

[Cite as *State v. Warren*, 2010-Ohio-5718.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-376 (C.P.C. No. 03CR-3010)
Lloyd A. Warren,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 23, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Lloyd A. Warren, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court reimposed appellant's original sentence and advised him of mandatory post-release control ("PRC").

{¶2} On September 19, 2003, after a jury found appellant guilty of felonious assault and abduction, the trial court sentenced appellant to a three-year prison term for the abduction count and a seven-year prison term for the felonious assault count, to run

concurrently to each other. However, the trial court failed to notify appellant of the mandatory PRC term, and the sentencing entry did not specify any PRC.

{¶3} The trial court held a sentencing hearing on March 26, 2010, to correct the judgment entry to reflect the mandatory term of PRC. Appellant was not physically present at the sentencing hearing, but participated via video conference. Appellant's counsel was physically present at the hearing, and appellant declined to confer with him before the court proceeded. The trial court sentenced appellant to the original prison sentence, and advised appellant that a term of three years of mandatory PRC would attach to his sentence. On March 26, 2010, the court issued a nunc pro tunc entry memorializing the sentence. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

The trial court erred by re-sentencing Defendant-Appellant when he was not physically present at the hearing and had not waived his right to be present.

{¶4} Appellant argues in his assignment of error that the trial court erred by re-sentencing him when he was not physically present at the hearing and had not waived his right to be present. We first note that appellant failed to raise this issue at any point during the hearing before the trial court. Failure to object results in a waiver of any error resulting from the defendant's absence. *State v. Carr* (1995), 104 Ohio App.3d 699, 703. Therefore, our review must proceed under a plain error analysis. Plain error does not exist unless it can be said that, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶5} Appellant contends that the trial court's imposition of PRC by video conference violated Crim.R. 43(A) and his due process right to be physically present at

every stage of his criminal proceeding. We initially note that, in his argument, appellant cites to different versions of Crim.R. 43(A). Appellant first cites the language of former Crim.R. 43(A) that a defendant "shall be present" at every stage of the trial for his proposition that his physical presence was required at the sentencing hearing. However, appellant then cites to current Crim.R. 43(A)(2) and (3), which are provisions included only in the current version of Crim.R. 43, effective July 1, 2008. The current version of Crim.R. 43(A) now specifically requires that a defendant "must be physically present" at every stage of the criminal proceeding, and Crim.R. 43(A)(2) now permits participation by a defendant via remote video if the defendant waives the right to physical presence in writing or on the record under Crim.R. 43(A)(3). For its part, the state of Ohio, plaintiff-appellee, argues that Crim.R. 43(A) does not require physical presence, apparently referring to former Crim.R. 43(A), given current Crim.R. 43(A) now explicitly refers to "physical" presence.

{¶6} Nevertheless, the state argues that, even if physical presence is required, appellant forfeited all but plain error by failing to raise the issue at the hearing, and there exists no plain error here. Plain error does not exist unless it can be said that, but for the error, the outcome of the trial clearly would have been otherwise. *Long* at 97. Notice of plain error must be taken only with the utmost caution, only under exceptional circumstances and only to prevent a manifest miscarriage of justice. *Id.* at 94-95.

{¶7} We agree with the state that appellant has failed to demonstrate any plain error, as the outcome of the trial would not clearly have been otherwise but for the error. It is axiomatic that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A); *State v.*

Hale, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶100. "An accused's absence, however, does not necessarily result in prejudicial or constitutional error." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶90. " '[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' " *Id.*, quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-08, 54 S.Ct. 330, 333, overruled on other grounds, *Duncan v. Louisiana* (1968), 391 U.S. 145, 154, 88 S.Ct. 1444, 1450. Thus, the defendant's absence in violation of Crim.R. 43(A), although improper, can constitute harmless error where she suffers no prejudice. *State v. Williams* (1983), 6 Ohio St.3d, 281, 285-87. See also *State v. Armas*, 12th Dist. No. CA2004-01-007, 2005-Ohio-2793 (a violation of Crim.R. 43(A) is not a structural error; therefore, it is subject to the harmless error analysis).

{¶8} Initially, it is clear that appellant's rights were adequately protected. Appellant was represented by counsel, and appellant told the court he wished to proceed with mandatory PRC and did not wish to confer with his counsel. See *Williams* at 286 (absence during proceedings was not a violation of due process when defendant's interests were adequately represented by his attorney). Appellant does not allege that his counsel's representation was defective in any manner. Appellant also indicated he understood what the trial court was conveying to him at various points in the proceeding. In addition, appellant personally participated in the hearing by asking questions directly to the court. When the trial court gave appellant an opportunity to speak, appellant asked if there was any way he could not have PRC because he was not from Ohio and wanted to go to his hometown of Chicago. The trial court told appellant that PRC was mandatory, and appellant asked about the appeal process. The trial court told appellant he could

appoint appellant counsel, and appellant responded that he desired counsel for an appeal. Thus, not only was appellant represented by counsel, but appellant also actively participated in the hearing and indicated he understood the nature of the proceedings.

{¶9} Furthermore, appellant suffered no prejudice by not being physically present and being present only via remote video. The trial court re-sentenced appellant to the same sentence as originally ordered, and the three-year period of PRC ordered by the trial court was mandatory. Appellant does not claim that his physical presence could have changed the outcome of the trial, and we fail to see how his physical presence could have made any difference. See *Williams* at 286 (no prejudice resulted from absence when there was no evidence that defendant's attendance at the proceedings would have contributed to his defense). Therefore, we find that a fair and just hearing was not in any way thwarted by appellant's physical absence, and his rights were adequately represented by both his own participation and his counsel's at the hearing. Therefore, appellant's assignment of error is overruled.

{¶10} Accordingly, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
