who appeared from Key West, Florida, via video-conference, in violation of [Rule 32.1\(b\)\(2\) of the Federal Rules of Criminal Procedure](#). [Id.](#) at 599–601.

[Thompson](#) is unhelpful for two reasons. First, it establishes a harmless-error standard, and Shanks has not argued how he was harmed by his absence. For example, he does not argue that any trial testimony was incorrect, nor does he proffer his own counter testimony. Moreover, the judge instructed the jury not to draw any adverse inference from Shanks’s absence, and he gave Shanks repeated chances to change his mind and come to court. Second, [Thompson](#) is distinguishable. Because the judge there used videoconferencing, the defendant had no in-person appearance before that judge. See [id.](#) at 597, 601. Here, the trial judge, counsel, and the court reporter all came to Shanks and appeared in his physical presence, so Shanks received a live, face-to-face encounter with the judge. Only then did the judge assess Shanks’s demeanor and find that Shanks waived his right to attend the rest of the trial in court.

All Citations

962 F.3d 317

III. CONCLUSION

Shanks's absence from most of his trial violated neither [Rule 43](#) nor his constitutional [*325](#) rights. Shanks has also not shown prejudice from his absence. We therefore AFFIRM.

Footnotes

- * We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. [Fed. R. App. P. 34\(a\)\(2\)\(C\)](#).

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