



1992

Trial by Jury

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People v. Webb¹³⁷⁸
 (decided October 15, 1991)

A criminal defendant was convicted, by a jury, of multiple sex crimes. At defendant's trial, jurors were permitted to go home overnight during deliberations. The defendant claimed that it was error for the trial court to allow him to waive the mandatory sequestration requirement of Criminal Procedure Law (CPL) section 310.10.¹³⁷⁹ The court of appeals held that the statutory sequestration requirement does not create a fundamental right so integral to the trial proceeding that it can never be waived by the defendant.¹³⁸⁰ Although the defendant did not explicitly assert any violation of his constitutional rights, this decision nevertheless impacts the right to a jury trial guaranteed by article I, section 2 of the New York State Constitution. The court of appeals reasoned that the mandatory sequestration requirement is merely a creature of statute that does not involve either constitutionally based or common law rights.¹³⁸¹

After the jury was charged and retired to deliberate, the court, the defendant and defense counsel discussed in open court the possibility of allowing the jurors to go home for the night if they did not reach a verdict by 4:50 P.M.¹³⁸² After consulting with his attorney, the defendant agreed to let the jury go home

1378. 78 N.Y.2d 335, 581 N.E.2d 509, 575 N.Y.S.2d 656 (1991).

1379. *Id.* at 339, 581 N.E.2d at 510, 575 N.Y.S.2d at 657. Section 310.10 of the New York Criminal Procedure Law states:

Following the court's charges, the jury must retire to deliberate upon its verdict in a place outside the courtroom. It must be provided with suitable accommodations therefore and must be continuously kept together under the supervision of a court officer or court officers. In the event such court officer or court officers are not available, the jury shall be under the supervision of an appropriate public servant or public servants. Except when so authorized by the court or when performing administrative duties with respect to the jurors, such court officers or public servants, as the case may be, may not speak to or communicate with them or permit any other person to do so.

N.Y. CRIM. PROC. LAW § 310.10 (McKinney 1982).

1380. *Webb*, 78 N.Y.2d at 336, 581 N.E.2d at 509, 575 N.Y.S.2d at 656.

1381. *Id.* at 339-40, 581 N.E.2d at 511, 575 N.Y.S.2d at 658.

1382. *Id.* at 337, 581 N.E.2d at 509, 575 N.Y.S.2d at 656.

overnight and expressly agreed, on the record, to waive CPL section 310.10.¹³⁸³ The following day, the jury convicted the defendant.

On appeal to the appellate division, fourth department, the defendant claimed that it was error to permit the jurors to go home overnight during deliberations. The appellate division reversed the conviction and ordered a new trial.¹³⁸⁴ The prosecution was then granted leave to appeal.

The court of appeals reversed the appellate division and reinstated the guilty verdict.¹³⁸⁵ The court of appeals noted that in *People v. Coons*,¹³⁸⁶ the case upon which the defendant had relied in his appeal to the fourth department, the issue of the waiveability of the statutory sequestration requirement had *not* been decided.¹³⁸⁷ According to the court of appeals, in *Webb*,

1383. *Id.* at 337, 581 N.E.2d at 510, 575 N.Y.S.2d at 656-57.

1384. *Id.* at 338, 581 N.E.2d at 510, 575 N.Y.S.2d at 657.

1385. *Id.*

1386. 75 N.Y.2d 796, 551 N.E.2d 587, 552 N.Y.S.2d 94 (1990).

1387. *Webb*, 78 N.Y.2d at 338, 581 N.E.2d at 510, 575 N.Y.S.2d at 657.

Some appellate division courts interpreted *Coons* to suggest that the mandatory sequestration requirement of CPL § 310.10 could *not* be waived. In *People v. D'Alvia*, 171 A.D.2d 96, 105, 575 N.Y.S.2d 495, 501 (2d Dep't), *appeal denied*, 78 N.Y.2d 1075, 583 N.E.2d 950, 577 N.Y.S.2d 238 (1991), the appellate court included a discussion of this broader reading of *Coons*. *D'Alvia*, however, decided two weeks prior to the court of appeals' decision in *Webb*, was similar to that decision. The *D'Alvia* court held that CPL § 310.10 could be waived by a criminal defendant. The court found that sequestration was not a guaranteed right protected by the right to a jury trial in criminal cases under either the New York State or Federal Constitution. *Id.* at 105-06, 575 N.Y.S.2d at 501-02. *D'Alvia* discussed a 1976 third department decision which held that CPL § 310.10 could be waived by a criminal defendant if the defendant was not prejudiced. *Id.* at 105, 575 N.Y.S.2d at 501 (citing *People v. Silvernail*, 55 A.D.2d 72, 75, 389 N.Y.S.2d 641, 643 (3d Dep't 1976)). However, after *Coons* "the Third Department implicitly found that *Silvernail* was no longer viable precedent based on its interpretation of *Coons* as holding that a violation of CPL § 310.10 could not be waived." *Id.* (citations omitted). Two other fourth department cases, decided the same day as *People v. Webb*, 161 A.D.2d 1167 (4th Dep't 1990), *rev'd*, 78 N.Y.2d 335, 581 N.E.2d 509, 575 N.Y.S.2d 656 (1991), also relied on this interpretation of *Coons*. See *People v. Smith*, 161 A.D.2d 1160, 556 N.Y.S.2d 420 (4th Dep't), *appeal denied*, 76 N.Y.2d 865, 561 N.E.2d 905, 560 N.Y.S.2d 1005 (1990); *People*

the decision in *Coons* merely held that the court's failure to comply with CPL section 310.10, by allowing jurors to return overnight during deliberations, could be reviewed on appeal although the defendant did not object at trial.¹³⁸⁸ The court of appeals did agree that here, as in *Coons*, the defendant's failure to object at trial to the court's non-compliance with the sequestration requirement of CPL section 310.10 did not preclude appellate review.¹³⁸⁹

In *Webb*, the court of appeals rejected the defendant's argument in regard to the relationship between preservation and waiver. The defendant argued that because the sequestration requirement of CPL section 310.10 had "been held to be sufficiently linked to the mode of proceedings so as not to require preservation,"¹³⁹⁰ this also meant that the requirement could not be waived.¹³⁹¹ According to the court of appeals, relying on *People v. Ahmed*,¹³⁹² the concepts of preservation and waiver are two distinct concepts, although they are "often 'inextricably intertwined.'"¹³⁹³ In discussing *Ahmed*, the *Webb* court stated that the presence and active participation of the judge was "an integral component of the common-law right to trial by jury, a fundamental right which could not be waived by the defendant except in compliance with the strict statutory terms . . . mandated by the State Constitution" ¹³⁹⁴

v. Dasher, 161 A.D.2d 1207, 556 N.Y.S.2d 422 (4th Dep't), *appeal denied*, 76 N.Y.2d 855, 561 N.E.2d 894, 560 N.Y.S.2d 994 (1990). *D'Alvia* expressly rejected the third department's interpretation of *Coons*. *D'Alvia*, 171 A.D.2d at 105, 575 N.Y.S.2d at 501. The court of appeals, in *Webb*, agreed that *Coons* should *not* be broadly construed as deciding the waiver issue, but did not mention these prior cases.

1388. *Webb*, 78 N.Y.2d at 338, 581 N.E.2d at 510, 575 N.Y.S.2d at 657.

1389. *Id.*

1390. *Id.* at 339, 581 N.E.2d at 510, 575 N.Y.S.2d at 657.

1391. *Id.*

1392. 66 N.Y.2d 307, 487 N.E.2d 894, 496 N.Y.S.2d 984 (1985).

1393. *Webb*, 78 N.Y.2d at 339, 581 N.E.2d at 511, 575 N.Y.S.2d at 658 (quoting *Ahmed*, 66 N.Y.2d at 311, 487 N.E.2d at 896, 496 N.Y.S.2d at 986; *People v. Michael*, 48 N.Y.2d 1, 5 n.1, 394 N.E.2d 1134, 1135 n.1, 420 N.Y.S.2d 371, 372 n.1 (1979)).

1394. *Id.*

The court distinguished *Webb* from *Ahmed*, stating that *Ahmed* implicated a “defendant’s common-law and constitutionally based right to a jury trial.”¹³⁹⁵ In *Webb*, however, the court noted that jury sequestration is completely a creature of statute, and does not “reflect [an] established common-law right of the defendant.”¹³⁹⁶ According to the court, CPL section 310.10 “does not relate to the actual trial proceeding.”¹³⁹⁷ In *Webb*, the court took the view that when, as here, the particular circumstances do not suggest a need for jury sequestration during deliberations, it is within the court’s discretion.¹³⁹⁸

The *Webb* court stated that this less than stringent view of mandatory jury sequestration is in accord with the federal view.¹³⁹⁹ The court referred to *United States v. Arciniega*¹⁴⁰⁰ and *United States v. Acuff*.¹⁴⁰¹ These cases reflect the majority view in federal courts that jury sequestration, after submission of the case to the jury, is within the sound discretion of the judge, and that absent a showing of prejudice to the defendant, lack of sequestration is not reversible error.¹⁴⁰² Unlike New York, in

1395. *Id.*

1396. *Id.* at 339-40, 581 N.E.2d at 511, 575 N.Y.S.2d at 658. In *Webb*, the court found that jury sequestration does not implicate any common-law rights implicitly stating that jury sequestration is not part of the constitutional right to a jury trial in criminal cases under article 1, section 2 of the New York State Constitution. In *Ahmed*, the court explained that article 1, section 2 has been interpreted as guaranteeing the right to trial by jury *as it existed at common-law*. *Ahmed*, 66 N.Y.2d at 311, 487 N.E.2d at 896, 496 N.Y.S.2d at 986. In addition, the court in *Webb* indicated that at common law, sequestration was not for the purpose of protecting the defendant’s rights but to force the jury to make a decision. *Webb*, 78 N.Y.2d at 340, 581 N.E.2d at 511, 575 N.Y.S.2d at 658.

1397. *Webb*, 78 N.Y.2d at 340, 581 N.E.2d at 511, 575 N.Y.S.2d at 658.

1398. *Id.* at 339-40, 581 N.E.2d at 511, 575 N.Y.S.2d at 657-58. Provided, however, that the criminal defendant has properly waived his right. *Id.*

1399. *Id.* at 340, 581 N.E.2d at 511, 575 N.Y.S.2d at 658.

1400. 574 F.2d 931 (7th Cir.), *cert. denied*, 437 U.S. 908 (1978).

1401. 410 F.2d 463 (6th Cir.), *cert. denied*, 396 U.S. 830 (1969).

1402. *Id.* at 466-67; *Arciniega*, 574 F.2d at 933. In federal court, the judge has the discretion during the trial and deliberations to sequester the jury. In New York, the Criminal Procedure Law gives the judge such discretion “from the time the jurors are sworn to the time they retire to deliberate upon the verdict” N.Y. CRIM. PROC. LAW § 270.45 (McKinney 1982).

federal courts, jury sequestration has no statutory predicate requiring sequestration during jury deliberations. Therefore, the trial judge may decline to sequester the jury without the defendant's consent.¹⁴⁰³ As in New York, it appears that there is no right to sequester the jury that is constitutionally guaranteed under the Federal Constitution.¹⁴⁰⁴ Under New York law, based on *Webb*, the defendant is given more protection than under federal law because a proper waiver of CPL section 310.10 is required before sequestration is denied.

SUPREME COURT, APPELLATE DIVISION

FOURTH DEPARTMENT

In re DES Market Share Litigation¹⁴⁰⁵ (decided November 15, 1991)

The plaintiffs, children who sustained injuries caused by their mothers' ingestion during pregnancy of the drug diethylstilbestrol (DES), claimed that an order denying a trial by jury on the issue of "market share"¹⁴⁰⁶ violated their right to a jury trial pursuant to the New York State Constitution.¹⁴⁰⁷ The court held that because this was an action for money damages for personal injuries that raised an "issue of fact" and was a request for "legal relief,"¹⁴⁰⁸ the New York State Constitution¹⁴⁰⁹ required a jury trial.¹⁴¹⁰

1403. See *Powell v. Spalding*, 679 F.2d 163, 166 n.3 (9th Cir. 1982).

1404. *Id.* (citing *Young v. Alabama*, 443 F.2d 854, 856 (5th Cir. 1971), *cert. denied*, 405 U.S. 976 (1972)).

1405. 171 A.D.2d 352, 578 N.Y.S.2d 63 (4th Dep't 1991), *aff'd*, No. 87, 1992 WL 60498 (N.Y. Apr. 1, 1992).

1406. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 511-12, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied*, *Rexall Drug Co. v. Tigue*, 493 U.S. 944 (1989).

1407. *DES*, 171 A.D.2d at 354, 578 N.Y.S.2d at 64; N.Y. CONST. art. I, § 2.

1408. N.Y. CIV. PRAC. L. & R. § 4101(1) (McKinney 1963).

1409. N.Y. CONST. art. I, § 2.

1410. *DES*, 171 A.D.2d at 356, 578 N.Y.S.2d at 66.