

OPINION
48-83

May 18, 1948 (OPINION)

CRIMINAL PROCEDURE

RE: Plea of Guilty May Be Entered Only by Defendant in Person

Your letter of May 14 relative to the possibility of a plea of guilty being entered in the absence of the defendant by his counsel has been received.

It is our opinion that under section 29-1302 the defendant's personal appearance is unnecessary at the arraignment and he may appear by counsel only. Section 29-1421, in our opinion, prohibits the entry of a plea of guilty being entered by counsel. This section seems to admit of no other construction. However, as I understand the facts in this case, the defendant is willing to enter a plea of guilty and in fact has so informed his counsel. I suggest that this matter might be handled in this way. Since his counsel cannot enter a plea of guilty and the defendant does not want to enter a plea of not guilty, counsel could so state to the court and the court should order a plea of not guilty for the defendant.

Section 29-1604 expressly provides that a trial for a misdemeanor may be had in the absence of the defendant if such absence is voluntary. Section 29-1602 provides that a trial by jury may be waived by the consent of the defendant and states attorney expressed in open court and entered in the minutes of the court. Our court has held that a defendant in a murder case can waive a trial by jury. See *State v. Thronson*, 49 N.D. 348, 191 N.W. 629, 634; *State v. Layer*, 48 N.D. 366, 380, 184 N.W. 666.

It would appear then that if the defendant is out of the state and refuses to attend upon the trial he can waive a trial by jury and the waiver can be made by his counsel in open court. This is not depriving the defendant of any constitutional right and he certainly could not later claim that his trial was improper when held by the court without a jury if he refuses to come to the state and go on trial. It is, therefore, our suggestion that the defendant be arraigned in his absence as the statute provides in the presence of his counsel and a copy of the information can then be delivered to his counsel. His counsel can then state to the court that the defendant is out of state and does not intend to return for trial and that he refuses to enter a plea of not guilty, and the court could then enter the plea of not guilty for him. The defendant's attorney could then consent in open court to a trial without a jury and the court could proceed to the trial. The evidence pointing to the guilt of the defendant could be presented to the court and he could make his decision accordingly.

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Attorney General