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Right to Be Present

RIGHT TO BE PRESENT

N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him.

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and . . . to be confronted with the witnesses against him . . . .

COURT OF APPEALS

People v. Velasco[816]
(decided April 4, 1991)

A criminal defendant claimed that his right to be present under the state[817] and federal[818] constitutions was violated because he was not present at all material stages of his criminal proceeding. The defendant was absent from a precharge conference, a side-bar *voir dire*, and a conference in the robing room where counsel advised the court of their peremptory challenges and their challenges for cause.[819]

The court of appeals held that the defendant was not constitutionally required to be present at the precharge conference, attended by counsel for both sides, as it involved only questions of law or procedure.[820] The court also held that the defendant was not constitutionally required to be present at the side-bar *voir dire*

816. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).
817. N.Y. CONST. art. I, § 6.
818. U.S. CONST. amend. VI.
819. *Velasco*, 77 N.Y.2d at 472, 510 N.E.2d at 1071, 568 N.Y.S.2d at 722.
820. *Id.*

because "the determination that a prospective juror was disqualified before voir dire was a matter for the court and [the] defendant had no . . . constitutional right to personally participate in the discussions leading to the court's ruling."[821] Lastly, the court held that the defendant's constitutional right to be present at the impaneling of the jury was not violated by his exclusion from the robing room conference because "[t]he in-chambers discussion was a mere preliminary advisement of the court of challenges later effectuated in open court in the presence of [the] defendant and thus did not constitute a material part of the trial."[822]

The defendant, Velasco, was convicted of first degree manslaughter resulting from an altercation in which he fatally stabbed Raymond Nelson with a "Ninja" knife.[823] At the precharge conference, which was conducted in the court's robing room without the defendant present,[824] the parties discussed a stipulation regarding medical records, scheduling of the remainder of the trial and the court's charge to the jury. Additionally, the court denied a motion to dismiss the murder charge but granted a motion to dismiss a weapons charge.[825]

The trial court, prior to the formal *voir dire*, asked the prospective jurors a series of questions, in the presence of the defendant, "designed to search out matters which might lead to disqualification . . . ."[826] Jurors wishing to respond were directed to approach the bench where further inquiry was conducted between the court and juror in the presence of counsel

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821. *Id.* at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

822. *Id.* at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723; *see also* People v. Dokes, 570 N.Y.S.2d 357 (2d Dep't 1991), *appeal granted*, 78 N.Y.2d 1075, 583 N.E.2d 950, 577 N.Y.S.2d 238 (1991); *cf.* People v. Ramos, 173 A.D.2d 748, 570 N.Y.S.2d 247 (2d Dep't) (requiring that a defendant have a meaningful opportunity to participate in the critical stage of determining the ultimate composition of the jury), *appeal denied*, 78 N.Y.2d 1080, 583 N.E.2d 955, 577 N.Y.S.2d 243 (1991).

823. *Velasco*, 77 N.Y.2d at 471-72, 570 N.E.2d at 1071, 568 N.Y.S.2d 722.

824. *Id.* at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

825. *Id.*

826. *Id.* at 472-73, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

for both sides. However, the defendant and the remaining *venire* were excluded from these discussions. As a result of these conferences, some prospective jurors were excused while others were returned to the jury box for *voir dire*.[827]

During the impaneling of the jury, a conference was held in the robing room where counsel advised the court of their peremptory challenges and advanced the legal basis for their challenges for cause. Although the defendant was not present during the conference in the robing room, he had an opportunity to consult with his attorney before the challenges were made.[828] Additionally, the *voir dire* itself was held in open court as were formal challenges.

The court stated that while the defendant had a right to be present during the court's charge to the jury, the summations of counsel, and the impaneling of the jury, "[h]is presence is required only where his absence would have a substantial effect on his ability to defend."[829] The court further noted that due process only requires the defendant's presence at his trial "'to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'"[830]

With regard to the precharge conference held in the court's robing room, the court noted that "[t]he conference involved only questions of law or procedure and defendant's presence was not required."[831] The court downplayed the defendant's absence from the side-bar *voir dire* because "[h]e was present during the intitial questioning of the jurors and represented by counsel dur-

827. *Id.* at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

828. *Id.* at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723.

829. *Id.* at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722; *see also* People v. Mullen, 44 N.Y.2d 1, 4-5, 374 N.E.2d 369, 370, 403 N.Y.S.2d 470, 472 (1978) (court delineated the scope of a criminal defendant's constitutional right to be present during the trial of an indictment to include attendance at the jury impaneling, the introduction of evidence, counsels' summations, the jury charge and during additional instructions to the jury in the course of deliberation).

830. *Velasco*, 77 N.Y.2d at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722 (quoting Snyder v. Massachusetts, 291 U.S. 97, 108 (1934)).

831. *Id.*

ing the discussions at the bench."[832] Therefore, the court concluded that the "defendant's presence at the bench conference would have been 'useless, or the benefit but a shadow.'"[833] Lastly, the court again relied on the fact that the defendant had counsel available to protect his rights while absent from a conference in the robing room wherein "counsel advised the court of their peremptory challenges and challenges for cause."[834]

Federal law in this area is governed by *Snyder v. Massachusetts*.[835] The *Snyder* decision stands for the propostion that due process requires the presence of the defendant if "[i]t bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend."[836] However, the Court's assumption that a defendant has the right "to be present in his own person"[837] is not guaranteed in instances where the privilege would be illusory."[838] Furthermore, the Court noted that a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing offends some principle of justice . . . ."[839] The Court further acknowledged that while the "defense *may be made easier* if the accused is permitted to be present at the examination of the jurors or the summing up of counsel[,]"[840] it leaves the door open for the court to use its discretion.[841] Thus, the defendant is only "guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his

832. *Id.* at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

833. *Id.* at 473, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23 (quoting *Snyder*, 291 U.S. at 106-07).

834. *Id.* at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723.

835. 291 U.S. 97 (1934).

836. *Id.* at 106.

837. *Id.* at 105.

838. *Id.* at 106-07.

839. *Id.* at 105.

840. *Id.* at 106

841. The *Snyder* Court noted that "[m]any motions before trial are heard in the defendant's absence." *Id.* at 107. Furthermore, the Court noted that confusion will result if the Court fails to "mark the distinction between requirements in respect of presence that have their source in the common law, and requirements that have their source . . . in the federal constitution." *Id.*

presence would contribute to the fairness of the procedure."[842]

The New York courts have regularly followed *Snyder* when determining whether the defendant's right to be present has been violated. In *People v. Rodriguez*,[843] the court held that a discussion between the trial judge and defendant's counsel regarding the charge to the jury, which took place outside the jury's presence, did not violate his right to be present because the discussion "did not effect (sic) his ability to defend himself against the charges in any way . . . ."[844] Similarly, in *People ex rel. Lupo v. Fay*,[845] the court argued that the defendant's right to be present throughout trial "must be kept within limits of common sense and reason."[846] The court held that the defendant's presence was not required when his counsel argued a motion for mistrial because "[i]t is not literally true that after indictment nothing may validly be done in the defendant's absence . . . . There is no such requirement in decisions or by custom or tradition."[847]

Thus, under both the state and federal constitutions a criminal defendant's right to be present at all stages of his trial is not fully guaranteed, but is dependent upon whether or not the stage is material to the trial and whether his presence is needed in his defense.

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842. Kentucky v. Stincer, 482 U.S. 730, 745 (1987); *see also* United States v. Gordon, 829 F.2d 119, 123 (D.C. Cir. 1987).

843. 76 N.Y.2d 918, 564 N.E.2d 658, 563 N.Y.S.2d 48 (1990).

844. *Id.* at 921, 564 N.E.2d at 659, 563 N.Y.S.2d at 49; *see also Dokes*, 570 N.Y.S.2d at 358.

845. 13 N.Y.2d 253, 196 N.E.2d 56, 246 N.Y.S.2d 399 (1963), *cert. denied*, 376 U.S. 958 (1964).

846. *Id.* at 256, 196 N.E.2d at 58, 246 N.Y.S.2d at 401.

847. *Id.*; *see also* People v. Mullen, 44 N.Y.2d 1, 5, 374 N.E.2d 369, 371, 403 N.Y.S.2d 470, 472 (1978) (literal application of mandate requiring presence of a criminal defendant at trial is not demanded); People v. Ferguson, 67 N.Y.2d 383, 390, 494 N.E.2d 77, 81, 502 N.Y.S.2d 972, 976 (1986) ("[A] defendant who has a lawyer relegates control of much of the case to the lawyer except as to certain fundamental decisions reserved to the client."); *Ramos*, 173 A.D.2d at 749, 570 N.Y.S.2d at 248 (2d Dep't 1991) (defendant's right to be present does not extend to every discussion between counsel and court, and particularly not to discussions relating to jury empanelment or the exercise of challenges).