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Article 17

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First Department, People v. Mason

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RIGHT TO TESTIFY

U.S. CONST. amend. XIV:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . and be confronted with the witnesses against him . . . No person shall be deprived of life, liberty, or property without due process of law.

SUPREME COURT, APPELLATE DIVISION FIRST DEPARTMENT

People v. Mason[1]
(decided February 29, 2000)

The defendant was charged with one count of criminal possession of a weapon in the second degree and two counts of criminal possession of a weapon in the third degree, and was convicted as charged by the jury in the Supreme Court.[2] The defendant appealed from this judgment, arguing that there was a "fundamental error of constitutional law concerning defendant's right to testify," and that this error cannot be considered harmless.[3] The appellate court reversed the lower court's decision and remanded the case for a new trial, finding reversible error and enormous prejudice to the defendant.[4]

At the close of the case, the defendant informed the court that he wanted to testify, but his counsel had advised him against

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[1] 263 A.D.2d 73, 706 N.Y.S.2d 1 (1st Dep't 2000).
[2] *Id.* at 74, 706 N.Y.S.2d at 2.
[3] *Id.*
[4] *Id.* at 73, 706 N.Y.S.2d at 1.

it.[5] The court stated that if defendant testified on his own behalf, he would be cross-examined about statements that he made after he was arrested implying his guilt.[6] The court also noted the fact that the defendant made a statement commending his counsel on her wise decision not to allow him to testify.[7] However, the defendant himself noted his objection for the court.[8] When the jury returned to the courtroom, counsel approached the bench and the judge decided that the court was not responsible for ordering the defendant to testify against counsel's decision.[9] After defense counsel delivered her summation, the defendant stated to the jury that the information they heard was not true and he wanted to tell them his side of the story, but was not permitted to do so.[10] The story that the defendant denied, and that the jury heard, was that the two officers, who testified at trial, were on patrol on the night in question, and saw a woman running toward them.[11] The woman pointed at the defendant and yelled that he had a gun. The defendant stopped and looked as if he was "discarding an object" and ran away.[12] The officers found the defendant hiding under a parked car. He had an empty holster that was manufactured for semiautomatic weapons, and a loaded semiautomatic gun was found in the area where defendant was seen discarding an object.[13] The defendant was then arrested.[14]

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[5] *Id.* at 75, 706 N.Y.S.2d at 3. The jury was not in the courtroom at the time. *Id.*

[6] *Id.*

[7] *Mason*, 263 A.D.2d at 75, 706 N.Y.S.2d at 3.

[8] *Id.*

[9] *Id.* The court further held that:

> [U]nder the circumstances since you think it's in his best interests given what we know maybe [sic] revealed upon his cross examination, that I will go with your judgment . . . I don't think that the rule that he must testify is entirely absolute and this case may be unique enough to amplify why it shouldn't be entirely absolute.

Id.

[10] *Id.* at 76, 706 N.Y.S.2d at 3.

[11] *Id.* at 74-75, 706 N.Y.S.2d at 2.

[12] *Id.*

[13] *Mason*, 263 A.D.2d at 74-75, 706 N.Y.S.2d at 2.

[14] *Id.*

After the defendant's outburst in court, the judge allowed the defendant to testify. The defense counsel made it clear, in the presence of the jury, that the judge's decision was over her objection.[15] The defendant's side of the story was that "he and a friend were sitting on a car . . . [and] when [the] police officers approached and searched them . . . the officers showed defendant a gun and told him he had dropped it and that he was being arrested for gun possession."[16] One of the officers rebutted, testifying "that defendant told him that the woman he was chasing was . . . his wife, . . . that defendant had chased her because she had 'pissed [him] off, and that he wasn't going to hurt her and only wanted to scare her.'"[17]

The issue that the court considered was "whether a fundamental error of constitutional law concerning the defendant's right to testify . . . ultimately resulted in prejudice to defendant which cannot be deemed harmless and is sufficient to warrant a new trial."[18] In this case the court analyzed the due process right to testify that is guaranteed under both the Federal[19] and New York State[20] Constitutions, as well as § 260.30[21] of the Criminal

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[15] *Id.* at 76, 706 N.Y.S.2d at 3.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 74, 706 N.Y.S.2d at 2.

[19] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[20] N.Y. CONST. art. 1, § 6. This section provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . and be confronted with the witnesses against him . . . No person shall be deprived of life, liberty, or property without due process of law." *Id.*

[21] N.Y. CRIM. PROC. § 260.30. This statute provides in pertinent part:
The order of a jury trial, in general, is as follows:

1. The jury must be selected and sworn.
2. The court must deliver preliminary instructions to the jury.
3. The people must deliver an opening address to the jury.
4. The defendant may deliver an opening address to the jury.

Procedure Law (CPL) that "sets forth the order in which a jury trial is to proceed."[22] However, when deciding whether the lower court's decision was harmless, "the law, the evidence and the unique circumstances of each particular case must be viewed as a whole."[23]

In the case at bar, the appellate court analyzed the decision in *People v. Burke*.[24] There, the appellate court found that "[t]he magnitude and fundamental nature of one's right to be heard in criminal proceedings pending against him compels a finding that the error cannot be found harmless . . . ."[25] The defendant was convicted of promoting prison contraband in the first degree.[26] He contended that he was denied the right to testify on his own behalf.[27] Defense counsel had advised against testifying, and the defendant went back and forth on the issue, eventually seeking to testify after the defense rested.[28] Counsel moved to reopen, but the motion was denied.[29]

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5. The people must offer evidence in support of the indictment.
6. The defendant may offer evidence in his defense.
7. The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or surrebuttal evidence in this pattern. In the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.
8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.
9. The people may then deliver a summation to the jury.
10. The court must then deliver a charge to the jury.
11. The jury must then retire to deliberate and, if possible, render a verdict.

Id.

[22] *Mason*, 263 A.D.2d at 76-77, 706 N.Y.S.2d at 3, 4.

[23] *Id.* at 78, 706 N.Y.S.2d at 5. (holding that "[t]here is . . . no set litmus test for determining what constitutes ineffective or inadequate legal representation . . .").

[24] 179 A.D.2d 994, 574 N.Y.S.2d 859 (3d Dep't 1991).

[25] *Id.* at 1001, 574 N.Y.S.2d at 860.

[26] *Id.* at 1000, 574 N.Y.S.2d at 859.

[27] *Id.*

[28] *Id.* at 1000, 574 N.Y.S.2d at 860.

[29] *Id.*

In *People v. Harami*,[30] there is a similar outcome. The defendant had requested to take the stand and the trial court denied the request, noting counsel's advice not to testify, as well as the negativity of cross-examination.[31] The appellate court in *Harami* found "that the trial court abused its discretion . . . by denying defendant's request to take the stand and testify in his own behalf."[32]

The error in the case at bar, like those in *Burke* and *Harami,* is "clearly of a constitutional nature and in order for such error to be deemed harmless, there must be no reasonable possibility that the error might have contributed to defendant's conviction and it must be found harmless beyond a reasonable doubt."[33]

When analyzing CPL § 260.30, the appellate court in *Mason* found that "[i]n the absence of a compelling reason to do so, the order of trial prescribed by CPL 260.30 should be adhered to."[34] The lower court in *Mason* deviated from the statutorily delineated order of trial, and was unable to cure that error by allowing the defendant to eventually testify at an improper stage.[35]

In *People v. Farrow*,[36] the appellate court found no abuse of discretion by the lower court, or violation of CPL 260.30, when it refused to reopen the trial in order for the defendant to testify.[37] However, *Farrow* can be distinguished from the case at bar because the defendant in *Farrow* requested to testify only after summations and during the jury charge, but in the case at bar, the defendant began his request at an earlier stage of trial.[38] "The order of proof, as set forth in CPL 260.30, may be varied by the trial court 'in its discretion in furtherance of justice.'"[39] "Nevertheless, 'the order of trial prescribed by statute should be

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[30] 93 A.D.2d 867, 461 N.Y.S.2d 376 (2d Dep't 1983).
[31] *Id.*
[32] *Id.* at 868, 461 N.Y.S.2d 376.
[33] *Mason,* 263 A.D.2d at 77, 706 N.Y.S.2d at 4.
[34] *Id.*; N.Y. CRIM. PROC. § 260.30.
[35] *Mason*, 263 A.D.2d at 77, 706 N.Y.S.2d at 4.
[36] 176 A.D.2d 130, 574 N.Y.S.2d 17 (1st Dep't 1991).
[37] *Id.*
[38] *Id.; Mason*, 263 A.D.2d at 75, 706 N.Y.S.2d at 3.
[39] *Farrow*, 176 A.D.2d at 130, 574 N.Y.S.2d at 17 (quoting People v. Benham, 160 N.Y. 402, 55 N.E. 11 (1899)).

followed unless there is a showing of a compelling reason for a variation.'"[40]

The dissenting opinion in the case at bar indicated that trials are never perfect and errors are practically unavoidable, but that most errors can be cured by subsequent remedial measures.[41] The dissent states that the initial error of precluding the defendant from testifying was cured by the remedial measure of allowing him to testify at a later point.[42]

However, the majority held that the trial court's actions "resulted in defendant testifying under haphazard and somewhat confusing conditions, result[ing] in enormous prejudice to defendant . . . . It appears likely, after the [defendant's] outburst, that the jury may very well have concluded that neither the court, nor his own attorney, had faith in his story."[43]

The defense counsel's misunderstanding of this important constitutional right to testify led directly to the defendant's prejudice.[44] Therefore, the error of the lower court cannot be deemed harmless beyond a reasonable doubt.[45]

In sum, the New York State Constitution[46] is more specific when it states, "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . and be confronted with the witnesses against him,"[47] and therefore more relevant to the case at bar. However, the right to testify is "[o]ne of the fundamental precepts of due process," [48] and is guaranteed under both the Federal[49] and New York State[50] Constitutions. Thus, the analysis of the lower court's decision reveals that the denial of the defendant's Federal and State

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[40] *Id.* (quoting People v. Theriault, 75 A.D.2d 971, 428 N.Y.S.2d 365 (N.Y. App. Div. 3d Dep't 1980)).
[41] *Mason,* 263 A.D.2d at 81, 706 N.Y.S.2d at 7 (Saxe, J., dissenting).
[42] *Id.*
[43] *Id.* at 77-78, 706 N.Y.S.2d at 4-5.
[44] *Id.* at 79, 706 N.Y.S.2d at 5.
[45] *Id.* at 77, 706 N.Y.S.2d at 4.
[46] N.Y. CONST. art. 1, § 6.
[47] *Id.*
[48] *Mason*, 263 A.D.2d at 76, 706 N.Y.S.2d at 3.
[49] U.S. CONST. amend. XIV.
[50] N.Y. CONST. art. 1, § 6.

constitutional right to testify resulted in reversible error and a new trial.[51]

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[51] *See Mason*, 263 A.D.2d 73, 706 N.Y.S.2d 1.

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