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Due Process, Court of Appeals: People v. Thompson

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factors such as whether the facility was “competently staffed and properly equipped” and “operated in the manner” required by the Public Health Laws and whether the people who ran the facility “possess[ed] the character, competence, training, and ability” to administer the facility, clearly discretionary factors.¹³⁵ Because Daxor’s provisional licenses could be revoked at any time and thus did not give rise to a property interest, Daxor was not entitled to a due process hearing.¹³⁷

It is clear from the previous cases that the federal and state law governing the protection of property rights under due process are coterminous. Both federal and New York State courts look at whether the party claiming the property right has a legitimate claim of entitlement to it under the law or contract that established the right¹³⁸ and then decide whether the law grants discretion to the authority granting the right.¹³⁹ Finally, both the state and federal courts apply a balancing test¹⁴⁰ in order to see how much discretion defeats the entitlement.¹⁴¹

People v. Thompson¹⁴²
(decided October 23, 1997)

Defendant appealed his conviction,¹⁴³ claiming his right to due process under the New York State Constitution¹⁴⁴ was violated

¹³⁶ *Id.* (quoting N.Y. PUB. HEALTH LAW § 575 (2), § 573 (2) (McKinney 1990)).

¹³⁷ *Id.* at 99-100, 681 N.E.2d at 361, 659 N.Y.S.2d at 194.

¹³⁸ *Id.* at 98, 681 N.E.2d at 361, 659 N.Y.S.2d at 193 (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

¹³⁹ *Id.* at 98-99, 681 N.E.2d at 361, 659 N.Y.S.2d at 194 (citing RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911, 918 (2d Cir. 1989)).

¹⁴⁰ See Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

¹⁴¹ Sullivan v. Town of Salem, 805 F.2d 81, 85 (2d Cir. 1986); Daxor, 90 N.Y.2d at 99, 681 N.E.2d at 361, 659 N.Y.S.2d at 194.

¹⁴² 90 N.Y.2d 615, 687 N.E.2d 1304, 665 N.Y.S.2d 21 (1997).

¹⁴³ *Id.* at 618, 687 N.E.2d at 1304, 665 N.Y.S.2d at 23. Defendant was convicted of kidnapping in the first degree, five counts of rape in the first degree, four counts of sodomy in the first degree, assault in the second degree, and robbery in the third degree. *Id.*

when a substitute judge was allowed to hear the remainder of his trial after the initial judge got sick.¹⁴⁵ The Appellate Division, Second Department affirmed his conviction,¹⁴⁶ holding there was “no per se constitutional right to have the same Judge preside throughout a criminal defendant’s trial.”¹⁴⁷ The New York Court of Appeals, upon granting leave to appeal,¹⁴⁸ found that “a Judge may be substituted for another if the original Judge becomes incapacitated during a jury trial, as long as the substitute indicates on the record the requisite familiarity with the proceedings and no undue prejudice occurs to the defendant or the People.”¹⁴⁹ Finding no prejudice,¹⁵⁰ the Court of Appeals held defendant’s right to due process was not violated.¹⁵¹

¹⁴⁴ N.Y. CONST. art. I, § 6. This section provides in relevant part that “no person shall be deprived of life, liberty or property without due process of law.” *Id.*

¹⁴⁵ *Thompson*, 90 N.Y.2d at 616, 687 N.E.2d at 1305, 665 N.Y.S.2d at 22. A jury trial was commenced on January 14, 1993. *Id.* at 617, 687 N.E.2d at 1305, 665 N.Y.S.2d at 22. On January 25, 1993, the opening statement was delivered by the People. *Id.* Several prosecution witnesses gave testimony over the next several days. *Id.* On February 1, 1993, the People and the defendant were informed by the judge’s law secretary that the Justice was unexpectedly hospitalized and required surgery and would be unable to continue with the trial until April. *Id.* No matters were pending before the court, and another Justice was assigned to continue the case. *Id.* Defendant submitted a motion for a mistrial. *Id.* at 617-18, 687 N.E.2d at 1305, 665 N.Y.S.2d at 22. Oral arguments on the motion were heard by the new Justice. *Id.* “Defendant consented to this Justice presiding over the remainder of the case should the mistrial motion be denied.” *Id.* “Noting that the grounds presented on the mistrial motion would also warrant the granting of ‘a motion to set aside any guilty verdict’ that might be returned, the Justice reserved decision on the mistrial motion.” *Id.* (quoting *People v. Thompson*, 158 Misc. 2d 397, 400, 601 N.Y.S.2d 418 (Sup. Ct. Queens County 1993)). The trial resumed, and defendant was convicted. *Id.* at 618, 687 N.E.2d at 1306, 665 N.Y.S.2d at 22-23. Defendant again raised his mistrial motion, and the court denied the motion. *Id.* Defendant was sentenced to 119 ½ years to life and defendant appealed. *Id.*

¹⁴⁶ *Id.* at 618, 687 N.E.2d at 1305, 665 N.Y.S.2d at 23.

¹⁴⁷ *Id.* (quoting *People v. Thompson*, 222 A.D.2d 156, 161, 645 N.Y.S.2d 884, 888 (2d Dep’t 1996)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 621, 687 N.E.2d at 1308, 665 N.Y.S.2d at 25.

Both the Federal¹⁵² and New York State¹⁵³ Constitutions guarantee a right to a jury trial, New York courts have interpreted the right to a jury trial in the New York Constitution as a right that “existed at common-law.”¹⁵⁴ The Court of Appeals has held that “when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the Constitution and laws provide without any essential change.”¹⁵⁵

Relying on these principles, New York courts have ruled that it was impermissible for a judge to substitute during a trial.¹⁵⁶ It was impossible, the *Thompson* court explained, “to ascertain ‘what influence (the original judge) might have exercised during the trial, or in determining the punishment to be inflicted upon the prisoner.’”¹⁵⁷

Similarly, federal courts had followed the same proposition, basing their decisions upon the then unquestioned, nonwaivable right to a trial by jury.¹⁵⁸ In *Freeman v. United States*,¹⁵⁹ the

¹⁵⁰ *Id.* at 621-22, 687 N.E.2d at 1308, 665 N.Y.S.2d at 25.

¹⁵¹ *Id.* at 622, 687 N.E.2d at 1308, 665 N.Y.S.2d at 25.

¹⁵² See U.S. CONST. amend V. The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty or property, without due process of law.” *Id.*; U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” *Id.* See also U.S. CONST. art. III. Article III provides that “[t]he trial of all crimes, except in cases of impeachment, shall be by jury.” *Id.*

¹⁵³ See N.Y. CONST. art. I, § 2. This provision states: “Trial by jury in all cases in which it is heretofore been guaranteed by constitutional provision shall remain inviolate forever.” *Id.*

¹⁵⁴ *Thompson*, 90 N.Y.2d at 619, 687 N.E.2d at 1306, 665 N.Y.S.2d at 23 (quoting *People v. Ahmed*, 66 N.Y.2d 307, 311, 487 N.E.2d at 896, 496 N.Y.S.2d at 986 (1985)).

¹⁵⁵ *Id.* (quoting *People v. Cancemi*, 18 N.Y. 128, 138 (1858)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (quoting *Blend v. People*, 41 N.Y. 604, 606 (1870)). In *Blend*, defendant was tried before a three member bench. *Id.* at 604. When one of the Justices never returned from a dinner recess, another qualified Justice was appointed to finish the trial. *Id.* at 605. Defendant was convicted, and he appealed. *Id.* The conviction was reversed, as the court held that “the prisoner had a right to insist that his trial should proceed before the same court before which it was commenced.” *Id.* at 606.

¹⁵⁸ *Thompson*, 90 N.Y.2d at 619, 687 N.E.2d at 1307, 665 N.Y.S.2d at 24.

Second Circuit held that “[t]he continuous presence of the same judge and jury is equally essential throughout the whole trial.”¹⁶⁰ In *United States v. LaSorsa*,¹⁶¹ however, the Second Circuit declined to follow precedent, finding instead a “subsequent repudiation by the United States Supreme Court.”¹⁶² The enactment of Federal Rules of Criminal Procedure [hereinafter “F.R.C.P.”] Rule 25 (a)¹⁶³ in 1966 created guidelines to protect the rights of criminal defendants in the event of a need for judge substitution.¹⁶⁴ Specifically, a three prong test was established to

¹⁵⁹ 227 F. 732 (2nd Cir. 1915) (holding in overturning defendant’s conviction “[i]t is without question that it is the duty of a trial judge to be present during all stages of a criminal trial.”).

¹⁶⁰ *Id.* at 759-60.

¹⁶¹ 480 F.2d 522 (2d Cir. 1973). Defendant was indicted on a charge of conspiracy to sell heroin without the buyer’s written order form in violation of 26 U.S.C. §§ 4705 (a), 7237 (b). *Id.* at 524. The presiding judge, having taken ill, was replaced on the last day of the trial. *Id.* at 530. The substitute judge complied with Federal Rules of Criminal Procedure Rule 25(a). *Id.* The jury returned a guilty verdict to the substitute judge. *Id.* Upon the announcement of the verdict, the substitute judge stated that the first judge would pass sentencing as he was more familiar with the case. *Id.* The first judge passed sentence. *Id.* The court stated in its holding

We are not bound by . . . [a] case, decided over fifty-five years ago [which] rested on a principle subsequently repudiated by the United States Supreme Court in *Patton v. United States*, 281 U.S. 276, (1930) the principle that a defendant may not waive his right to a jury trial Inasmuch as the defendants do not claim, and have not shown, that they suffered substantial prejudice from the substitution of judges this claim is without merit.

Id. at 531 (citation omitted).

¹⁶² *Id.*

¹⁶³ FED. R. CRIM. P. 25 (a). Rule 25 (a) states:

During trial. If by reason of death, sickness or other disability, the judge before whom a trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

Id.

¹⁶⁴ *Id.*

ensure that no prejudicial effect would be felt by the defendant.¹⁶⁵ First, the primary judge must be unable to continue “by reason of death, sickness or other disability.”¹⁶⁶ Second, the substituting judge must regularly sit in competent jurisdiction,¹⁶⁷ and finally, the substituting judge must certify familiarity with the record of trial.¹⁶⁸ The *LaSorsa* court, having found all three elements met,¹⁶⁹ as well as no evidence of undue prejudice,¹⁷⁰ found the defendant’s claim of due process violation without merit¹⁷¹ and upheld the defendant’s conviction.¹⁷²

In New York, however, there is no rule analogous to Rule 25 (a) of the Federal Rules of Criminal Procedure.¹⁷³ Defendant in *Thompson* “contends that the rights guaranteed under the [New York] State Constitution and the procedural proscriptions of Judicial Law § 21 prohibit the adoption of procedures similar to those outlined in Rule 25 (a) in New York.”¹⁷⁴ The Court of Appeals found that though there have been occasions when more protections of due process rights have been offered by the state,¹⁷⁵ in this context an extension is unwarranted as there is “no [New York] State constitutional mandate for a jury trial before the same judge from start to finish.”¹⁷⁶ The court further found “nothing in the requirements of due process that indicates that the midtrial substitution of a Judge rises to the level of a per se constitutional violation. Thus, a jury trial before the same Judge does not represent a nonwaivable, common-law right guaranteed by the [New York] State Constitution.”¹⁷⁷

¹⁶⁵ *LaSorsa*, 480 F.2d at 531.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 530.

¹⁷⁰ *Id.* at 531.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *People v. Thompson*, 90 N.Y.2d 615, 620, 687 N.E.2d at 1307, 665 N.Y.S.2d at 24 (1997).

¹⁷⁴ *Id.* at 621-22, 687 N.E.2d at 1307, 665 N.Y.S.2d at 24.

¹⁷⁵ *Id.* at 622, 687 N.E.2d at 1307, 665 N.Y.S.2d at 24.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 621, 687 N.E.2d at 1308, 665 N.Y.S.2d at 25.

Defendant further contended that Judicial Law § 21 prevented the substitution of a judge in a trial when not present for oral argument.¹⁷⁸ The court rebuffed this claim, holding that this law “does not prevent the substitution of a Judge in a jury trial since the ultimate determination of guilt or innocence belongs to the jury and not the Trial Judge.”¹⁷⁹

Both the Federal¹⁸⁰ and New York Constitutions,¹⁸¹ in evaluating due process claims, “require the balancing of factors -- ‘an evaluation of the interests of the parties to the dispute, the adequacy of the contested procedures to protect those interests and the government’s stake in the outcome.’”¹⁸²

While New York does not have a statute congruent to Rule 25(a) of the Federal Rules of Criminal Procedure,¹⁸³ the Court of Appeals in *Thompson* opted to maintain the federal standard.¹⁸⁴ Applying this standard, the court found that the defendant’s claims to have been “deprived of the ‘internal consistency’ that a single Judge brings to a trial”¹⁸⁵ simply does not implicate due process.¹⁸⁶ Applying this standard, the court found that the presence of the same judge from commencement to conclusion of a trial is not inviolable component to a fair trial under state or federal constitutional analysis.¹⁸⁷

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See supra* note 10.

¹⁸¹ *See* N.Y. CONST. art. I § 2.

¹⁸² *Thompson*, 90 N.Y.2d at 621, 687 N.E.2d at 1307, 665 N.Y.S.2d at 24 (quoting *La Rossa v. Abrams*, 62 N.Y.2d 583, 588, 468 N.E.2d 19, 479 N.Y.S.2d 181 (1984)).

¹⁸³ *Id.* at 620, 687 N.E.2d at 1307, 665 N.Y.S.2d at 24 .

¹⁸⁴ *Id.* at 621, 687 N.E.2d at 1307, 665 N.Y.S.2d at 25.

¹⁸⁵ *Thompson*, 222 A.D.2d at 161, 645 N.Y.S.2d at 884.

¹⁸⁶ *Id.*

¹⁸⁷ *Thompson*, 90 N.Y.2d at 622, 687 N.E.2d at 1308, 665 N.Y.S.2d at 25.