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PERSON ARRESTED ON AN AFFIDAVIT FOR A MISDEMEANOR MAY BY WRITTEN WAIVER WAIVE HIS PERSONAL APPEARANCE PROVIDING THE COURT HAS FINAL JURISDICTION OF OFFENSE CHARGED.

SYLLABUS:

A person arrested on an affidavit for a misdemeanor, filed in a mayor's court, may, by a written waiver, waive his personal appearance to answer such charge and enter a plea of guilty upon which the mayor may assess a fine and proper costs as if the accused was present in open court, providing the court has final jurisdiction of the offense charged.

COLUMBUS, OHIO, July 1, 1925.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:— On June 16th, 1925, I received the following letter from you:

"The bureau is in receipt of a letter from Mr. R. A. Baskin, solicitor for the village of Bay, in relation to the practice of the mayor's court of defendant's waiving the right to be present and signing a statement to the effect that a plea of guilty is entered. A copy of Mr. Baskin's letter is enclosed herewith. On September 20th, 1924, the bureau advised the mayor of Rocky River that there was no legal authority given a mayor to waive the requirements of section 12626 G. C. and this letter is the one referred to by Mr. Baskin. A copy of the waiver used in the mayor's court of Rocky River is enclosed herewith.

"Question: May the mayor of a village legally use a waiver of this character when arrests are made for violation of ordinances or statutes and impose a penalty in the absence of the defendant?"

Enclosed therein was also a copy of a waiver and plea as follows:

"THE STATE OF OHIO,
Cuyahoga County.
In the mayor's court of the village of
Rocky River, Ohio.
THE VILLAGE OF ROCKY RIVER,
O., Versus
WAIVER

Rocky River, O., -----, 192-----

"I hereby waive the reading of the affidavit in the above entitled action, waive the right to be personally present in the mayor's court of said village; upon my trial, enter a plea of guilty to the charge of ----- and throw myself upon the mercy of the court.

Witness"

I find no statute of the state of Ohio covering the matter mentioned in your letter as applying directly to mayors or magistrates' courts.

Section 12626, General Code, reads:

"A person taken into custody, because of the violation of any provision of this subdivision of this chapter, shall forthwith be taken before a magistrate or justice of the peace in a city, village or county, and be entitled to an immediate hearing. If such hearing cannot be had, he shall be released from custody on giving his personal undertaking to appear in answer for such violation at such time or place as shall then be indicated, secured by a deposit of a sum equal to the maximum fine for the offense with which he is charged; or, in lieu thereof, if he be the owner, he can leave the motor vehicle with a written consent given at the time by the owner, who must be present, with such judicial officer."

Section 13676, General Code, reads:

"A person indicted for a misdemeanor, upon request in writing subscribed by him and entered on the journal, may be tried in his absence, or by the court. No other person shall be tried unless personally present, but if a person indicted escape or forfeit his recognizance, after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present; and, if a felony, the case shall be continued until the accused appears in court, or is retaken."

Section 12626 G. C., is for the protection of the rights of the accused and, in the absence of statute applying to magistrates courts, as section 13676 G. C., applies in courts of common pleas, we must look to the general rules governing the rights and privileges of persons arrested for violations of state laws or ordinances.

In 12 Cyc. page 306, we find the following:

"A preliminary examination is a personal privilege, and the accused may waive it * * *."

In 3 Cyc. page 503, we find the following:

"Formerly, an appearance was by actual presence in court, either in person or by attorney, and such appearance still exists in contemplation or fiction of law. A technical or formal appearance is no longer necessary, however, even when particularly prescribed by rule of practice, nor need there be any act done or words spoken in court."

40 Cyc., page 266, reads:

"Waiver is usually a matter of personal privilege * * *. Any person of full age and action sui juris can waive matters affecting simply his property or alienable rights."

12 Cyc., page 307, reads:

"By waiving the examination either expressly or by implication the accused is thereafter estopped to claim a discharge because none was held."

12 Cyc., page 347, reads as follows:

"Generally * * *, arraignment in the case of misdemeanors may be waived * * *. By voluntarily pleading to an indictment or information without objection, a defendant waives formal arraignment or defects in the arraignment."

12 Cyc., page 352, reads:

"In the absence of a statutory provision to the contrary, defendant, even in a capital case, has a right to plead guilty, and the court must accept the plea and pronounce the proper judgment and sentence."

12 Cyc., page 344, reads:

"* * * arraignment may be dispensed with if a plea is entered."

In the case of *Truman vs. Walton*, 59 O. S. 517, we find on page 528 the following:

"And in respect of a certain class of offenses, i. e., misdemeanors such trial under certain conditions is authorized by section 7301, Revised Statutes. That statute, however, attaches this condition; the person accused must request in writing to be tried in his absence. This provision of itself raises an implication that without his written request one accused of an offense could not be tried in his absence. If this section is not limited in its operation to cases in the court of common pleas or possibly probate court, but should be held to include mayors' courts as well, and further if the phrase 'a misdemeanor' therein used should be held to include an offense committed in violating a village ordinance, nevertheless it would not authorize the action of the plaintiff in error in trying the defendant in error while absent, because to authorize the mayor to try him while thus absent he must have requested in writing to be thus tried. Now, this was not done. And for this reason, the statute (section 7301) even if otherwise applicable, would afford no justification for trying defendant in error in his absence."

(Section 7301 R. S. is now section 13676, General Code.)

The constitutional right of a defendant to his day in court is a personal privilege and may be waived in this state.

In view of the above citations and in the absence of any statute to the contrary it is my opinion that a person arrested on an affidavit for a misdemeanor, filed in a mayor's court, may, by a written waiver, waive his personal appearance to answer such charge and enter a plea of guilty upon which the mayor may assess a fine and proper costs as if the accused was present in open court providing the court has final jurisdiction of the offense charged.

Respectfully,
C. C. CRABBE,
Attorney General.