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Right to Counsel, Court of Appeals: People v. Carracedo

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to have Assistance of Counsel for his defence.

N.Y. CONST. art. I, § 6:

In any trial in any country whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . .

COURT OF APPEALS

People v. Carracedo[1]
(decided May 6, 1997)

Defendant, Jose Carracedo, (during a pretrial suppression hearing at the trial court level) was told by the judge not to communicate with his counsel concerning the case.[2] This direction was given to the defendant in the middle of the his cross-examination testimony.[3] This directive by the judge was to last for the overnight recess in the case, and was not for an extended period of time.[4] Defendant was ultimately convicted of second-degree murder.[5] Defendant appealed the conviction contending that he was denied a fair trial because of the ban that was placed on his ability to communicate with his attorney during the overnight recess.[6] The Appellate Division found the defendant's contention to have merit and held that "the ban

[1] 89 N.Y.2d 1059, 681 N.E.2d 1276, 659 N.Y.S.2d 830 (1997).
[2] *Id.* at 1061, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

placed on defendant's communication with his attorney violated defendant's Sixth Amendment right to counsel".[7]

In reaching its conclusion, the Appellate Division relied on *Geders v. United States*,[8] where the defendant in a federal drug prosecution was directed by a district court judge not to talk to his counsel, or anyone about the case, during a seventeen hour overnight recess during his direct examination and shortly before his cross-examination was to begin.[9] His counsel objected but the defendant was ultimately convicted.[10] The Court explained that it is common for an attorney to consult with a client during recesses in order to go over what has occurred at trial that day.[11] The end of the day is often a time when much work is accomplished between the two in terms of strategy, as well as the attorney's quest for information which is based on that day's testimony or matters in which the attorney has not fully explored before with his client.[12] The Court "recognized that the role of counsel is important because . . . a defendant is [not] equipped to understand and deal with the trial process without the lawyer's guidance."[13] The Court held that an order that prohibited a defendant from talking to his counsel during a seventeen-hour overnight recess "between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."[14]

Finding a violation of defendant's Sixth Amendment rights, the Appellate Division stayed the appeal and remitted the matter to

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[7] *See* U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "to have the Assistance of Counsel for his defense." *Id. See also* N.Y. CONST. art. I, § 6. This section provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to appear and defend in person and with counsel . . . ." *Id.* (*Carracedo,* 89 N.Y.2d at 1061, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831).

[8] 425 U.S. 80 (1975).

[9] *Id.* at 81.

[10] *Id.* at 85.

[11] *Id.*

[12] *Id.*

[13] *Id.* (citing Powell v. Alabama, 287 U.S. 45 (1932); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963)).

[14] *Id.* at 91.

the Supreme Court of New York for a new suppression hearing.[15] The new suppression hearing resulted in a finding that the subject evidence should not be suppressed and the Appellate Division affirmed defendant's conviction.[16]

On appeal, the Court of Appeals stated that it could not review the appropriateness of the Appellate Division's holding that the directive constituted a Sixth Amendment violation since the People did not appeal.[17] The Court of Appeals then explained, it could not give them relief.[18] The court further explained that by doing so it "would in essence be affording affirmative relief to a nonappealing party, [which] we are not empowered to do."[19]

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[15] *Carracedo*, 89 N.Y.2d at 1061, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* (quoting People v. Carpentino, 80 N.Y.2d 65, 68, 599 N.E.2d 668, 669, 587 N.Y.S.2d 264, 265 (1992)). In *Carpentino*, defendant was indicted on charges of drug possession, weapons possession, and criminal possession of a hypodermic instrument. *Id.* at 67, 599 N.E.2d at 669, 587 N.Y.S.2d at 265. Defendant moved to suppress the physical evidence and challenged certain statements made by an informant as perjurious. *Id.* Defendant also requested an in camera hearing in advance of trial to look into the existence of the informant. *Id.* The court granted the motion only to the extent of ordering of a hearing regarding the existence of the informant. *Id.* The People were unable to produce the informant and moved to reargue the portion of the decision in which the Judge granted the in camera examination. *Id.* Defendant moved, once again, that the physical evidence seized be suppressed. *Id.* This request was granted and the People appealed. *Id.* The Appellate Division reversed, holding that the in camera hearing was not improper but the hearing court should not have ordered the evidence suppressed without looking to alternative evidence of the informant's existence (the People wanted to put a detective under oath to disclose who the informant was and to testify to his conversations with the informant). *Id.* at 67-68, 599 N.E.2d at 669, 587 N.Y.S.2d at 265. The People argued that the hearing court should not have allowed an in camera hearing in the first place. *Id.* at 68, 599 N.E.2d at 669, 587 N.Y.S.2d at 265. The court then held that they could not consider that argument by the People because if the court were to say that the hearing judge did abuse his power in ordering the examination it would be affording relief to a nonappealing party. *Id.*

The Court of Appeals in *Carracedo* rejected defendant's contention that he deserved a reversal of his conviction and receive a new trial.[20] The court stated that the new suppression hearing was an adequate remedy that cured any constitutional violation which may have occurred at the original suppression hearing.[21] Also, the court noted that the occurrence of the communication ban lasted for one evening and occurred one year before the trial began and in the scheme of the entire matter was not serious enough to deny the defendant of a fundamental right to a fair trial.[22] Thus, there was no need to proceed with an analysis to determine whether the defendant was, in fact, prejudiced by the actions taken by the court.[23]

In *People v. Hilliard*,[24] the New York Court of Appeals held that a 30 day pretrial bar on communications was a denial of a fundamental right to a fair trial.[25] Also, in *People v. Felder*,[26]

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[20] *Carracedo*, 89 N.Y.2d at 1061, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831.

[21] *Id.* at 1061-62, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831.

[22] *Id.* at 1062, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831.

[23] *Id.* (citing People v. Hilliard, 73 N.Y.2d 584, 540 N.E.2d 702, 542 N.Y.S.2d 507 (1989); People v. Felder, 47 N.Y.2d 287, 418 N.Y.S.2d 295, 391 N.E.2d 1274 (1979)). In *Hilliard*, the defendant was arrested and then arraigned. *Id.* at 586, 540 N.E.2d 702, 542 N.Y.S.2d at 507. While being arraigned, defendant continually failed to comply with the Judge's orders to remain quiet. *Id.* The Judge then found him in contempt of court and ordered his counsel not to have any contact with him for 30 days following the arraignment. *Id.* The People conceded that the Judges orders were in error but they were harmless, however, the court held that this was a violation of his constitutional right to counsel after such right had attached at arraignment. *Id.* The court's order was punitive and without justification, thus denying him his constitutional right to a fair trial and not harmless. *Id.* at 586, 540 N.E.2d at 702-03, 542 N.Y.S.2d at 507-08. The court held that this error could not be remedied by a new trial and ordered that the order of the Appellate Division should be reversed and the indictment against him should be dismissed. *Id.*

[24] 73 N.Y.2d 584, 540 N.E.2d 702, 542 N.Y.S.2d 507 (1989). *See supra* note 23.

[25] *Id.* at 586-87, 540 N.E.2d at 702-03, 542 N.Y.S.2d at 507-08.

[26] 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979). In *Felder*, four defendants sought to vacate their convictions on the grounds that they were denied effective assistance of counsel. *Id.* Their claims came from the fact that all were represented by the same counsel in separate criminal trials by

the court held that where a defendant in a criminal trial has unknowingly been represented by a layman who is masquerading as an attorney his conviction must be set aside without regard to whether he was individually prejudiced by such representation. In *Carracedo*, unlike *Hilliard,* the ban was only for a night and was during the course of the suppression hearing, while giving testimony on cross-examination; not at trial and certainly not for an extended period of time.[27]

Defendant further contended that the ban on his communication was prejudicial because it could have affected his trial strategy and was at a time in the litigation process when he and his counsel could have discussed plea options or have gone over issues that were coming up later at trial.[28] The court however found defendant's arguments to be too speculative and held that the Appellate Division's finding that a new suppression hearing was a sufficient remedy.[29]

Finally, defendant contented that reversal was called for because the People lost certain Rosario materials[30] prepared by the trainer of a dog that was used to track Carracedo to the scene of the crime.[31] The court responded by explaining that "when Rosario materials are lost or destroyed, the court is required to

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the same man, Albert Silver, who had not been admitted to practice law. *Id.* The Court of Appeals in each case reversed the order of the Appellate Division and granted the motion to vacate the judgment of conviction. *Id.* The court ordered a new trial holding that where a defendant in a criminal trial has unknowingly been represented by a layperson who is masquerading as an attorney his conviction must be set aside without regard to whether he was individually prejudiced by such representation. *Id.*

[27] *Carracedo*, 89 N.Y.2d at 1061, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831.

[28] *Id.* at 1062, 681 N.E.2d at 1277, 659 N.Y.S.2d at 831.

[29] *Id.* at 1061-62, 681 N.E. at 1277-78, 659 N.Y.S.2d at 831-32.

[30] *See* generally People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961). Rosario materials are those materials required to be disclosed to defense counsel for use in cross-examination and all pre-trial statements of witnesses relating to the subject matter of their testimony, whether made to police, District Attorney, Grand Jury, unless it is confidential and needs to be keep as such. *Id.*

[31] *Carracedo*, 89 N.Y.2d at 1062, 681 N.E.2d at 1278, 659 N.Y.S.2d at 832.

impose a sanction designed to eliminate resulting prejudice to the defendant."[32] In the case at bar, any possible prejudice by the loss of evidence was cured by special jury instructions.[33] The court relied on *People v. Martinez,*[34] which stated that "[t]he determination of what is [an] appropriate [remedy] is committed to the trial court's sound discretion . . . . [T]he court's attention should focus primarily on the overriding need to eliminate prejudice to the defendant."[35] The court also pointed to the case of *People v. Kelly,*[36] in which the Court of Appeals decided that a dismissal of two informations, which charged defendants with criminal possession of stolen property in the third degree, was an inappropriate response to the prosecutions' failure to produce a stolen wallet.[37] The wallet was to be used at trial against the defendants because it was on their possession at the time of arrest.[38] The court in *Kelly* stated that the definition of "appropriate action" is to be committed to the sound discretion of the trial court, "as a general matter the drastic remedy of dismissal should not be invoked where a less severe measure[] can rectify the harm done by the loss of the evidence."[39] The court noted that there were such other remedies available and that the lower court abused its discretion in dismissing the charges.[40] Here, the court held that any possible prejudice by the loss of evidence was cured by the special jury instructions. The de novo suppression hearing was an adequate remedy for the trial court's direction to the defendant that he refrain from communicating with his counsel during the overnight recess. The defendant, according to the Court of Appeals, did not show that there was any potential for prejudice at the suppression hearing stage.

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[32] *Id.*

[33] *Id.* The trial court instructed the jury to use "utmost caution" and that the evidence had "slight probative value". *Id.*

[34] 71 N.Y.2d 937, 524 N.E.2d 134, 528 N.Y.S.2d 813 (1988).

[35] *Id.* at 940, 524 N.E.2d at 136, 528 N.Y.S.2d at 815.

[36] 62 N.Y.2d 516, 467 N.E.2d 498, 478 N.Y.S.2d 834 (1984).

[37] *Id.* at 518-19, 467 N.E.2d 499, 478 N.Y.S.2d at 835.

[38] *Id.*

[39] *Id.* at 521, 467 N.E.2d at 501, 478 N.Y.S.2d 837.

[40] *Id.*

Thus, the Court of Appeals held that this was not a violation of the defendants' right to counsel. The defendant's final argument for the reversal of his conviction due to the missing Rosario material by the State, was put to rest because the Court of Appeals found that the instructions to the jury cured any prejudice that may have effected the defendant.

People v. Cohen[41]
(decided October 30, 1997)

The defendant, Benjamin E. Cohen, was convicted in 1996 in the County Court, Warren County upon entering a plea of guilty to murder in the second degree.[42] The plea was entered "after the County Court denied his omnibus motion to suppress physical evidence and his inculpatory statement pertaining to the murder of a store clerk"[43] and the defendant was sentenced to a prison term of twenty-five years to life.[44]

Defendant appealed the denial of the suppression motion to the Appellate Division, which unanimously affirmed[45] and then was granted leave to appeal to the New York State Court of Appeals.[46] Defendant argued that the physical evidence should have been suppressed because the warrant that authorized the seizure was invalid as it was obtained based on a false statement given by an informant.[47] He also argued that his right to counsel under the New York State Constitution[48] had been violated when

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[41] 90 N.Y.2d 632, 687 N.E.2d 1313, 665 N.Y.S.2d 30 (1997).

[42] People v. Cohen, 226 A.D.2d 903, 640 N.Y.S.2d 921 (3d Dep't 1996). The New York Statute for murder in the second degree is embodied in New York Penal Law § 125.25. N.Y. PENAL LAW § 125.25 (McKinney 1998).

[43] *Id.* at 903, 640 N.Y.S.2d at 922.

[44] *Id.* at 906, 640 N.Y.S.2d at 924.

[45] *Id.*

[46] People v. Cohen, 90 N.Y.2d 632, 634-35, 687 N.E.2d 1313, 1314, 665 N.Y.S.2d 30, 31 (1997).

[47] *Id.* at 636, 687 N.E.2d at 1315, 665 N.Y.S.2d at 32.

[48] U.S. CONST. amend. VI. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state