Touro Law Review

Volume 8 | Number 1 Article 12

1991

Confrontation Clause

CONFRONTATION CLAUSE

N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend . . . and be confronted with the witnesses against him.

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .

COURT OF APPEALS

People v. Cintron[34]
(decided January 11, 1990)

A criminal defendant, convicted of attempted rape, attempted sodomy and sexual abuse of a four year old child, contended that his right to confront witnesses as provided under the state[35] and federal[36] constitutions was violated when the trial court permitted the complaining child witness, pursuant to article 65 of the state's Criminal Procedure Law, to testify outside of the physical presence of the defendant.[37] The court of appeals reversed defendant's conviction, holding that while the statute was constitutional on its face, it was unconstitutional as applied to the defendant.[38]

Article 65 of the state's Criminal Procedure Law[39] permits children under the age of twelve, offered as witnesses in criminal proceedings regarding sexual misconduct, the opportunity to testify in a separate "testimonial room" which is detached from the courtroom. The purpose of this statute, according to the state

34. 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990).
35. N.Y. CONST. art. I, § 6.
36. U.S. CONST. amend. VI.
37. *Cintron*, 75 N.Y.2d at 253, 551 N.E.2d at 563, 552 N.Y.S.2d at 70.
38. *Id.* at 266, 551 N.E.2d at 571, 552 N.Y.S.2d at 78.
39. N.Y. CRIM. PROC. LAW §§ 65.00-.30 (McKinney Supp. 1991).

legislature, is to shield the child from severe mental or emotional harm that may accompany testifying in the presence of the defendant and "in the public atmosphere of the courtroom concerning the intimate sexual details of the crime."[40] If a child is permitted to testify in this fashion, the statute provides the use of a live two-way closed-circuit television which allows both the defendant and the child witness to simultaneously view each other,[41] thus purporting to preserve the defendant's constitutional right to confront his or her witnesses.[42]

Before a child is permitted to give transmitted testimony outside of the actual presence of the defendant, the court must make two findings as required by section 65.20(5).[43] First, the court must determine if the child is a "vulnerable witness."[44] To be a vulnerable witness, section 65.10(1)[45] requires the court to determine by clear and convincing evidence that "*as a result of extraordinary circumstances, . . . [the] child . . . will suffer severe mental or emotional harm* if required to testify" in the courtroom and that testifying outside of the courtroom by "live, two-way closed-circuit television . . . will help prevent, or diminish the likelihood . . . of such harm."[46] If this finding is made, the court will permit the child to testify in the testimony room but also allow the criminal defendant and his or her attorney to be present in the same room.[47] Second, if it is found that the child will likely suffer from extreme mental or emotional harm if forced to testify in the presence of the defendant, the court can order the defendant and attorney to be present in the courtroom while the

40. *Cintron*, 75 N.Y.2d at 254, 551 N.E.2d at 564, 552 N.Y.S.2d at 71.

41. *Id.* at 254 n.2, 551 N.E.2d at 564 n.2, 552 N.Y.S.2d at 71 n.2 (citing N.Y. CRIM. PROC. LAW § 65.00(4) (McKinney Supp. 1991)).

42. *Id.* at 254, 551 N.E.2d at 564, 552 N.Y.S.2d at 71.

43. N.Y. CRIM. PROC. LAW § 65.20(5) (McKinney Supp. 1991).

44. *Cintron*, 75 N.Y.2d at 254, 551 N.E.2d at 564, 552 N.Y.S.2d at 71 (citing N.Y. CRIM. PROC. LAW § 65.20(1), (10) (McKinney Supp. 1991)).

45. N.Y. Crim. Proc. Law § 65.10(1) (McKinney Supp. 1991).

46. *Cintron*, 75 N.Y.2d at 254, 551 N.E.2d at 564, 552 N.Y.S.2d at 71 (emphasis in original) (quoting N.Y. CRIM PROC. LAW § 65.10(1) (McKinney Supp. 1991)).

47. *Id.* at 261, 551 N.E.2d at 568, 552 N.Y.S.2d at 75.

child testifies in the testimonial room.[48] Under article 65, either party, or the trial court itself, can move for a declaration that the child witness be permitted to testify by use of the two-way closed-circuit television.[49] This motion can be raised prior to trial[50] or during the trial.[51] If the motion is raised prior to trial, the court is required to hold a hearing to determine whether the child meets the requirements of section 65.20(5). If the motion is raised during trial, according to section 65.20(10), the trial court "may make a determination 'from its own observations' that a witness is suffering severe mental or emotional harm."[52]

In the case at bar, the trial court ruled pursuant to section 65.20(10) that the victim, now five years old, be allowed to testify by live closed-circuit two-way television. The court based its ruling on several observations of the child while testifying before the court. The court observed that she was unable to articulate any verbal responses and found that she could only communicate by shaking her head. The court also noticed that after looking at the defendant, "she was extremely reluctant to take the stand."[53]

At this point during the trial, the court directed that the defendant and jury be excused from the courtroom so that the court could observe the child outside of the defendant's presence. While able to respond to questions, the court noted that she still could not verbalize her responses. After bringing back the defendant and jury, the court directed that the child could testify as an unsworn witness.[54] While testifying, the court noticed that when

48. *Id.* at 261, 551 N.E.2d at 568-59, 552 N.Y.S.2d at 75-76 (citing N.Y. CRIM. PROC. LAW § 65.30(5) (McKinney Supp. 1991)). The court of appeals added that section 65.30(5) directs that the "defendant's counsel must remain in the courtroom unless the court is satisfied that counsel's presence in the testimonial room will not encourage the jury to draw any adverse inference or impede the defendant's ability to communicate freely with his attorney." *Id.*

49. *Id.* at 255, 551 N.E.2d at 565, 552 N.Y.S.2d at 72.

50. *Id.*; *see* N.Y. CRIM. PROC. LAW § 65.20(1) (McKinney Supp. 1991).

51. *Cintron*, 75 N.Y.2d at 255, 551 N.E.2d at 565, 552 N.Y.S.2d at 72; N.Y. CRIM. PROC. LAW § 65.20(10) (McKinney Supp. 1991).

52. *Cintron*, 75 N.Y.2d at 255, 551 N.E.2d at 565, 552 N.Y.S.2d at 72 (quoting N.Y. CRIM. PROC. LAW § 65.20(10) (McKinney Supp. 1991)).

53. *Id.* at 256, 551 N.E.2d at 565, 552 N.Y.S.2d at 72.

54. *Id.*

the prosecutor blocked her view of the defendant, she "became more communicative."[55] When asked by the prosecutor if the defendant scared her, she "no added affirmatively."[56] Additionally, when asked to demonstrate what occurred between the defendant and her by use of anatomically correct dolls, she "remained unresponsive."[57]

At the close of her testimony, the prosecution moved for the court to declare the child a "vulnerable" child witness, thus allowing subsequent testimony to be given by closed-circuit television.[58] Over the defendant's objection, the court granted the motion.

On appeal, the defendant contended that article 65 is facially unconstitutional under both state and federal confrontation provisions, claiming that each provision "permits nothing less than total eye-to-eye confrontation in defendant's physical presence."[59] Alternatively, he contended that if the court of appeals determines that article 65 is constitutional on its face, then the trial judge misapplied its provisions during his trial.

The court of appeals rejected defendant's first contention, holding that article 65 is constitutional on its face.[60] To uphold the constitutionality of the statute, however, the court found that the trial court's determination of vulnerability based upon its subjective observations of the child, as permitted under section 65.20(10), did not provide sufficient evidence to allow infringement of defendant's confrontation rights. The court, therefore, incorporated "the clear and convincing" burden of proof, described in section 65.10(1), as an additional requirement to a trial court's determination of vulnerability when made under

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 256-57, 551 N.E.2d at 566, 552 N.Y.S.2d at 73. Under article 65, both the prosecution and defense can either declare the child a vulnerable witness by formal motion made prior to trial pursuant to section 65.20(1), or both can make such a motion during the trial pursuant to section 65.20(10). N.Y. CRIM. PROC. LAW § 65.20(1), (10) (McKinney Supp. 1991).

59. *Cintron*, 75 N.Y.2d at 257, 551 N.E.2d at 566, 552 N.Y.S.2d at 73.

60. *Id.*

section 65.20(10).[61] In this case, the court of appeals reversed the defendant's conviction and ordered a new trial since the trial court's finding of vulnerability was based solely upon its subjective observations of the child.

The court began its analysis by rejecting defendant's interpretation of *Coy v. Iowa*,[62] a United States Supreme Court case, as conferring upon the criminal defendant unfettered rights to confront his or her witnesses. In that case, the Supreme Court invalidated an Iowa statute, which was similarly enacted to protect the complaining child witness from the trauma of testifying in the presence of a defendant, because its provisions failed to adequately protect the defendant's confrontation rights.[63]

The Supreme Court offered two reasons why the Iowa statute failed to pass constitutional muster. First, the Court found that the defendant's right "to meet face to face all those who appear and give evidence at trial" was abridged because the screen erected between the child witness and defendant, after adjusting the courtroom lights, effectively blocked the defendant's view of the child and totally blocked the child's view of the defendant.[64] Second, the Court held that the state's "legislatively imposed presumption of trauma" placed upon the child witness was not specific enough to further the state's interest of protecting the child from emotional harm, and therefore failed to override the more compelling sixth amendment right.[65] The Court added in dicta, however, that a criminal defendant's confrontation rights were not absolute,[66] proposing that such an infringement could

61. *Id.* at 262-63, 551 N.E.2d at 569-70, 552 N.Y.S.2d at 76-77.

62. 487 U.S. 1012 (1988).

63. *Id.* at 1020.

64. *Id.* at 1015, 1021 (quoting California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

65. *Id.*

66. Justice O'Connor, concurring with the majority, wrote separately to elaborate on her view that a criminal defendant's confrontation rights are not absolute and may give way to the state interest of protecting the child witness from courtroom trauma. *Id.* at 1022 (O'Connor, J., concurring). The Justice further noted that state statutes such as New York's article 65 provision, which permit two-way closed-circuit television, "may raise no substantial Confrontation Clause problem since they involve testimony in the presence of

be constitutionally permissible if enacted by the state to "further an important public policy."[67]

According to the court of appeals, this dicta provided authority that a criminal defendant's confrontation rights could be constitutionally infringed upon. Comparing the two statutes, the court determined that the New York statute did not possess the infirmities found in the Iowa statute and therefore concluded that the former would meet the constraints imposed by *Coy*.[68]

The court noted that article 65 differed from the Iowa statute in two respects. First, article 65 calls for two-way closed-circuit television transmission which allows both the defendant and child witness to see each other as opposed to the Iowa statute, which permitted only the defendant to see a silhouette of the child. Second, the New York provision requires the trial court to make an individualized showing, demonstrated by clear and convincing evidence, that the child witness would likely suffer severe mental or emotional harm.[69] The Iowa statute's method of imputing by law a presumption of child trauma was too arbitrary to permit infringement of the defendant's confrontation rights.

To safeguard against such possibilities, the court of appeals determined that the clear and convincing burden of proof stated in section 65.10(1) must be read into section 65.20(10) so as to adequately protect defendant's confrontation rights. The court found that this standard of proof requires the trial record to show legal proof from which an appellate court could determine whether the trial court's finding of severe mental or emotional harm was supported by clear and convincing evidence.[70] The court noted that this legal proof could come in the form of testimony from either the child's mother, family members, or the child's psychotherapist. The court cautioned, however, that the statute does not require a separate hearing nor expert testimony to

---

the defendant." *Id.* at 1023 (O'Connor, J., concurring).

67. *Id.* at 1021.

68. *Cintron*, 75 N.Y.2d at 258-60, 551 N.E.2d at 567-68, 552 N.Y.S.2d at 74-75.

69. *Id.* at 260, 551 N.E.2d at 568, 552 N.Y.S.2d at 75.

70. *Id.* at 263, 551 N.E.2d at 570, 552 N.Y.S.2d at 77.

determine whether an article 65 order is proper.[71]

In this case, the court determined that the trial court's own factual findings were insufficient to satisfy the clear and convincing standard of proof. According to the court, "[i]ndications that the child was afraid of the defendant and could testify more readily in his absence, while consistent with the likelihood that the child will suffer 'severe mental or emotional harm,' simply do not prove it" by clear and convincing evidence.[72] In *Cintron*, the court of appeals, interpreting *Coy*, found that article 65 satisfied the minimum criteria necessary to pass federal constitutional muster. The defendant in *Cintron*, however, brought both state and federal constitutional claims. As the court did not separately analyze the statute under the state constitution, it may be implied that the statute passes state constitutional muster.

Subsequently, the federal equivalent was recently reinterpreted by the United States Supreme Court in *Maryland v. Craig*.[73] In *Craig*, the Supreme Court held that a Maryland statute which permitted a child witness to testify by one-way closed-circuit television was constitutional. Under this statute, the one-way transmission allows the defendant to see the child witness testify, but does not allow the child to see the defendant. Rather than develop a strict test, the *Craig* Court determined that a case by case analysis was preferable in this area. Because article 65 provides for two-way transmission of the child witness testimony, the statute provides less infringement of the defendant's confrontation rights than the one found constitutional in *Craig*. Until the court of appeals is called upon to decide whether a lesser statutory requirement would pass muster under the state constitution, it is uncertain whether the state constitution itself offers greater protection to the defendant.

Judge Alexander concurred with the majority view that article 65 is constitutional on its face in regard to a defendant's right to confront his or her witnesses. He stated, however, that the majority failed to address the issue of whether article 65

71. *Id.* at 265, 551 N.E.2d at 571, 552 N.Y.S.2d at 78.
72. *Id.* at 266, 551 N.E.2d at 571, 552 N.Y.S.2d at 78.
73. 110 S. Ct. 3157 (1990).

adequately protects the defendant's confrontation rights in regard to allowing the child witness to testify outside of the actual presence of the trier of fact.[74] The judge believed that use of televised testimony unconstitutionally impairs the ability of the jury to properly "assess the demeanor and credibility of a vulnerable child witness."[75]

Judge Alexander, pointing to some of the perception deficiencies that accompany televised testimony, stated that

> [w]hile a television monitor conveys the image of the testifying witness to the jury, the color and sound may not be true, the witness' voice may be distorted, minor background noises may be magnified so as to create significant distractions and other distractions such as the child witness playing with a microphone may result from the procedure itself.[76]

The judge also cautioned that studies have shown that juries have a tendency to find televised testimony to be more credible than that of in court testimony.[77] Lastly, the judge believed that such testimony prohibits the trier of fact from watching a witness' body movements, thus diminishing the ability of the trier of fact to discover subtle gestures which may uncover signs that the witness is not telling the truth.[78] According to the judge, problems associated with televised testimony are violative of defendant's confrontation rights and would therefore render article 65 unconstitutional.[79]

In a dissenting opinion, Judge Bellacosa disagreed with the majority, contending that the trial judge's subjective observations

---

74. *Cintron*, 75 N.Y.2d at 268, 551 N.E.2d at 572, 552 N.Y.S.2d at 79 (Alexander, J., concurring).

75. *Id.* at 268, 551 N.E.2d at 573, 552 N.Y.S.2d at 80 (Alexander, J., concurring).

76. *Id.* at 271, 551 N.E.2d at 575, 552 N.Y.S.2d at 82 (Alexander, J., concurring).

77. *Id.* (Alexander, J., concurring) (citing Hocheiser v. Superior Court, 161 Cal. App. 3d 777, 787, 208 Cal. Rptr. 273, 279 (Cal. App. Dep't Super. Ct. 1984)).

78. *Id.* at 272, 551 N.E.2d at 575, 552 N.Y.S.2d at 82 (Alexander, J., concurring).

79. *Id.* (Alexander, J., concurring).

satisfied the clear and convincing evidence requirement of article 65. He noted that the trial judge is in the best position to document the child witness' psychological state for purposes of determining whether he or she should testify by closed-circuit television. In this case, the judge would have upheld the defendant's conviction, noting that the trial judge documented ample evidence that the child was eligible for article 65 protection.[80]

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Henderson[81]
(decided April 16, 1990)

The defendant, convicted of sodomy in the first degree, sexual abuse in the first degree and endangering the welfare of a child, asserted that her right to confront witnesses as guaranteed under both the state[82] and federal[83] constitutions was violated when the trial judge permitted, pursuant to article 65 of the state's Criminal Procedure Law,[84] two complaining child witnesses to testify by live two-way closed circuit television. While noting that the court of appeals recently held that article 65 contains sufficient safeguards to withstand a facial challenge on confrontation clause grounds, the second department held that as applied to the defendant, it was violative of his confrontation rights.[85]

Prior to defendant's trial, the court, pursuant to section 65.20 of the New York Criminal Procedure Law,[86] granted the prose-

80. *Id*, at 272-76, 551 N.E.2d at 575-78, 552 N.Y.S.2d at 82-85 (Bellacosa, J., dissenting).

81. 156 A.D.2d 92, 554 N.Y.S.2d 924 (2d Dep't), *appeal denied*, 76 N.Y.2d 736, 557 N.E.2d 1194, 558 N.Y.S.2d 898 (1990).

82. N.Y. CONST. art. I, § 6.

83. U.S. CONST. amend. VI.

84. N.Y. CRIM. PROC. LAW §§ 65.00-.30 (McKinney Supp. 1991).

85. *Henderson*, 156 A.D.2d at 97, 554 N.Y.S.2d at 927.

86. N.Y. CRIM. PROC. LAW § 65.20 (McKinney 1982 & Supp. 1991).