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Right To Trial By Jury

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RIGHT TO TRIAL BY JURY

N.Y. CONST. art. I, § 8:

Trial by jury is guaranteed as provided in article one of this constitution. The legislature may provide that in any court of original jurisdiction a jury shall be composed of six or of twelve persons and may authorize any court which shall have jurisdiction over crimes and other violations of law, other than crimes prosecuted by indictment, to try such matters without a jury, provided, however, that crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution.

SUPREME COURT

KINGS COUNTY

People v. Sanders¹
(printed April 5, 1994)

The defendant contended that his constitutional right to a trial by jury, pursuant to the New York State Constitution,² was violated when an alternate juror was substituted for a regular juror after deliberations had begun. The defendant claimed that his “oral and written consent to the substitution of a juror during

1. N.Y. L.J., Apr. 5, 1994, at 21 (Sup. Ct. Kings County 1994).

2. N.Y. CONST. art. I, § 2. Article I, section 2 provides in pertinent part: Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever A jury trial may be waived by the defendant in all criminal cases . . . by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.

Id.

deliberations was both ineffective” and constitutionally impermissible and, subsequently, moved to vacate his murder conviction.³ The court found that the defendant “knowingly, intelligently and voluntarily consented to the substitution,” thereby lawfully waiving his constitutional right to a jury trial.⁴ Consequently, the court found no constitutional violation and denied the defendant’s action to set aside the conviction.⁵

During the second day of deliberations one juror was unable to continue with the deliberations.⁶ The trial judge gave the defendant three choices: (1) retain the distraught juror; (2) move for a mistrial; or (3) continue deliberations with the remaining eleven jurors.⁷ The defendant refused all three options and asked that an alternate juror, dismissed at the start of deliberations, be recalled to replace the one who was unable to continue.⁸ Despite the trial judge’s warning that the defendant would be bound by the jury’s verdict, and despite the fact that the replacement of the juror was illegal, the defendant maintained his desire for the substitution.⁹

Prior to the 1966 decision in *People v. Ryan*,¹⁰ under the old New York Code of Criminal Procedure,¹¹ an alternate juror was not permitted to replace a regular trial juror.¹² The New York Court of Appeals in *Ryan* changed this rule. Although it was permissible to substitute a juror pre-deliberation, post-deliberation substitution amounted to the addition of a thirteenth

3. *Sanders*, N.Y. L.J., Apr. 5, 1994, at 21.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* Prior to the defendant’s acceptance of the option, the court “explored fully” the defendant’s “understanding and agreement” that he would be bound by the verdict if he exercised the option. *Id.*

10. 19 N.Y.2d 100, 224 N.E.2d 710, 278 N.Y.S.2d 199 (1966).

11. See N.Y. CRIM. PROC. LAW § 270.35 historical note (McKinney 1994); see also *Ryan*, 19 N.Y.2d at 101-02, 224 N.E.2d at 711, 278 N.Y.S.2d at 200-01.

12. *Ryan*, 19 N.Y.2d at 104-05, 224 N.E.2d at 711, 278 N.Y.S.2d at 200-01.

juror¹³ and was, thus, a violation of the defendant's constitutional right to a trial by a jury of twelve.¹⁴ The court explained:

The reason that there is no provision for substitution after the case has been submitted to the jury is that the Advisory Committee felt that, "[i]t is in only rare situations that the procedure could be used, and it is believed that an alternate juror who enters the jury room after deliberation has begun is not fully qualified to render an intelligent verdict, having missed part of the discussion and consideration which makes up the deliberative process."¹⁵

The court of appeals in *Ryan* indicated that a defendant could waive the right to trial by jury of twelve and consent to the substitution of an alternate juror who had been dismissed once the deliberations had begun, though it did not endorse this course of action.¹⁶ In this case of first impression, the court of appeals delineated requirements which must be met in order for a defendant to validly waive his constitutional right to a jury trial.¹⁷ Under the New York State Constitution, a defendant could consent to the substitution of an alternate juror after deliberations had begun if the waiver was made "by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense."¹⁸ The court wanted to ensure that the defendant had voluntarily given his informed consent and waived his constitutional right.¹⁹

13. *Id.* at 104-05, 224 N.E.2d at 713, 278 N.Y.S.2d at 203.

14. *See* N.Y. CONST. art. I, § 2 n.11. This note states that: "The trial by jury to which this section has reference is a trial by common law jury of twelve men." *Id.*

15. *Ryan*, 19 N.Y.2d at 104, 224 N.E.2d at 713, 278 N.Y.S.2d at 203 (quoting Second Preliminary Report of Advisory Committee on Practice and Procedure (N.Y. LEGIS. DOC. 1958 No. 13, at 228)).

16. *Id.* at 105, 224 N.E.2d at 713, 278 N.Y.S.2d at 203-04.

17. *Id.*

18. *Id.* at 104-05, 224 N.E.2d at 712-13, 278 N.Y.S.2d at 202-03. *See* N.Y. CONST. art. 1, § 2.

19. *See Ryan*, 19 N.Y.2d at 100, 224 N.E.2d at 710, 278 N.Y.S.2d at 199.

In *Ryan*, however, the consent was given by the defendant's counsel, not the defendant himself, and therefore did not satisfy the constitutional requirement for a waiver.²⁰ The court found the substitution of an alternate juror for a regular juror who had become ill after the jury had deliberated for five hours violated the defendant's constitutional rights because the defendant himself was not present nor was he consulted.²¹ Consent by the defendant's counsel was deemed to be insufficient notwithstanding the fact that the defendant's counsel had consented to the substitution.²²

The common law rule in *Ryan* was subsequently codified in section 270.35 of the New York Code of Criminal Procedure.²³ It provides that in a criminal case, substitution of an alternate juror, after the jury has begun its deliberations, is a violation of a defendant's fundamental right to a trial by jury. This right is protected under the New York Constitution, absent a lawful waiver by the defendant. Under this statute, a defendant's

20. *Id.* at 106, 224 N.E.2d at 713, 278 N.Y.S.2d at 204. *See People v. Leon*, 28 A.D.2d 912, 282 N.Y.S.2d 301 (2d Dep't 1967) (stating that reversal was required even though substitution of alternate juror was consented to be the defense).

21. *Ryan*, 19 N.Y.2d at 103, 224 N.E.2d at 712, 278 N.Y.S.2d at 202.

22. *Id.* at 105-06, 224 N.E.2d at 713, 278 N.Y.S.2d at 203-04. *See People v. Sosnicki*, 30 A.D.2d 576, 291 N.Y.S.2d 197 (2d Dep't 1968) (holding that "reversible error was committed when alternate juror substituted for a regular juror" after deliberations had begun); *People v. Leon*, 28 A.D.2d 912, 912, 282 N.Y.S.2d 301, 301 (2d Dep't 1967) (concluding that "reversal is also required by . . . *People v. Ryan* prohibiting the substitution of an alternate juror after the original jury has begun its deliberation").

23. N.Y. CRIM. PROC. LAW § 270.35 (McKinney 1994). This section provides in pertinent part:

If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity . . . the court must discharge the juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement. Such consent must be in writing and signed by the defendant in person in open court in the presence of the court.

Id.

consent is required to be written and signed by the defendant himself in the court.

In *People v. Cannady*,²⁴ the Supreme Court, Kings County, held that the “formal procedure” elicited in article I, section 2 of the New York Constitution,²⁵ was “designed to ensure that the defendant’s waiver is made knowingly, voluntarily and intelligently” and “this waiver may not be inferred solely from the defendant’s absence,”²⁶ even though the defendant’s counsel consented to the substitution.²⁷ In other cases, however, courts have focused upon the defendant’s ability to “make a knowledgeable consent to the substitution after the full implication” that consent is brought to their attention,²⁸ rather than the manner in which the consent was given or the waiver was made.²⁹ In *People v. Adamson*,³⁰ the Supreme Court, Queens County, held that a stipulation by both parties’ counsel was invalid consent even though the defendant was present in court.³¹ The court reasoned that the mandatory statutory criteria,³² that the defendant’s consent be made in writing and “accepted after the trial judge determined whether such waiver was knowingly and intelligently made,”³³ was necessary “to demonstrate that there has been a considered consent after

24. 127 Misc. 2d 783, 487 N.Y.S.2d 294 (Sup. Ct. Kings County 1985).

25. N.Y. CONST. art. I, § 2.

26. *Cannady*, 127 Misc. 2d at 783, 785, 487 N.Y.S.2d 294, 297.

27. *See* *People v. Adamson*, 108 Misc. 2d 394, 437 N.Y.S.2d 613 (Sup. Ct. Queens County 1981) (finding that a stipulation by defense counsel did not satisfy the constitutional requirements for waiver).

28. *Id.* at 399, 437 N.Y.S.2d at 616. *See* *People v. Donovan*, 136 Misc. 2d 47, 50, 517 N.Y.S.2d 657, 658 (Sup. Ct. Bronx County 1987) (upholding the defendant’s conviction even though he refused to consent to the substitution because deliberations had just begun).

29. *See* *People v. Page*, 153 Misc. 2d 870, 583 N.Y.S.2d 141 (Sup. Ct. N.Y. County 1992) (holding that the fact that the defendant did not give a written waiver did not invalidate his consent to substitution or warrant reversal of conviction), *aff’d*, 619 N.Y.S.2d 567 (1994).

30. 108 Misc. 2d 394, 400, 437 N.Y.S.2d 613, 617 (Sup. Ct. Queens County 1981).

31. *Id.*

32. N.Y. CRIM. PROC. LAW § 270.35 (McKinney 1994).

33. *Adamson*, 108 Misc. 2d at 400, 437 N.Y.S.2d at 617.

defendant's constitutional rights had been fully explained and understood."³⁴

The Supreme Court, Bronx County, has subsequently questioned the wisdom of the prescribed guidelines elicited in section 270.35 of the New York Code of Criminal Procedure,³⁵ finding that "[t]he linchpin of the 1966 *Ryan* ruling . . . no longer exists."³⁶ The court reasoned that the Federal Rules of Criminal Procedure,³⁷ which were relied upon in the court of appeals' decision in *Ryan*,³⁸ no longer required a defendant's consent to the substitution of an alternate juror after submission of the case for deliberation.³⁹ In *People v. Donovan*,⁴⁰ the court relied on the Second Circuit's decision in *United States v. Hillard*⁴¹ which found no violation of the United States Constitution⁴² by the lack of defendant's consent to the substitution⁴³ and "specifically rejected the argument that a subsequent verdict would have been rendered by a thirteen-man jury."⁴⁴ The court consequently held that under the circumstances of the case,⁴⁵ where the jury had barely begun to deliberate⁴⁶ and deliberations were ordered "to begin anew,"⁴⁷ there was "no violation of the common-law twelve man jury

34. *Id.* See *People v. Barnes*, 58 A.D.2d 608, 608, 395 N.Y.S.2d 232, 232 (2d Dep't 1977) (holding that "substitution without appellant's consent and over his objection of an alternate juror after deliberations had commenced was prejudicial error").

35. N.Y. CRIM. PROC. LAW § 270.35 (McKinney 1994).

36. *People v. Donovan*, 136 Misc. 2d 47, 50, 517 N.Y.S.2d 657, 658 (Sup. Ct. Bronx County 1987)

37. *Id.* at 50, 517 N.Y.S.2d at 658-59.

38. *Ryan*, 19 N.Y.2d at 104, 224 N.E.2d at 712, 278 N.Y.S.2d at 200. "The Federal Rules of Criminal Procedure provide that alternate jurors must be discharged after the case is submitted to the jury." *Id.*

39. *Donovan*, 136 Misc. 2d at 50, 517 N.Y.S.2d at 658-59.

40. 136 Misc. 2d 47, 517 N.Y.S.2d 657 (Sup. Ct. Bronx County 1987)

41. 701 F.2d 1052 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983).

42. *Id.*

43. *Id.*

44. *Id.* at 1057.

45. *Donovan*, 136 Misc. 2d at 51-52, 517 N.Y.S.2d at 659-60.

46. *Id.*

47. *Id.* at 51, 517 N.Y.S.2d at 659.

constitutionally mandated,⁴⁸ no verdict having been rendered, and deliberations . . . having been minimal at most.”⁴⁹

In the 1992 decision *People v. Page*,⁵⁰ the Supreme Court, New York County, emphasized the objectives of the constitutional and statutory provisions over the statutory requirements. The court distinguished the case from *Ryan* and its progeny,⁵¹ rejecting the defendant’s claim that because his consent to the substitution was not given in writing, his conviction should be set aside.⁵² In coming to its conclusion, the court reasoned that “[i]n actuality, the writing requirement for consent to seat the alternate exists to insure that defendant’s consent is ‘knowing, voluntary and intelligent.’”⁵³ Moreover, while the defendant’s consent was not given in writing, in the precedent cases upon which the defendant relied, the consent was given by the defendant’s counsel and not by the defendant himself.⁵⁴ Therefore, the court held that while the defendant’s

48. *Id.*

49. *Id.*

50. 153 Misc. 2d 870, 583 N.Y.S.2d 141 (Sup. Ct. New York County 1992).

51. See *People v. Sosnicki*, 30 A.D.2d 576, 291 N.Y.S. 2d 197 (2d Dep’t 1968) (holding that the substitution of an alternate juror after deliberations began violated defendant’s constitutional right to a trial by jury); *People v. Leon*, 28 A.D.2d 912, 282 N.Y.S.2d 301 (2d Dep’t 1967) (finding that defense counsel’s consent ineffective where substitution of an alternate juror was made after the jury began deliberating); *People v. Cannady*, 127 Misc. 2d 783, 487 N.Y.S.2d 294 (Sup. Ct. Kings County 1985) (explaining that the defendant’s absence precluded a lawful substitution of an alternate juror notwithstanding defense counsel’s consent), *aff’d*, 138 A.D.2d 616, 526 N.Y.S.2d 202 (2d Dep’t 1988); *People v. Adamson*, 108 Misc. 2d 394, 437 N.Y.S.2d 613 (Sup. Ct. Queens County 1981) (holding that the substitution of alternate juror, absent the constitutional requirements of defendant’s consent in writing and in open court violated his constitutional right to a trial by jury).

52. *Page*, 153 Misc. 2d at 871, 583 N.Y.S.2d at 141.

53. *Id.* at 871, 583 N.Y.S.2d at 142.

54. *Id.* at 872, 583 N.Y.S.2d at 142. See *Leon*, 28 A.D.2d 912, 282 N.Y.S.2d 301 (finding reversal required by substitution of a juror after deliberations had begun); *Adamson*, 108 Misc. 2d 394, 437 N.Y.S.2d 613 (holding that despite the fact that defendant was present, stipulation by defendant’s counsel did not constitute a valid waiver).

consent did not meet the statutory directives,⁵⁵ his waiver satisfied the statutory and constitutional objectives because the defendant was directly involved and the court had “sought the defendant’s view personally.”⁵⁶

In applying the statutory and constitutional mandates in *Sanders*, the court found no “constitutional infirmity in the procedure followed.”⁵⁷ Here, the defendant’s consent was given orally and in writing, with the court’s full inquiry into the defendant’s options and the implications of such a waiver with both the defendant and his counsel.⁵⁸ The defendant’s consent was, therefore, found to have been “knowingly, intelligently and voluntarily” given and the waiver valid.⁵⁹ Accordingly, where “the defendant executed such a statutory waiver and stated unequivocally his understanding both of his options and the implications of his decision,” the court found no constitutional violation as a result of the substitution and thereby denied the defendant’s motion to vacate his murder conviction.⁶⁰

55. N.Y. CRIM. PROC. LAW § 270.35.

56. *Page*, 153 Misc. 2d at 872, 583 N.Y.S.2d at 142.

57. *Sanders*, N.Y. L.J., Apr. 5, 1994, at 12.

58. *Id.*

59. *Id.* The court found the waiver valid notwithstanding defense counsel’s advice that the procedures taken in this case may have been unlawful. *Id.*

60. *Id.*