



1992

Right to Be Present

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Procedure Commons](#), [Fourteenth Amendment Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

(1992) "Right to Be Present," *Touro Law Review*. Vol. 8: No. 3, Article 48.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss3/48>

This New York State Constitutional Decisions is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

spective state and federal constitutional guarantees afforded the defendant.

People v. Ortega⁹³⁴
(decided July 12, 1991)

A criminal defendant contended that his right to be present with counsel under the federal⁹³⁵ and state⁹³⁶ constitutions, as well as his state statutory rights, were violated when the court held an in chamber conference with the prosecution's key witness absent the defendant and all counsel.⁹³⁷ The appellate division held that the trial court's *ex parte* conference with Officer Fritzen, a key witness for the prosecution, violated the defendant's right to be present with counsel at all important stages of the trial.⁹³⁸ The court stated that since the defendant's guilt or innocence was at issue, "the decision whether [an] informant's identity should be disclosed must not be resolved in an *ex parte* proceeding."⁹³⁹

The defendant, Ortega, was convicted by a jury, of second and third degree criminal sale of a controlled substance as well as two counts of possession of a controlled substance in the third degree. The conviction resulted from a sale of cocaine to an undercover police officer introduced to the defendant by a confidential informant. During the trial, the defendant's repeated requests for disclosure of the informant's identity were denied. Upon cross-examination by defense counsel, police officer Fritzen, chief witness for the prosecution, refused to disclose the identity of the informant who accompanied him when he purchased the cocaine from the defendant. The court, in an attempt to resolve the issue, conducted an *in camera* conference in chambers with Officer Fritzen without the knowledge or consent of either side. Again, Fritzen refused to identify the informant. Subsequently, the court

934. 572 N.Y.S.2d 241 (4th Dep't), *aff'd*, 78 N.Y.2d 1101, 585 N.E.2d 372, 578 N.Y.S.2d 123 (1991).

935. U.S. CONST. amend. VI.

936. N.Y. CONST. art. I, § 6.

937. *Ortega*, 572 N.Y.S.2d at 242.

938. *Id.* The court's holding was based on *People v. Insogna*, 28 A.D.2d 771, 773, 281 N.Y.S.2d 124, 128 (3d Dep't 1967).

939. *Ortega*, 572 N.Y.S.2d at 242 .

placed on record that the purpose of the conference was to inform Fritzen of a potential *Goggins*⁹⁴⁰ problem and to persuade Fritzen to disclose the informant's identity. Consequently, the trial court concluded that the informant's identity did not require disclosure.⁹⁴¹

The fourth department, in a brief decision,⁹⁴² agreed with the defendant's argument that his due process rights were violated. The majority, invoking *Goggins*, reasoned that "[w]hen the defendant's guilt or innocence is at issue, the decision whether the informant's identity should be disclosed must not be resolved in an *ex parte* proceeding."⁹⁴³

The dissent noted that the majority did not fault the trial court's determination that the informant's identity need not be disclosed. As such, the dissent disagreed with the majority that the defendant's due process right to be present with counsel at all material stages of the trial had been violated.⁹⁴⁴ Instead, the dissent argued that in order for the defendant to show his right to be present was violated, he had to show that the "ex parte discussion was a 'critical stage' of trial, and the defendant's absence therefrom had a 'substantial effect on his ability to defend.'"⁹⁴⁵ Additionally, the dissent argued that the *Goggins* rule was

940. *People v. Goggins*, 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied*, 419 U.S. 1012 (1974). The court of appeals stated that the decision regarding the informant's identity should not be resolved in an *ex parte* proceeding, because it would "arguably trifle with the constitutional right to confrontation and the right to counsel." *Id.* at 169, 313 N.E.2d at 44, 356 N.Y.S.2d at 575.

941. *Ortega*, 572 N.Y.S.2d at 242 (Denman and Boomer, J.J., dissenting). The trial court's decision was apparently based on the reliability of Officer Fritzen's testimony identifying the defendant as the seller of the cocaine. *Id.*

942. The vote was 3-2, with Justices Callahan, Balio and Lowery in the majority and Justices Denman and Boomer dissenting. *Id.*

943. *Id.*

944. *Id.* The dissent likened the defendant's position in the present case to that of the defendant in *Goggins*. In *Goggins* the court concluded that the identity of the informant need not be disclosed because proof of the defendant's identification was not assailed. *Goggins*, 34 N.Y.2d at 168, 313 N.E.2d at 43, 356 N.Y.S.2d at 574.

945. *Ortega*, 572 N.Y.S.2d at 242 (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

inapplicable in this instance as the trial court did not base its decision on anything that transpired during the *ex parte* conference with Officer Fritzen.⁹⁴⁶

Lastly, the dissent argued that had the defendant's rights been violated by the trial court's conduct, it was not reversible error. The dissent reasoned that the *ex parte* conference "did not relate to the substance of the witness's testimony, did not concern defendant's guilt or innocence and did not relate to the court's determination that the case did not present a *Goggins* problem."⁹⁴⁷

Federal case law in this area is governed by *Snyder v. Massachusetts*.⁹⁴⁸ In *Snyder*, the United States Supreme Court stated that a defendant has a right under the Fourteenth Amendment "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."⁹⁴⁹ However, the Court cautioned that this privilege is not guaranteed when "the privilege of presence . . . would be useless, or the benefit but a shadow."⁹⁵⁰ Instead, the defendant's due process rights concerning presence are conditioned "to the extent that a fair and just hearing would be thwarted by his absence"⁹⁵¹ In sum, the defendant's right to be present at any stage of the criminal proceeding is guaranteed only to the extent that it is "critical to its outcome if his presence would contribute to the fairness of the procedure."⁹⁵²

The New York decisions are consistent with the federal courts on the issue of defendant's right to be present at a criminal pro-

946. *Id.* at 242-43 (Denman and Boomer, J.J., dissenting). The *Goggins* rule states "that 'the decision as to whether the informant's identity should be disclosed must not be resolved in an *ex parte* proceeding'" *Id.* (Denman and Boomer, J.J., dissenting) (quoting *People v. Goggins*, 34 N.Y.2d 163, 168, 313 N.E.2d 41, 44, 356 N.Y.S.2d 571, 575, *cert. denied*, 419 U.S. 1012 (1974)).

947. *Id.* at 243 (Denman and Boomer, J.J., dissenting).

948. 291 U.S. 97 (1934).

949. *Id.* at 105-06.

950. *Id.* at 106-07.

951. *Id.* at 107-08.

952. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

ceeding. The court of appeals has regularly cited *Snyder* when determining whether the defendant's right to be present has been violated.⁹⁵³ The defendant does not have an unequivocal right to be present at all stages of the trial.⁹⁵⁴ Instead, the court of appeals has recognized that while the "defendant has the right to be present, with counsel, at all material stages of the trial,"⁹⁵⁵ its "literal application . . . is not demanded."⁹⁵⁶

Therefore, it appears that under both the federal and state constitutions a criminal defendant's right to be present is contingent upon whether his absence will have a substantial effect on his ability to defend himself.

953. See *People v. Velasco*, 77 N.Y.2d 469, 472, 570 N.E.2d 1070, 1071, 568 N.Y.S.2d 721, 722 (1991); *People v. Rodriguez*, 76 N.Y.2d 918, 921, 564 N.E.2d 658, 659, 563 N.Y.S.2d 48, 49 (1990); *People v. Mullen*, 44 N.Y.2d 1, 4-5, 374 N.E.2d 369, 370-71, 403 N.Y.S.2d 470, 472 (1978).

954. *Rodriguez*, 76 N.Y.2d at 921, 564 N.E.2d at 659, 563 N.Y.S.2d at 49.

955. *People v. Cain*, 76 N.Y.2d 119, 123, 556 N.E.2d 141, 143, 556 N.Y.S.2d 848, 850 (1990).

956. See *Mullen*, 44 N.Y.2d at 5, 374 N.E.2d at 371, 403 N.Y.S.2d at 472 ("Common sense dictates that substantial performance of its terms is sufficient.") *Id.*