In the
Indiana Supreme Court

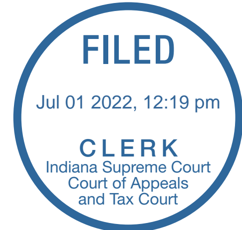
Latuwan Anthony Partee,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
21A-CR-01529

Trial Court Case No.
49G21-1705-F2-18608



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 7/1/2022.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

Massa, J., Slaughter, J., and Goff, J., vote to deny transfer.

David, J., dissents from the denial of transfer with separate opinion in which Rush, C.J., joins.

David, J., dissenting from the denial of transfer.

The right of a criminal defendant to be present at his own trial can be forfeited if, after being warned of the potential for removal, he continues to engage in disruptive or obstreperous behavior. In *Illinois v. Allen,* the U.S. Supreme Court held that "[o]nce lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." 397 U.S. 337, 343 (1970).

I respectfully disagree with the Court of Appeals' conclusion that *Allen* does not require trial courts to inform disruptive defendants who have been removed from the courtroom that they can reclaim their right to be present. Indeed, *Allen* makes clear that two elements must be met for a defendant to lose his right to be present at trial: first, the defendant must be warned by the judge that he will be removed if he continues his disruptive behavior; then, the defendant must be informed that he may return to the courtroom when he agrees to conduct himself properly. 397 U.S. at 343. Here, though Partee was warned of his impending removal, he was never told how he could earn his right to return to the courtroom. Accordingly, I would grant transfer to provide needed guidance to our trial courts, which all too often must navigate proceedings involving disruptive, vexatious, and outright abusive litigants.

Here, defendant Partee requested to represent himself as a "sovereign citizen" in his criminal trial. After the court denied his request, Partee lodged several allegations and frivolous arguments, including an accusation that the trial court was "committing treason and fraud." Tr. Vol. 1 at 101. At the trial court's instruction, a deputy removed Partee from the courtroom, and the court explained that Partee had "waived [his] right to be here by being obstinate[.]" *Id.* Before voir dire, Partee returned to the courtroom and continued to lodge the same frivolous arguments and statements. After finding that Partee's conduct would be disruptive and prejudicial if witnessed by the jury, the court stated that he had "forfeited [his] right to be at trial," and remanded him to jail. *Id*. at 130.

At the next pretrial conference, Partee continued to interrupt the trial court and object to the proceedings based on his sovereign citizen status.

The trial court found Partee in contempt, sentenced him to 180 days in jail, and removed him from the courtroom.

On the first day of trial, Partee was again present in the courtroom, again disruptive, and again removed because he "refuses to – to quit talking right now." *Id.* at 175. Partee was briefly brought back to the courtroom, but when he continued his tirade, the court again removed him and stated that "[h]e has forfeited his right to be here at trial." *Id.* at 188.

Partee remained absent from the entire first day of trial. And on the second day of trial, the court made no attempt to bring him back to determine whether he would continue to be disruptive, nor did it communicate to Partee how he could earn his way back to the courtroom. Partee ultimately was convicted of a Level 2 felony. On appeal, he challenged the trial court's failure to advise him that he could regain his right to be present by promising to behave, alleging that this constituted fundamental error.

The State argues that nothing in *Allen* requires a trial court to make an explicit advisement, much less *sua sponte* bring the defendant back periodically to inquire whether he is now willing to behave. And it seems to urge a constructive-notice standard, pointing out that "this was not a case where a defendant was unaware of his right or how to execute it, nor was it a case where a defendant notified the trial court that he was ready to behave but was still denied the opportunity to attend the remainder of the trial." Resp. Br. at 6 (internal citations omitted). Because Partee had been removed from and returned to the court during several pretrial proceedings, the State argues, he already knew or should have known that he could reclaim his right to be present. The Court of Appeals agreed, finding that—any waiver aside—*Allen* does not explicitly require that a defendant be advised that he may return to the courtroom if he promises to behave.

I disagree. While the court's decision to remove Partee from the courtroom was more than warranted under the circumstances, its failure to ensure that Partee was informed how he could reclaim the right to be present—or even **that** he could reclaim this right—renders the process constitutionally inadequate and constitutes fundamental error.

The Court of Appeals correctly observes that courts have interpreted *Allen* in different ways, and not all states require that the trial court be the one to inform a defendant that he can reclaim the right to be present. *See, e.g.*, *State v. Wood*, 123 A.3d 111, 122 (Conn. App. 2015) (finding that the trial court complied with rules of practice by sending defense counsel to advise the defendant of his right to return, rather than personally informing him of this right); *State v. Chapple*, 36 P.3d 1025, 1033 (Wash. 2001) (holding that a trial court's requirement that defense counsel speak with the defendant and report back was adequate to inform the defendant of his ability to reclaim his right to return).

Some states have further held that *Allen* does not require courts to allow a defendant to be **physically** present in the courtroom. *See, e.g.*, *Commonwealth v. Tejada*, 161 A.3d 313, 319–20 (Pa. Super. Ct. 2017) (holding that the court "complied with *Allen's* directive that an accused be given an opportunity to reclaim his right" to be present by allowing the defendant to appear via videoconference after he continued to disrupt proceedings, thereby avoiding "the draconian step of total forfeiture of his right"). Others have emphasized courts' discretion to not accept at face value a defendant's promise to behave. *See, e.g.*, *Douglas v. State*, 214 P.3d 312, 317 (Alaska 2009) (finding no abuse of discretion where judge "reiterated his willingness to take breaks and provide Douglas with paper and pen so Douglas could communicate with his attorney" but did not allow him to reenter the courtroom).

But though *Allen* provides no precise instructions on how a defendant should be informed that they can reclaim the right to be present, *see Morrison v. State*, 480 S.W.3d 647, 660 (Tex. Ct. App. 2015), it does provide that a removal process is constitutionally adequate only when a defendant is so informed—whether by the court itself or defense counsel.[1] 397 U.S. at

[1] The case the Court of Appeals cites in concluding that no advisement is required, *Scurr v. Moore*, is distinguishable. 647 F.2d 854, 858 (8th Cir. 1981). There, defendant Moore was "brief[ly] exclu[ded]" from trial for a period of 20 to 30 minutes during direct examination of the State's key witness. *Id.* After a recess, Moore returned to the courtroom for the remaining two days of his nine-day trial. *Id.* Here, Partee was excluded from his entire trial, and the record does not reflect that the judge made any attempt to communicate with him after his removal to assess his willingness to control his behavior.

346. And Partee was not given such an advisement. He also was not brought back before the court on the second day of his trial to again assess whether he was willing to conduct himself appropriately.

We should not presume that criminal defendants are aware of the precise scope of their constitutional rights—such as when and how their right to be present at their own trial may be forfeited and reclaimed. And under the constructive-notice approach championed by the State and approved by the Court of Appeals, it is unclear **how** defendants like Partee may communicate their willingness to behave when they are neither brought back before the court nor informed by counsel that they can reclaim their right to be present.

The U.S. District Court Benchbook recommends that "[a]t the beginning of each session, the court should advise the defendant that he or she may return to the courtroom if the defendant assures the court that there will be no further disturbances." FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES at 145 (6th ed. 2013). This is a reasonable approach, but by no means the only one. Courts may also ask defense counsel to advise the defendant as to reclaiming his right to return, *see Wood*, 123 A.3d at 122, give the defendant pen and paper and an opportunity to communicate with counsel, *see Douglas*, 214 P.3d at 317, or allow the defendant to appear over video, *see Tejada*, 161 A.3d at 319–20—so long as the defendant is adequately apprised of his constitutional rights.

Moreover, though not an issue on appeal, a review of the record shows that the trial court did not adhere to the appropriate procedures when holding Partee in contempt. Just as *Allen* requires that the defendant be given an opportunity to indicate his willingness to behave, our contempt process requires judges to afford the contemnor the opportunity to purge the contempt—that is, to make an oral record of any explanation for (or denial of) the contemptuous behavior. This did not occur here. In difficult times, trial judges should rely on the instructions provided in the Civil and Criminal Benchbooks or seek guidance from the Indiana Office of Court Services.

I agree with the Court of Appeals that the trial court should be commended for its restraint and patience in dealing with a defendant as

difficult as Partee. But a defendant's unruliness does not excuse trial courts from the obligation to follow the law, nor do defendants irrevocably forfeit their constitutional right to be present at trial when they engage in disruptive behavior. I would find that the lack of any advisement here constitutes fundamental error, and therefore dissent from the denial of transfer.

Rush, C.J., joins.