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Due Process: People v. Outley

under the Federal Constitution[388] and the New York State Constitution.[389] Both the state and federal due process protections governing ancillary trial proceedings are evaluated by the standard articulated in *Snyder*: whether the defendant's presence will contribute to his defense.[390] The court of appeals noted that there have been occasions in which it has afforded the defendant greater due process rights than those guaranteed by the Federal Constitution.[391] However, under both a state and federal due process analysis, a defendant has no right to attend a proceeding which evaluates the testimonial capacity of a witness.[392]

People v. Outley[393]
(decided February 16, 1993)

In separate actions decided as companion cases, the defendants in *Outley*, *Maietta* and *Ogtong* contested enhanced criminal sentences imposed against them for violating no-arrest conditions in their plea agreements.[394] Defendants claimed that when a defendant denies post-plea criminal conduct, in keeping with the state[395] and federal[396] constitutional requirements of due process, the court must conduct an evidentiary hearing to determine the validity of the defendant's post-plea arrest.[397] The New York

388. 80 N.Y.2d at 457, 606 N.E.2d at 958, 591 N.Y.S.2d at 830.

389. *Id.*

390. *Id.*

391. *See, e.g.*, People v. Antommarchi, 80 N.Y.2d 247, 250, 804 N.E.2d 95, 97, 590 N.Y.S.2d 33, 35 (1992) (stating that a court may conduct side-bar conferences in defendant's absence in order to determine a juror's testimonial capacity but may not look into a potential juror's "ability to weigh the evidence objectively unless defendant is present"); People v. Dokes, 79 N.Y.2d 656, 656, 595 N.E.2d 836, 836, 584 N.Y.S.2d 761, 761.

392. *Morales*, 80 N.Y.2d at 457, 606 N.E.2d at 958, 591 N.Y.S.2d at 830.

393. 80 N.Y.2d 702, 610 N.E.2d 356, 594 N.Y.S.2d 683 (1993).

394. *Id.* at 707, 610 N.E.2d at 358, 594 N.Y.S.2d at 685.

395. N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

396. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

397. *Outley*, 80 N.Y.2d at 712, 610 N.E.2d at 361, 594 N.Y.S.2d at 688.

Court of Appeals held that the inquiry conducted in each case was sufficient for the sentencing court to conclude that there was a legitimate basis for the arrest as a precondition for imposing enhanced sentences.[398]

In *Outley*, the defendant pleaded guilty to charges of sexual abuse.[399] During the plea bargaining stage, the court agreed to sentence the defendant to a period of probation on the condition that the defendant "'not be arrested on any other charges during the adjournment period.'"[400] The transcripts of the plea plainly indicated that the defendant understood this conditional provision and voluntarily accepted it.[401] When the defendant appeared for sentencing six weeks later, it was revealed that he had been arrested on a criminal contempt charge just one month and four days after his original plea hearing.[402] In defense of his arrest, the defendant argued that he lacked the "'requisite criminal intent to defy [the orders] to constitute a criminal contempt.'"[403] Thereafter, the defendant argued that a "hearing was necessary to determine whether it could be shown 'by a preponderance of the evidence that the defendant' had, in fact, 'committ[ed] the crimes' . . . and that without 'an evidentiary hearing' the court lacked the power to impose an enhanced sentence."[404] "After reviewing the unfavorable probation report, the court . . ." increased the defendants' original probation sentence to one year

398. *Id.* at 713, 610 N.E.2d at 361, 594 N.Y.S.2d at 688.

399. *Id.* at 707, 610 N.E.2d at 358, 594 N.Y.S.2d at 685.

400. *Id.* at 707-08, 610 N.E.2d at 358, 594 N.Y.S.2d at 685.

401. *Id.* at 708, 610 N.E.2d at 358, 594 N.Y.S.2d at 685 ("The court stated to defendant: 'If you violate any of these conditions, [the court] will not be bound by my promise, and [the court] will be free to sentence you to whatever the case allows, in this case, up to one year in prison. Do you understand that?' Defendant replied, 'Yes.'").

402. *Id.* (The defendant was arrested on a charge of criminal contempt for violating two court orders "directing him to stay away from his wife and daughter and their residence.").

403. *Id.* ("Defendant explained that . . . his violation of the orders 'was not done with malice', . . . and [that] 'there was no bad intent whatsoever.'").

404. *Id.*

in a rehabilitation center.[405] This ruling was subsequently affirmed by the appellate division.[406]

The facts in the *Maietta* and *Ogtong* cases presented similar circumstances. Essentially, in both cases, the defendants entered guilty pleas on a condition imposed by the trial judge that they not find themselves arrested on any criminal charge prior to the time of their final sentencing hearing.[407] Subsequent to their plea arrangements, each defendant was arrested on a new criminal charge.[408] In both instances, a full evidentiary hearing on the matter was not conducted,[409] and the judge enhanced the sentence that was originally agreed to by the defendant, based upon the defendant's breach of the no-arrest provision of the plea.[410] On appeal, both cases were affirmed by the appellate term.[411]

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405. *Id.* ("Moreover, the court noted, defendant's wife . . . had called the police and . . . had signed a sworn affidavit attesting to the allegations in the criminal contempt complaint, indicating she wanted the Order of Protection enforced.").

406. 173 A.D.2d 17, 578 N.Y.S.2d 529 (1st Dep't 1991).

407. 80 N.Y.2d at 711, 610 N.E.2d at 359-60, 594 N.Y.S.2d at 686-87. In *Maietta*, the defendant pleaded guilty to criminal possession of stolen property in the third degree. *Id* at 709, 610 N.E.2d at 359, 594 N.Y.S.2d at 686. In *Ogtong* the defendant pleaded guilty to criminal possession of a weapon in the third degree. *Id.* at 711, 610 N.E.2d at 360, 594 N.Y.S.2d at 687.

408. *Id.* at 709, 711, 610 N.E.2d at 359, 360 594 N.Y.S.2d at 686, 687. In *Maietta*, the defendant was arrested for burglary between his plea hearing and sentencing hearing. *Id.* at 709, 610 N.E.2d at 359, 594 N.Y.S.2d at 686. In *Ogtong*, the defendant was arrested for criminal possession of a controlled substance in the seventh degree between his plea hearing and sentencing hearing. *Id.* at 711, 610 N.E.2d at 360, 594 N.Y.S.2d at 687.

409. *Id.* at 710-712, 610 N.E.2d at 359-360, 594 N.Y.S.2d at 686-687. In *Maietta*, the defendant attempted to show that although his vehicle was used in the burglary he had nothing to do with it. The *Ogtong* defendant attempted to show that he only possessed a residue amount of cocaine and argued that it was a mere technical violation. *Id.*

410. *Id.* at 709-712, 610 N.E.2d at 359-360, 594 N.Y.S.2d at 686-687. In *Maietta*, the defendant's conditional sentence was increased from imprisonment of four to eight years to 10 to 20 years, and in *Ogtong* the defendant's conditional sentence was increased from five years probation to imprisonment of 1 1/4 to 3 3/4 years. *Id.*

411. *Ogtong*, 185 A.D.2d 253, 586 N.Y.S.2d 19.

At issue in each case before the New York Court of Appeals was whether the minimum requirements of due process were complied with when the defendant, who faced an enhanced sentence stemming from his breach of a no-arrest condition, was denied a full evidentiary hearing to explain his conduct or lack thereof.[412] The court held that when a defendant denies the post-plea criminal conduct, the sentencing court is not required to conduct a full evidentiary hearing "to satisfy itself by a preponderance of the evidence that the defendant has, in fact, committed the crime for which he was arrested."[413] The court noted that "[i]mposing such a requirement would have the effect of changing the condition of the plea bargain from *not being arrested for a crime to not actually committing a crime.*"[414] Furthermore, the court reasoned "that the proposed evidentiary hearing rule, if adopted, would have the undesirable consequence of requiring, in effect, a 'minitrial' of the defendant's guilt or innocence on the new charge."[415] However, the court did not completely dismiss the requirements of due process, rather it required a discretionary hearing for the trial judge in which the inquiry would remain flexible and informal.[416] The court stated that:

> Obviously, the mere fact of the arrest, without more, is not enough. A no-arrest condition could certainly not be held to have been breached by arrests which are malicious or merely baseless. When an issue is raised concerning the validity of the postplea charge or there is a denial of any involvement in the underlying crime, the court must conduct an inquiry at which the defendant has an opportunity to show that the arrest is without foundation. The nature and extent of the inquiry — whether through a summary hearing pursuant to CPL 400.10 or some other fair means — is within the court's discretion. The inquiry must be of

412. 80 N.Y.2d at 712, 610 N.E.2d at 361, 594 N.Y.S.2d at 688.

413. *Id.*

414. *Id.* at 712-13, 610 N.E.2d at 361, 594 N.Y.S.2d at 688 (citations omitted).

415. *Id.* at 713, 610 N.E.2d at 361, 594 N.Y.S.2d at 688 (citing *Maietta*, 173 A.D.2d at 24, 578 N.Y.S.2d 529).

416. *Id.*

> sufficient depth, however, so that the court can be satisfied — not of defendant's guilt of the new criminal charge but of the existence of a legitimate basis for the arrest on that charge.[417]

Ultimately, the court concluded that "the inquiry conducted [in each case] was sufficient so that the sentencing court could be satisfied that there was a legitimate basis for the arrest."[418] In *Outley*, the court held that the sentencing court did not err in finding a legitimate foundation for the new charge.[419] Similarly, in *Maietta*, the court found that the "record establishe[d] a solid factual and legal basis for the postplea arrest . . . ."[420] The court in *Ogtong* held that the record was "sufficient to establish a breach of the no-arrest condition . . . [t]he sentencing court afforded defendant an adequate opportunity to explain the circumstances of the arrest."[421]

Thus, the New York courts have found that due process does not require a full evidentiary hearing when a defendant faces an enhanced sentence for allegedly breaching a no-arrest condition. For example, in *New York v. Harrison*,[422] the defendant asserted that "his due process rights were violated because the court gave improper consideration to extraneous crimes in imposing his sentence."[423] The court, however, found the defendant's claim to be baseless, stating that "[a] sentencing court may properly consider a defendant's subsequent arrests, especially where the court expressly conditioned its earlier sentencing promise on defendant's good conduct."[424]

Similarly, in *New York v. Kihm*,[425] the defendant claimed that the imposition of "an enhanced sentence because of a mere accusation is violative of the due process."[426] The court,

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417. *Id.* (citations omitted).
418. *Id.* at 713, 610 N.E.2d at 361, 594 N.Y.S.2d at 688.
419. *Id.* at 713-14, 610 N.E.2d at 361, 594 N.Y.S.2d at 688.
420. *Id.* at 714, 610 N.E.2d at 361, 594 N.Y.S.2d at 688.
421. *Id.* at 714, 610 N.E.2d at 362, 594 N.Y.S.2d at 689.
422. 161 A.D.2d 550, 556 N.Y.S.2d 54 (1st Dep't 1990).
423. *Id.* at 551, 556 N.Y.S.2d at 55.
424. *Id.*
425. 143 A.D.2d 199, 532 N.Y.S.2d 11 (2d Dep't 1988).
426. *Id.*

however, found that "before the enhanced sentence was imposed, the defendant was afforded the opportunity to deny or explain his arrest . . . which due process requires."[427] The court reasoned that when the defendant was given the opportunity to explain his situation, he "came forward with no information casting doubt on the fact of his arrest . . . so as to warrant further or more formal inquiry."[428]

The New York courts have, however, remanded cases on appeal from enhanced sentences with a no-arrest condition when it was found that the defendant may actually have had a justifiable excuse for his arrest, thereby putting his alleged breach of the no-arrest condition in doubt. For instance, in *New York v. Banks*[429] the defendant was arrested subsequent to his plea.[430] The defendant asserted that there was an explanation for his arrest.[431] However, the lower court disregarded the defendant's explanation and gave the defendant a more serious sentence.[432] In this appeal, the court found that the trial court "deprived [the] defendant of his right to a meaningful opportunity to refute the single, aggravating factor which influenced the court in increasing defendant's punishment."[433] Indeed, the court pointed out that "[o]ffenses committed by a defendant, even those for which he has not been convicted, may properly be submitted to the court as factors to be considered in imposing sentence."[434]

427. *Id.* at 199, 532 N.Y.S.2d at 11-12 (citations omitted).

428. *Id.* at 199, 532 N.Y.S.2d at 12 (citations omitted).

429. 161 A.D.2d 957, 557 N.Y.S.2d 529 (3d Dep't 1990).

430. *Id.* at 957, 557 N.Y.S.2d at 530. The defendant pled guilty to two counts of burglary and was arrested for criminal possession of stolen property in the fourth degree prior to his sentencing hearing. *Id.* at 957-58, 557 N.Y.S.2d at 530.

431. *Id.* at 958, 557 N.Y.S.2d at 530. The defendant asserted that he was merely a passenger in a stolen vehicle, that the vehicle was stolen by someone other than himself, and that he had no knowledge that the vehicle was stolen. *Id.*

432. *Id.*

433. *Id.* at 958, 557 N.Y.S.2d at 531.

434. *Id.* (citation omitted).

In *New York v. Faulkner*[435] the defendant pleaded guilty to attempted sale of a controlled substance.[436] In exchange he received a youthful offender status and a shorter sentence which was conditioned on not being arrested before his sentencing hearing.[437] At his sentencing hearing, it was revealed that he had been arrested.[438] The defendant argued that he was completely innocent of the charge.[439] However, the trial court entirely disregarded the defendant's argument, denied him youthful offender status and imposed a harsher sentence than what was part of the original agreement.[440] In this appeal, the court vacated the trial court's sentence and ruled that "[w]hen [the] defendant disputed the validity of the subsequent arrest and criminal charge, [the trial] [c]ourt should have afforded him the opportunity to refute the subsequent charge at a presentence conference."[441]

The United States Court of Appeals for the Second Circuit has ruled consistently with the New York standard regarding due process requirements for sentencing. In *Innes v. Dalsheim*,[442] the court overturned the defendant's enhanced sentence.[443] However, it did not do so because the defendant was deprived of an evidentiary hearing in order to determine the validity of the arrest.[444] Rather, the sentence was vacated because it was found

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435. 182 A.D.2d 1025, 583 N.Y.S.2d 542 (3d Dep't 1992).

436. *Id.* at 1025, 583 N.Y.S.2d at 543.

437. *Id.* The defendant "pleaded guilty to attempted criminal sale of a controlled substance in the third degree pursuant to an agreement that he would be granted youthful offender treatment and sentenced to a prison term of 1-3 years." *Id.*

438. *Id.* at 1026, 583 N.Y.S.2d 543. The "defendant had been arrested and indicted for criminal sale of a controlled substance in the second degree." *Id.*

439. *Id.*

440. *Id.*

441. *Id.* (citation omitted).

442. 864 F.2d 974 (2d Cir. 1988).

443. *Id.* at 980. The defendant was originally charged with robbery and was arrested again for robbery subsequent to entering a conditional plea. *Id.* at 975. The plea was contingent upon not being arrested between his plea and sentencing hearings. *Id.*

444. *Id.* at 980.

that "[u]nder [the] plea agreement, it [could not] safely be said that Innes voluntarily, knowingly and intelligently waived his right to a jury trial."[445] Because of this, the court explained, "whatever waiver [defendant] agreed to was without adequate knowledge of the consequences flowing from his breach of the plea agreement."[446] Therefore, the defendant was denied his due process protections.[447]

Additionally, in *United States v. Lee*[448] the Second Circuit stated that "a district court judge's discretion when imposing sentence is 'largely unlimited either as to the kind of information that he may consider, or the source from which it may come.'"[449] The court explained that "[d]ue process is violated when the information on which the defendant is sentenced is 'materially untrue' or is, in fact, 'misinformation.'"[450] The court noted that a sentencing court is required to insure that the information that it uses in fixing the punishment is "reliable and accurate."[451] Ultimately, the court held that "the district court is under no duty to conduct a full-blown evidentiary hearing in each instance where information in a pre-sentence report is challenged. Nor does the convicted defendant have an absolute right to demand that kind of hearing."[452]

In sum, both New York and Federal law are in accord by asserting that the constitutional guarantee of due process does not mandate that a defendant who enters a plea bargain, which is conditional upon a no-arrest provision, must absolutely receive a full evidentiary hearing for an alleged breach of the condition before the sentence can be enhanced. Rather, due process only requires that the defendant have a reasonable opportunity to be

445. *Id.*

446. *Id.*

447. *Id.*

448. 818 F.2d 1052 (2d Cir. 1987). The defendant was the leader of a Chinese gang that was charged with various RICO violations. *Id.* at 1053.

449. *Id.* at 1055 (citing United States v. Tucker, 404 U.S. 443 (1972)).

450. *Id.* (citing Townsend v. Burke, 334 U.S. 736 (1948)).

451. *Id.*

452. *Id.* at 1056. The court was satisfied that the district court afforded the defendant a full opportunity to rebut the government's allegations. *Id.*

heard. Only when the defendant raises a truly reasonable suspicion as to the validity of the subsequent arrest must a more formal inquiry take place. Whereas, if the defendant offers either no excuse or no reasonable explanation for his subsequent arrest, an evidentiary hearing into the matter is not required.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Hope v. Perales[453]
(decided March 23, 1993)

Plaintiffs, who included "income-eligible women, physicians and various health care organizations,"[454] claimed that the New York State Prenatal Care Assistance Program[455] (hereinafter PCAP) is violative of the New York State Constitution because it does not include financial assistance for "medically necessary abortions" for similarly situated women eligible under PCAP provisions.[456] Plaintiffs, seeking declaratory and injunctive relief,[457] contended that the "funding scheme"[458] violated their

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453. 189 A.D.2d 287, 595 N.Y.S.2d 948 (1st Dep't 1993) (per curiam).

454. *Id.* at 290, 595 N.Y.S.2d at 949.

455. N.Y. PUB. HEALTH LAW §§ 2520-29 (McKinney 1993). An "eligible service recipient" is defined under § 2521 as:

> [A] pregnant, low-income woman, who is not otherwise eligible for medical assistance and whose income is one hundred eighty-five percent or less of the comparable federal income official poverty line . . . . Pregnant women eligible pursuant to this subdivision shall continue to be eligible for assistance, without regard to any change in income of the families of which they are members, through the end of the month in which a sixty day period which begins on the last day their pregnancies shall end.

Id.

456. *Hope*, 189 A.D.2d at 291, 595 N.Y.S.2d at 950.

457. *Id.* at 290, 595 N.Y.S.2d at 949.

458. *Id.* at 291, 595 N.Y.S.2d at 950. PCAP's funding scheme is set forth in Chapter 584 and § 2522 of the New York Public Health Law, which provides: