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## Right to Be Present

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People v. Dokes<sup>1279</sup>  
(decided June 11, 1992)

The defendant appealed his criminal conviction on the grounds that the trial court conducted a *Sandoval*<sup>1280</sup> hearing in his absence and thus his right to be present at all material stages of his trial pursuant to the state<sup>1281</sup> and federal<sup>1282</sup> constitutions was violated.<sup>1283</sup> The court held that the *Sandoval* hearing conducted in the defendant's absence "was a material stage of the trial at which the defendant's presence was required."<sup>1284</sup> Therefore, the order of the appellate division affirming the judgment of his conviction was reversed and a new trial ordered.<sup>1285</sup>

Prior to jury selection in the defendant's trial, a conference was held in the judge's robing room in which the court heard counsels' arguments on defendant's *Sandoval* motion to preclude the People from cross-examining defendant about prior crimes. The defendant was not present during this conference.<sup>1286</sup> Prior to this conference there was an earlier *Sandoval* hearing in connection with a previous effort to try the defendant on these

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1279. 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992).

1280. People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). The court noted:

In each case the defendant shall inform the court of prior convictions and misconduct. The trial court in its discretion and in the interests of justice shall then determine whether and to what extent the defendant has met his burden of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion.

*Id.* at 378, 314 N.E.2d at 418, 357 N.Y.S.2d at 856.

1281. N.Y. CONST. art. I, § 6.

1282. U.S. CONST. amend. VI.

1283. *Dokes*, 79 N.Y.2d at 658, 595 N.E.2d at 837, 584 N.Y.S.2d at 762.

1284. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1285. *Id.*

1286. *Id.* at 658-59, 595 N.E.2d at 838, 584 N.Y.S.2d at 763.

charges.<sup>1287</sup> The People argued that the defendant was present at the prior *Sandoval* hearing and that the subsequent hearing was simply a reargument of the prior *Sandoval* hearing. Accordingly, the People maintained that assuming the defendant's presence is required at a *Sandoval* hearing, his presence at the initial hearing satisfied the requirement for the later proceeding.<sup>1288</sup> The defendant argued that he was not present at the prior *Sandoval* hearing and that his right to be present at all material stages of his trial was violated when the trial court conducted the *Sandoval* hearing in his absence.<sup>1289</sup>

The court observed that the record of the second hearing, from which the defendant was absent, indicates that the motion was considered *de novo* and therefore, the factual dispute with respect to defendant's presence at the initial hearing is insignificant.<sup>1290</sup> The court did not consider it material whether the defendant was present or not at the first hearing.<sup>1291</sup> The court of appeals reasoned that even if the defendant was present at the first hearing the benefits that the defendant may have obtained by his presence did not carry over to the second hearing.<sup>1292</sup>

The court maintained that "[a] defendant's presence at trial is required not only by the Confrontation and Due Process Clauses of the federal and state constitutions, but also by Criminal Procedure Law section 260.20, which provides that 'a defendant must be personally present during the trial of an indictment.'"<sup>1293</sup> The court noted that this statutory right has been extended to "the impaneling of the jury, the introduction of evidence, the summations of counsel, and the court's charge to the jury."<sup>1294</sup> The court further maintained that due process requires

1287. *Id.* at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763.

1288. *Id.*

1289. *Id.*

1290. *Id.*

1291. *Id.*

1292. *Id.* at 659-60, 595 N.E.2d at 838, 584 N.Y.S.2d at 763.

1293. *Dokes*, 79 N.Y.2d at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763 (quoting N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1982)).

1294. *Id.* (quoting *People v. Velasco*, 77 N.Y.2d 469, 472, 570 N.E.2d 1070, 1071, 568 N.Y.S.2d 721, 722 (1991)). See also *People v. Mullen*, 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978). In *Mullen*, the court

that a defendant be present “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”<sup>1295</sup> The court stated that it has applied these standards and “held that a defendant has a right to be present during a pretrial suppression hearing during which wit-

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held that important proceedings such as the impaneling of the jury, introduction of evidence, summations of counsel and the court’s charge to the jury must be deemed a part of the “trial” as that term is used in Criminal Procedure Law section 260.20, providing that a defendant must be personally present during the trial of an indictment. *Id.* at 4, 374 N.E.2d at 370, 403 N.Y.S.2d at 472. Accordingly, “any further instructions given to the jury after they have retired to deliberate constitute[s] the court’s charge and are, therefore, viewed as part of the trial . . . [The Court reasoned that] these proceedings are deemed part of the trial because the presence of the defendant is considered ‘essential to the attainment of justice and the protection of the innocent.’” *Id.* (quoting *Maurer v. People*, 43 N.Y. 1, 3 (1870)). In *People v. Sloan*, 79 N.Y.2d 386, 592 N.E.2d 784, 583 N.Y.S.2d 176 (1992), the court held that the defendant had a fundamental right to be present with counsel during voir dire questioning of the jurors about the effect of pretrial publicity on jurors’ attitudes towards the possible predisposition to believe a key prosecution witness and their ability to weigh evidence objectively. The court explained that the defendant’s presence could have been critical in making determinations to challenge for cause and peremptories. *Id.* at 392, 592 N.E.2d at 787, 583 N.Y.S.2d at 179. *But see* *People v. Velasco*, 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991). In *Velasco*, the court held that the defendant’s presence was not required when the court posed questions relating only to the qualifications of jurors in the general sense, questions concerning such matters as physical impairments, family obligations, and work commitments. The court reasoned that the defendant’s presence or absence could have had no effect on the ultimate fairness of the trial proceeding. *Id.* at 473, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

1295. *Dokes*, 79 N.Y.S.2d at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). *See also* *Mullen*, 44 N.Y.2d at 5, 374 N.E.2d at 370, 403 N.Y.S.2d at 472 (“[D]ue process requires the presence of a defendant . . . ‘to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.’”) (quoting *Snyder*, 291 U.S. at 107); *People v. Ciaccio*, 447 N.Y.2d. 431, 436, 391 N.E.2d 1347, 1349-50, 418 N.Y.S.2d 371, 373 (1979) (presence of the defendant is constitutionally required at all proceedings dealing with “impaneling the jury, receiving evidence, the summations of counsel, receiving the verdict, . . . the court’s charge, admonishments and instructions to the jury, [and] where the court is required to state the fundamental legal principles applicable to criminal cases”).

nesses are examined and cross-examined noting that 'defendant alone may be able to inform his attorney of inconsistencies, errors and falsities in the testimony of the officers or other witnesses.'"1296

The court of appeals noted that "[i]n determining whether a defendant has a right to be present during a particular proceeding . . . [depends] on whether the proceeding involve[s] factual matters about which defendant might have . . . knowledge that would be useful in advancing the defendant's or countering the People's position."<sup>1297</sup> If it does, then the defendant has a right to be present.<sup>1298</sup> The court held that the "*Sandoval* hearing in this case was such a proceeding."<sup>1299</sup> The New York Court of Appeals reasoned that the importance of the defendant's ability to participate in this proceeding is compounded by the importance of the hearing.<sup>1300</sup>

A ruling on the permissible scope of cross-examination is often the pivotal factor in the defendant's decision whether to testify.<sup>1301</sup> The court of appeals reasoned that given the number of factors that are relevant to the court's decision in determining the extent that the prosecutor will be able to cross-examine the defendant about prior arrests and prior bad acts, the potential for meaningful participation by the defendant during the determination of the merits of a *Sandoval* motion is apparent.<sup>1302</sup>

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1296. *Dokes*, 79 N.Y.S.2d at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763 (quoting *People v. Anderson*, 16 N.Y.2d 282, 288, 213 N.E.2d 445, 447, 266 N.Y.S.2d 110, 114 (1956)); see also *People v. Turaine*, 78 N.Y.2d 871, 872, 577 N.E.2d 55, 56, 573 N.Y.S.2d 64, 65 (1991) (holding that defendant had right to be present at hearing to determine admissibility of witness' proposed testimony that defendant threatened him to prevent him from testifying against the defendant, reasoning that defendant had right to confront witness against him at hearing and also to advise counsel of any errors or falsities in witness' testimony).

1297. *Dokes*, 79 N.Y.2d at 660, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1298. *Id.*

1299. *Id.*

1300. *Id.* at 661-62, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1301. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1302. *Id.* at 661, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

The court observed that usually the focus of such a hearing is a report compiled by the State Division of Criminal Justice Services (DCJS) on the defendant's criminal history.<sup>1303</sup> This report contains information about prior arrests and the disposition of those charges.<sup>1304</sup> The court noted that the prosecutor will usually seek permission to cross-examine the defendant about the charges in the report.<sup>1305</sup> Further, the People may also seek to inquire about prior bad acts which they are aware of that have not been the subject of formal charges.<sup>1306</sup> The court of appeals stated that "the defendant is in the best position to point out errors in the DCJS report,<sup>1307</sup> to [controvert] assertions by the prosecutor with respect to uncharged acts and to provide counsel with details about the underlying facts of both charged and uncharged acts."<sup>1308</sup> Accordingly, the court maintained that the defendant's presence will help to insure that the court's determination will not be based solely on the prosecutor's "unrebutted view of the facts."<sup>1309</sup>

Therefore, "except in circumstances where the nature of the defendant's criminal history and the issues to be resolved at the *Sandoval* hearing render the defendant's presence superfluous, the hearing should not be conducted without the presence of the accused."<sup>1310</sup> The court "conclude[d] that the *Sandoval* hearing was a material stage of the trial at which the defendant's presence was required."<sup>1311</sup> Further, "[s]ince the contention concerns the

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1303. *Id.* at 660, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1304. *Id.*

1305. *Id.* at 660-61, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1306. *Id.* at 661, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1307. The court cited to a 1991 State Comptroller report which depicted the DCJS records as replete with errors which rendered them unreliable to law enforcement officials, prosecutors and judges as a source for criminal history data. *Id.* at 661 n.4, 595 N.E.2d at 839 n.4, 584 N.E.2d at 764 n.4.

1308. *Id.* at 661, 595 N.E.2d at 839-40, 584 N.E.2d at 764-65.

1309. *Id.* at 661, 595 N.E.2d at 840, 584 N.Y.S.2d at 765 (quoting *People v. Ortega*, 78 N.Y.2d 1101, 1103, 585 N.E.2d 372, 373, 578 N.Y.S.2d 123, 124 (1991)).

1310. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1311. *Id.*

right conferred by CPL section 260.20, the defendant's failure to object is not fatal to his claim."<sup>1312</sup>

Federal law in this area is governed by *Snyder v. Massachusetts*.<sup>1313</sup> In *Snyder*, the United States Supreme Court recognized that the "presence of defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."<sup>1314</sup> Further, the Court stated that the privilege extends "whenever his presence has a relation, reasonably substantial, to the ful[fill]ness of his opportunity to defend against the charge."<sup>1315</sup> However, the Court did caution that the privilege of presence does not extend to a defendant when it would "be useless, or the benefit but a shadow."<sup>1316</sup> In sum, the defendant's right to be present is only insured when it "is critical to its outcome if his presence would contribute to the fairness of the procedure."<sup>1317</sup>

In conclusion, under New York law, except in circumstances where the nature of the defendant's criminal history and the issues to be resolved at the *Sandoval* hearing render the defendant's presence superfluous, the hearing is a material stage of the trial and should not be conducted without the presence of the accused. Similarly, under federal law, as enunciated in *Snyder*, the defendant's right to be present is not absolute, but is conditioned upon whether the stage of the proceeding is material and whether the defendant's presence is needed to aid in his defense.<sup>1318</sup>

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1312. *Id.*

1313. 291 U.S. 97 (1934).

1314. *Id.* at 107.

1315. *Id.* at 105-06.

1316. *Id.* at 106-07.

1317. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

1318. *Snyder*, 291 U.S. at 105-06.