Touro Law Review

Volume 12
Number 3 *New York State constitutional Decisions: 1995 Compilation*

Article 46

1996

Right to Counsel

People v. Joseph[122]
(decided December 22, 1994)

The defendant claimed that his right to counsel under both the State[123] and Federal[124] Constitutions was violated when he was forbidden to discuss his testimony with counsel over a weekend recess.[125] The court of appeals affirmed the decision of the Appellate Division, Second Department, reversed the conviction and ordered a new trial[126] because the length of prohibition prevented the defendant from discussing trial events which covered the "heart of his defense."[127]

Defendant was convicted of assault in the first degree because during an altercation with his former spouse, he burned her with acid.[128] The defendant testified about the incident at trial because he also sustained burns and there was an issue as to whether he was the initial aggressor.[129] The trial testimony started on a Friday afternoon and when the court adjourned for the weekend, the defendant was directed not to speak with his counsel about his testimony.[130] However, the court did permit him to speak with counsel about all trial matters other than his testimony.[131] Subsequent to the conviction, the appellate division held the trial court's prohibition of attorney-client communications about the ongoing testimony during the weekend recess violative of the

122. 84 N.Y.2d 995, 646 N.E.2d 807, 622 N.Y.S.2d 505 (1994).

123. N.Y. CONST. art. I, § 6. This section provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ." *Id.*

124. U.S. CONST. amends. VI, XIV. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." *Id.* The Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment; *see* Gideon v. Wainwright, 372 U.S. 335 (1963).

125. *Joseph*, 84 N.Y.2d at 996, 646 N.E.2d. at 807, 622 N.Y.S.2d at 505.

126. *Id.* at 996, 646 N.E.2d at 808, 622 N.Y.S.2d at 506.

127. *Id.* at 998, 646 N.E.2d at 809, 622 N.Y.S.2d at 507.

128. *Id.* at 996, 646 N.E.2d at 808, 622 N.Y.S.2d at 506.

129. *Id.*

130. *Id.*

131. *Id.*

constitutional right to counsel and reversed the conviction, ordering a new trial.[132]

Despite the fact that the court of appeals did not cite to the seminal case of *Strickland v. Washington*,[133] it nevertheless set out sufficient United States Supreme Court precedent to support its decision to affirm the appellate division.

The first Supreme Court case cited by the *Joseph* court was *Powell v. Alabama*.[134] In *Powell*, the defendants were each accused of rape and each received the death penalty after a one day trial.[135] The defendants were not afforded counsel at their arraignments and their appointed counsel was not ready for trial or even familiar with Alabama Rules of Criminal Procedure.[136] The *Powell* court held that the failure of the state to give the defendants reasonable time and opportunity to obtain counsel was a denial of due process of law in violation of the Fourteenth Amendment.[137] In light of the foregoing, the Supreme Court stated that for the right to counsel to be meaningful it "requires the guiding hand of counsel at every step in the proceedings."[138]

In addition, in *Geders v. United States*,[139] the Court held that a seventeen hour prohibition of attorney-client contact during an overnight recess was violative of the Sixth Amendment right to counsel.[140] The Court viewed the length of time involved as far too long to ban all communications between attorney and client.[141] It was also stated that there are other options a trial

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132. People v. Joseph, 198 A.D.2d 437, 438, 605 N.Y.S.2d 911, 912 (2d Dep't 1993) (stating that unlike a brief recess, it cannot be presumed that a defendant would spend an entire weekend discussing ongoing testimony with her attorney, although some discussion is likely).

133. 466 U.S. 668 (1984).

134. 287 U.S. 45 (1932).

135. *Id.* at 55.

136. *Id.*

137. *Id.* at 71.

138. *Id.* at 69.

139. 425 U.S. 80 (1976).

140. *Id.* at 88.

141. *Id.* The court stated that "[i]t is the common practice during such recesses for an accused and counsel to discuss the events of the day's trial.

judge could use to prevent the improper "coaching" of witnesses short of a ban on all communication.[142] For example, the trial judge has the discretion to change the order of witnesses and can postpone the lunch hour or evening recess should either be necessary to preserve the "integrity of the trial."[143] Furthermore, in *Brooks v. Tennessee*,[144] the Court held that should a conflict arise between the defendant's right to counsel and the prosecution's wish to cross-examine the defendant without testimonial influence of other witnesses, such conflict must be resolved in favor of the right of counsel.[145]

Moreover, in *Gideon v. Wainwright*,[146] the Sixth Amendment right to counsel in felony cases was held applicable to the states through the Fourteenth Amendment.[147] In *Gideon*, the state of Florida refused to supply counsel for an indigent's defense of a felony charge.[148] As a result, the defendant represented himself *pro se* was convicted, and received a five year prison sentence.[149] In addition, the Court in *Argersinger v. Hamlin*,[150] held that the rule espoused *Gideon* applies to defendants in any trial where imprisonment may be imposed.[151]

However, the right to counsel is not without limitations. In *Perry v. Leeke*,[152] the Supreme Court held that an order prohibiting the defendant from speaking with anyone, including his attorney, immediately at the end of defendant's testimony or during a fifteen minute recess did not violate the Sixth

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Such recesses are often times of intensive work . . . . The lawyer may need to obtain information made relevant by the day's testimony . . . ." *Id.*

142. *Id.* at 89.

143. *Id.* at 91.

144. 406 U.S. 605 (1972).

145. *Id.* at 611.

146. 372 U.S. 335 (1963).

147. *Id.* at 343.

148. *Id.* at 337.

149. *Id.*

150. 407 U.S. 25 (1972).

151. *Id.* at 40. The Court rejected Florida's rule which only supplied counsel to indigents if the potential imprisonment exceeded six months. *Id.*

152. 488 U.S. 272 (1989).

Amendment right to counsel.[153] The Court's concern was not primarily that the attorney would violate ethics regulations and "coach" the testimony, but rather that there was the danger that even if the attorney ethically assisted a defendant during the break period, it would impair the discovery of the truth by helping the defendant regain his "poise and sense of strategy."[154] The Court reasoned that even with the assumption that there was no deceit on the part of the witness, it would interfere with effective cross-examination, which is designed to "punch holes in a witness's testimony at just the right time, in just the right way."[155] Thus, in the federal system, there is a continuum which holds that absolute speaking bans, for long periods of time are unconstitutional but bans, for shorter periods (i.e., for recesses such as lunch), are acceptable.

In *People v. Blount*,[156] the Appellate Division, Second Department, indicated that it would follow the federal rule regarding attorney-client communications during recesses. The court in *Blount* held that the trial court violated the defendant's right to assistance of counsel when it prohibited the defendant from discussing testimony with his attorney during an overnight recess during cross examination.[157] Similarly, in *People v. Hagen*,[158] the court held that the trial court's instruction to the defendant not to discuss "her testimony in any manner, shape, or form"[159] during an overnight recess violated the defendant's right to counsel.[160] Both of the above mentioned cases rely on the Supreme Court decisions in *Perry*, and *Geders* as a guide in

153. *Id.* at 280.

154. *Id.* at 282.

155. *Id.* The court stated that it was appropriately within the trial judge's discretion to determine whether cross-examination would be more truthful by prohibiting discussion between the witness and third parties during a brief recess, even if the witness was the defendant. *Id.* at 282-84.

156. 159 A.D.2d 579, 552 N.Y.S.2d 441 (2d Dep't 1990).

157. *Id.* at 579-80, 552 N.Y.S.2d at 441-42.

158. 86 A.D.2d 617, 446 N.Y.S.2d 91 (2d Dep't 1990).

159. *Id.* at 618, 446 N.Y.S.2d at 91.

160. *Id.*

determining the constitutionality of a prohibition of communication between attorney and client.

Conversely, in *People v. Enrique*,[161] the defendant was denied all access to counsel during a two hour recess for lunch, taken before his testimony was completed.[162] The two hour prohibition was upheld as being constitutional by the court of appeals, which found that the decision whether to allow a defendant access to counsel, during such a limited time period, was a matter within the discretion of the trial court.[163] In *Enrique*, the defendant argued that New York should adopt a broader standard under article I, section 6 of the New York State Constitution.[164] than the federal interpretation based on *Geders* and *Perry*.[165] It was urged that counsel should be allowed to communicate with a client on any subject at any point during a trial, regardless of whether the defendant is in the midst of testimony.[166] The *Enrique* court stated that there was no convincing reason asserted by the defendant as to why New York should expand its rule beyond the federal standard.[167] Thus, the broader standard was rejected, with the court noting that there was never a difference in interpretation between the state and federal rights in question, and that all of the New York cases in this area used federal law in their decision making process and never "even hinted that the state rule might differ from the federal."[168] Therefore, the New York and federal view in this area are similar in their application.

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161. 80 N.Y.2d 869, 600 N.E.2d. 229, 587 N.Y.S.2d 598 (1992).

162. *Id.* at 870, 600 N.E.2d at 229, 587 N.Y.S.2d at 598.

163. *Id.* (affirming the order of the appellate division, 165 A.D.2d 13, 22, 566 N.Y.S.2d 201, 207 (1st Dep't 1991)).

164. *See supra* note 123.

165. 165 A.D.2d at 21, 566 N.Y.S.2d at 206.

166. *Id.*

167. *Id.*

168. *Id. See also* People v. Enrique, 80 N.Y.2d 869, 600 N.E.2d 229, 587 N.Y.S.2d 598 (1992). The lone dissenter, Judge Kaye (now Chief Judge) stated that both federal and state law had been violated in this instance, and that the right to counsel under New York's Constitution afforded broader protections than the federal, but she did not offer any caselaw to support these positions. *Id.* (Kaye, J., dissenting). In fact, the caselaw in New York