



1992

Right to Be Present

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SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Ramos⁸⁵³
(decided May 28, 1991)

A criminal defendant, convicted of second degree robbery and second degree assault, asserted that his right to be present during material stages of his trial under both the state⁸⁵⁴ and federal⁸⁵⁵ constitutions was violated when a trial judge permitted the defense attorney and prosecutor to exercise peremptory challenges and challenges for cause outside the defendant's presence.⁸⁵⁶ The court held that the exercise of such challenges without the defendant present did not violate defendant's right to be present.⁸⁵⁷

During *voir dire*, the trial judge stated his preference for taking each attorney's challenges for cause and peremptory challenges in the judge's robing room rather than in the courtroom. The trial judge explained:

I am not concerned so much with the defendant. I am concerned

concluded that the informant's identity did not require disclosure. *Id.*

853. 173 A.D.2d 748, 570 N.Y.S.2d 247 (2d Dep't), *appeal denied*, 78 N.Y.2d 1080, 583 N.E.2d 955, 577 N.Y.S.2d 243 (1991).

854. N.Y. CONST. art I, § 6.

855. U.S. CONST. amend. VI.

856. *Ramos*, 173 A.D.2d at 748, 570 N.Y.S.2d at 248. The defendant further contended that the trial judge's procedure was violative of § 260.20 of New York State's Criminal Procedure Law. This section provides:

A defendant must be personally present during the trial of an indictment; provided, however, that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct.

N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1982). The appellate division, however, did not provide any separate analysis of this alleged statutory violation.

857. *Ramos*, 173 A.D.2d at 749-50, 570 N.Y.S.2d at 249.

with the jury. I find that it is more expedient to take it inside. Here at the side bar looking over at the panel you might prejudice yourselves and you don't want to be — the jury shouldn't know which of you have challenged a potential juror.⁸⁵⁸

Both attorneys consented to this procedure and the challenges were taken in the judge's robing room.

In rejecting the defendant's claim, the court followed the recent New York Court of Appeals decision in *People v. Velasco*,⁸⁵⁹ and stated that the criminal "defendant's right to be present does not extend . . . to every discussion between counsel and the court simply because it takes place during and pertains to the impaneling of the jury and the exercise of challenges."⁸⁶⁰ The appellate division added that "[w]hat is required is that a defendant have meaningful opportunity to participate in the critical stage of determining the ultimate composition of the jury."⁸⁶¹ In *Ramos*, the court found that the defendant's rights were adequately protected because he had an opportunity to consult with his attorney during the *voir dire* and after the jury was impaneled.⁸⁶²

The court's holding squarely followed the court of appeals' decision in *Velasco*, which held that a criminal defendant's right to be present does not extend to every discussion between his or her counsel and the trial judge during the *voir dire*.⁸⁶³ Accordingly, the defendant's claim that he had a right to be present during a conference in the judge's robing room was rejected. The court did not provide a separate analysis for the state and federal claims.⁸⁶⁴

858. *Id.* at 749, 570 N.Y.S.2d at 248.

859. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).

860. *Ramos*, 173 A.D.2d at 749, 570 N.Y.S.2d at 248 (citing *Velasco*, 77 N.Y.2d at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723).

861. *Id.* at 749, 570 N.Y.S.2d at 249.

862. *Id.* at 749, 570 N.Y.S.2d at 248.

863. *Velasco*, 77 N.Y.2d at 472-73, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

864. *Ramos*, 173 A.D.2d at 749-50, 570 N.Y.S.2d at 248-49. For analysis of a criminal defendant's right to be present during the impaneling of the jury under the state and federal constitutions, see *Velasco*, 77 N.Y.2d at 469, 570 N.E.2d at 1070, 568 N.Y.S.2d at 721.