

1973 S.C. Op. Atty. Gen. 63 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3479, 1973 WL 20943

Office of the Attorney General

State of South Carolina

Opinion No. 3479

February 14, 1973

***1 1. A defendant properly charged before a magistrate or municipal court has no right to be absent from his trial and the trial judge may compel the defendant's personal appearance.**

2. The proper procedure to compel the personal appearance is through issuance of an arrest warrant.

Director

S. C. Commission on Alcoholism

You have inquired as to whether a magistrate and/or city recorder's court can require persons charged with first offense driving under the influence to appear in person before the court for disposition of the charge and if so what procedure is necessary for accomplishing the same.

The issue of whether a defendant has a *right* to be present in court when charged with a criminal offense has been treated in South Carolina; however, the question of whether a defendant has also a *duty* to be present appears to be one of novel import in this State.

In *Kivette v. United States*, (USCA 5th Cir. 1956) 230 F. 2d 749, 755, cert. den. 355 U. S. 935, 2 Led. 2d 418, 78 S. Ct. 419 (1958), the court quoted from 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, Chapter IX, Section 3. 'The requirement that an accused present himself for trial is one of the earliest established in the criminal law.' And as stated in 21 Am Jur 2d Criminal Law § 273, p. 308 (1965) 'The defendant has a duty as well as a right to be present at his trial . . .'

While it is true that in South Carolina an accused may be tried in his absence, *State v. Rabens*, 79 S. C. 542, 60 S. E. 442 (1908); *State v. Sessions*, 225 S. C. 177, 81 S. E. (2d) 287 (1954), it is doubtful that these cases can be construed as to create a *right* of a defendant to be absent from his trial for

' . . . (E)ven where [a defendant's] right to be present can be waived, this does not amount to a right to be absent, since the prosecution has a right to require his presence for purposes of identification by its witnesses and of receiving punishment if found guilty.' 21 Am Jur 2d Criminal Law § 273, p. 308, citing *State v. Tucker*, 190 N. C. 708, 130 S. E. 720.

Additionally, I have located no statutory or Constitutional authority creating a right to be absent from trial in a magistrate or municipal court. Therefore in my opinion a defendant properly charged before a magistrate or municipal court has no right to be absent from his trial and the trial judge may compel the defendant's personal appearance. It is my further opinion that the proper procedure to compel the personal appearance is through issuance of an arrest warrant.

James C. Harrison, Jr.

Assistant Attorney General

1973 S.C. Op. Atty. Gen. 63 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3479, 1973 WL 20943