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Trial by Jury

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SUPREME COURT, APPELLATE DIVISION FOURTH DEPARTMENT

People v. Finkle[1]
(decided June 18, 1999)

Following a bench trial, defendant Brian Finkle was "convicted of vehicular manslaughter in the second degree, three counts of assault in the third degree and various Vehicle and Traffic Law offenses."[2] The Appellate Division reversed Finkle's conviction after finding his "waiver of a jury trial" to be ineffective.[3] The appellate court contends defendant's waiver was invalid under New York Criminal Procedure Law, Section 320.10(1)[4] because it was executed one week after the close of trial and not before trial as the statute requires.[5] In addition, the Appellate Division found the waiver ineffective under both Article I § 2 of the New York State Constitution[6] and Criminal Procedure Law, Section 320.10(2)[7] because it was unclear whether Finkle signed the written waiver in "open court."[8] Consequently, the Appellate

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[1] 692 N.Y.S.2d 265 (4th Dep't), *appeal dismissed,* 692 N.Y.S.2d 636 (1999).

[2] *Id.* at 266.

[3] *Id.*

[4] N.Y. CRIM. PROC. LAW § 320.10(1) (McKinney 1995). This statute provides in pertinent part: "Except where the indictment charges the crime of murder in the first degree, the defendant, . . . may at any time before trial waive a jury trial . . .." *Id.*

[5] People v. Finkle, 692 N.Y.S.2d at 266.

[6] N.Y. CONST. art. I, § 2. This section provides in pertinent part:

> A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by written instrument signed by defendant in person in open court before and with the approval of the judge or justice of a court having jurisdiction to try the offense.
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> *Id.*

[7] N.Y. CRIM. PROC. LAW § 320.10(2) (McKinney 1995). This statute provides in pertinent part: "Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court." *Id.*

[8] *Finkle,* 692 N.Y.S.2d at 266.

Division held that a waiver analysis is not suitable based on the facts at issue and concluded instead that the entire bench trial violated both the New York Constitution and the Criminal Procedure Law, as it took place without a "valid and effective written waiver" executed by the defendant.[9]

During jury selection, the defendant, his attorney, and the Prosecution met with the trial judge in his chambers.[10] At that time, defense counsel indicated to the judge that he discussed both the right to a trial by jury and the option to proceed with trial on a non-jury basis with his client.[11] As a result, counsel indicated the defendant agreed with his recommendation to waive a jury trial under the circumstances of the case.[12] The trial court then advised defendant of his right to have his case tried by "twelve citizens of the County."[13] Defendant in turn indicated he was aware of this right but was prepared to give it up.[14] Finkle assured the trial court that was in fact his request, the court than accepted his oral waiver, and the trial proceeded.[15] At the conclusion of proof, the case "was adjourned for one week" pending the court's verdict.[16] When the parties returned to hear the verdict, the court indicated it had neglected to obtain defendant's written waiver of jury trial and asked defendant and counsel if they were executing a nunc pro tunc[17] at that time.[18] Defense counsel answered in the affirmative

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[9] *Id.*

[10] *Id.* at 267 (Pigott, Jr., J., dissenting).

[11] *Id.*

[12] Finkle, 692 N.Y.S.2d at 266. Defendant, whose blood alcohol content was 0.15, was involved in an automobile accident after attempting to pass the vehicle traveling in front of him. As a result of the accident, one person was killed and three others were injured. *Id.* at 266.

[13] *Id.* at 267 (Pigott, Jr., J., dissenting).

[14] *Id.* The judge asked the defendant whether he was requesting that the judge "sit as the ultimate determiner of guilt or innocence" in the matter. The defendant responded, "Yes, Your Honor." *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 268. BLACK'S LAW DICTIONARY defines nunc pro tunc as, "now for then, or in other words, a thing is done now, which shall have same legal force and effect as if done at a time when it ought to have been done." BLACK'S LAW DICTIONARY 737 (6th ed. 1991).

and handed a written jury waiver up to the court.[19] The trial court then executed the waiver, accepted it, and rendered its final verdict.[20]

The Appellate Division, in following *People v. Page*,[21] concluded that waiver of a jury trial must be accompanied by "a written instrument signed by defendant in open court before the trial judge," because that is what the New York Constitution expressly demands.[22] In reliance on this statement, the Appellate Division argued the same must be said regarding the New York State Constitution's implication, and the Criminal Procedure Law's clear requirement, that defendant's "written waiver must be executed 'before trial.'"[23]

However, the dissenting justice took a different approach to the circumstances. Although the dissent agreed in part with the majority opinion, J. Pigott, Jr. disagreed that the posttrial waiver was invalid.[24] In the dissent's view, after consulting his attorney the defendant clearly indicated his desire to waive a jury trial and have the court sit as the ultimate determiner of fact and arbiter of guilt or innocence.[25] Consequently, in the dissent's view, the record clearly supported the conclusion that Finkle knowingly,

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[18] *Finkle* at 268 (Pigott, Jr., J., dissenting).

[19] *Id.*

[20] *Id.*

[21] 88 N.Y.2d 1, 665 N.E.2d 1041, 643 N.Y.S.2d 1 (Ct. App. 1996). The court held the "unambiguous language and history of the constitutional waiver provision lead inescapably to the conclusion the waiver of the right to jury trial procured other than 'by the defendant in person in open court' is invalid." *Id.* at 10.

[22] *Finkle,* 692 N.Y.S.2d at 267 (relying on People v. Page, 88 N.Y.2d 1, 9, 665 N.E.2d 1041,1045-46, 643 N.Y.S.2d 1, 5-6 (Ct. App. 1996)).

[23] *Id.* at 267.

[24] *Id.* at 268. The dissenting judge, J. Pigott, Jr., agreed that the defendant's oral waiver of a jury trial in chambers was not effective. However, in Judge Pigott's view, since the defendant voluntarily signed the written waiver and did not move for a mistrial or object to the procedure in which it was obtained, the defendant effectively "waived any objection that the procedure failed to conform to statutory requirements." *Id.*

[25] *Id.* at 267 (4th Dep't 1999) (Pigott, Jr., J., dissenting).

voluntarily, and intelligently waived his right to a jury trial.[26] At the end of proof defendant was informed his original oral waiver was ineffective and chose at that time to execute a written waiver.[27] By this action, the dissent argues, the defendant "ratified the procedure utilized by the court and waived any claim that the procedure was defective."[28] The dissent also noted that although the majority found it was unclear whether the waiver was signed in open court, defendant failed to pursue this argument in his brief and therefore, the argument was deemed abandoned.[29]

The framers of the State Constitution specifically required a written, signed instrument in Article I, § 2, in order to ensure that a criminal defendant fully understands the implications and significance of giving up the fundamental right to a trial by jury.[30] According to the New York Court of Appeals in *People v. Page*,[31] the members of the 1938 Constitutional Convention[32] proposed the current requirement that a waiver must be in writing in the presence of the court as a protection of the rights of defendants.[33] Highlighting the importance of such requirements, the Convention members pointed out that a defendant, out of human habit, will think twice before putting his name to a piece of paper documenting he has waived one of his greatest rights.[34] Thus, the

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[26] *Id.* at 268. The dissenting judge points out that defendant was represented by counsel throughout the proceedings, that defendant indicated his desire to waive a jury trial, and finally that defendant executed the waiver after being informed that his original waiver was ineffective. *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* (relying on Ciesinski v. Town of Aurora, 202 A.D.2d 984, 609 N.Y.S. 745 (4th Dep't 1994) for the proposition that appellate courts will not consider new theories or issues on appeal, if proof might have been offered to refute or overcome those theories had they been presented in the first instance at trial).

[30] People v. Page, 88 N.Y.2d 6, 10, 665 N.E.2d 1041, 1046, 643 N.Y.S.2d 1, 6 (Ct. App. 1996).

[31] *Id.*

[32] *See id.* at 6. It was at the 1938 convention that the State Constitution was amended to adopt the current requirement that waiver of jury trial be a written instrument signed by defendant in open court before and with the approval of the court. *Id.*

[33] *Id.*

[34] *See* 2 Revised Record of 1938 NY State Constitutional Convention.

history of the written waiver provision establishes that the requirement of a signed, written waiver is critical to ensuring the defendant has knowingly, intelligently, and voluntarily waived one of the greatest rights a citizen has, the right to a trial by jury.[35]

Both the *Page* and *Finkle* courts express the importance of vigilantly enforcing the rights that are guarded and protected by the express provisions of the State Constitution, impressing that such provisions should not be disregarded lightly.[36] In accordance with this belief, the *Finkle* court stated that defendant's written waiver received by the trial court "one week after trial" did not constitute a waiver executed in "open court."[37] In addition, the trial court had not warned the defendant of the consequences of such waiver, nor had it informed defendant of his "absolute right to a mistrial and a retrial" by jury.[38] Therefore, the Appellate Division in *Finkle* reasoned that to uphold a waiver made without warning or inquiry by the court one week after the close of trial, just before rendering of the verdict, would result in an "intolerable relaxation" of the Constitutional and statutory requirements.[39]

In contrast, the Federal Constitution does not recognize the right of criminal defendants to have their case tried before a judge alone.[40] The framers of the Federal Constitution gave little indication of their intention behind Article III, § 2, which states that the "Trial of all Crimes shall . . . be by jury."[41] In addition, permitting defendants to choose their mode of trial was not widespread at the time the Federal Constitution was written, nor did any defendant claim to have such a right in any known case immediately following its adoption.[42] Certainly, if the framers of

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[35] *See id.*

[36] *See Page*, 88 N.Y.2d at 9, 665 N.E.2d at 1046, 643 N.Y.S.2d at 6; *Finkle*, 692 N.Y.S.2d at 267.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 267.

[40] *See* Singer v. United States, 380 U.S. 24 (1965).

[41] U.S. CONST. art. III, § 2, cl. 3. This section provides in pertinent part: "The Trial of all Crimes, except in Cases of Impeachment; shall be by jury." *Id.*

[42] *Singer*, 380 U.S. at 31. The *Singer* court traces the history of the right to a jury trial from English common law, to the U.S. colonies, where waiver existed in isolation, through the Constitutional Convention, adoption of the Constitution,

the Constitution intended to give the accused the option to waive a jury trial, it is difficult to understand why they did not draft the text to provide such an option.[43]

However, in the 1930 case *Patton v. United States,*[44] the U.S. Supreme Court was presented with the issue of whether a federal criminal defendant has the right to waive a trial by jury.[45] Choosing its language carefully, the U.S. Supreme Court in *Patton* dispelled any notion that a defendant had an absolute right to demand a trial before a judge alone.[46] Nevertheless, the U.S. Supreme Court took the position that a defendant charged with a federal crime may forego the Constitutional right to a trial by jury, as long as it is done with the defendant's express and intelligent consent, the consent of government counsel, and the approval of the court under responsible judgment.[47]

Returning to *Singer v. United States,*[48] the Supreme Court noted its awareness that the states have adopted several procedures to waive a jury trial in state criminal cases.[49] Furthermore, the framers of the Federal Rules of Criminal Procedure (F. R. Crim.P.) were also aware of these alternatives when they presented F. R. Crim.P Rule 23(a) to the court.[50] The Court has promulgated the rule and Congress has adopted it.[51]

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and finally the first U.S. Supreme Court case to decide the right to trial by jury was a right the accused could choose to waive. *Id.* at 27-34.

[43] *See* U.S. CONST. art. III § 2, cl. 3, *supra* at note 41 and accompanying text; *see also* U.S. CONST. amend. VI. The *Singer* court stated: "Indeed, if there had been recognition of such a right, it would be difficult to understand why Article III and the Sixth Amendment were not drafted in terms which recognized [such] an option." *Singer,* 380 U.S. at 31.

[44] 281 U.S. 276 (1930).

[45] *Id.* at 268.

[46] *See* Patton v. United States, 281 U.S. 276, 312–13 (1930).

[47] *Id.*

[48] 380 U.S. 24 (1965).

[49] *Id.* at 36-7. The Court points out that some states have made waiver contingent on approval by the prosecutor, others, while not giving the prosecutors a voice, have made court approval a prerequisite and still others have made the question of waiver one solely for the defendants informed decision. *Id.*

[50] *Singer,* 380 U.S. at 37. *See* FED. R. CRIM. P. 23(a). The rule states in pertinent part: "Cases required to be tried by jury shall be so tried unless the

In upholding the validity of F. R. Crim.P Rule 23(a), the U.S. Supreme Court stressed the importance of the Government's role, in cases where it feels a conviction is warranted, to assure the accused is tried in the forum the framers of the Constitution believed would produce the fairest result, trial by jury.[52] Therefore, the Court has come to recognize the right of an accused to waive a trial by jury as long as the government's attorney consents and the court approves.

The Federal Constitution does not expressly provide citizens with the option to waive the right to trial by jury. In contrast, the New York State Constitution clearly provides a defendant with that option. However, the U.S. Supreme Court has interpreted the Federal Constitution to provide a defendant, charged with a federal crime, the opportunity to waive the right to trial by jury. As noted, both the State and Federal Governments passed legislation intended to safeguard a defendant who chooses to waive such a fundamental right. In addition, both Federal and State law require such waiver to be in writing and approved by the court. However, federal law requires that a court's approval of a waiver must be accompanied by the consent of the government attorney, but the New York Constitution does not. Finally, although New York law clearly requires that the defendant sign such waiver in open court, it appears a federal defendant does not have to do so for the waiver to be accepted. In sum, although both federal and state laws allow

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defendant waives a jury trial in writing with the approval of the court and consent of the government." *Id.*

[51] *See Singer*, 380 U.S. at 37.

[52] *Id.* at 37. The Court expressed that:

> [t]he government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.' It was in light of this concept of the role of the prosecutor that rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver.
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> *Id.*

a defendant to waive the right to trial by jury, the requirements to do so are quite different.

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