



1993

## Right to Be Present

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## SUPREME COURT, APPELLATE DIVISION

## FIRST DEPARTMENT

People v. Aguilar<sup>1366</sup>  
 (decided March 19, 1992)

The defendant contended that his constitutional rights to be present at all material stages of his trial pursuant to the state<sup>1367</sup> and federal<sup>1368</sup> constitutions were violated when the trial court gave supplemental instructions to the jury in the defendant's absence.<sup>1369</sup> The court held that the defendant's "presence during supplemental instructions [to the jury] as 'constitutionally required.'"<sup>1370</sup> The court further held that the court committed a reversible error when it failed to inquire into the circumstances surrounding the defendant's absence nor did it recite the facts and reasons it relied upon in reaching its determination that the defendant's absence was deliberate.<sup>1371</sup> Lastly, the court held

1366. 177 A.D.2d 197, 582 N.Y.S.2d 383 (1st Dep't 1992).

1367. N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . .").

1368. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature of the accusation . . . .").

1369. *Aguilar*, 177 A.D.2d at 199, 582 N.Y.S.2d at 384.

1370. *Id.* at 200, 582 N.Y.S.2d at 385.

1371. *Id.* at 200, 582 N.Y.S.2d at 384-85. *See People v. Sanchez*, 65 N.Y.2d 436, 482 N.E.2d 56, 492 N.Y.S.2d 577 (1985). In *Sanchez*, the court of appeals held that if a defendant deliberately leaves the courtroom after his trial has begun or leaves after he has been told that his trial is about to begin, he forfeits his right to be present at the trial regardless of whether he knows that the trial will continue in his absence. *Id.* at 443-44, 482 N.E.2d at 59-60, 492 N.Y.S.2d at 580-81. However, in each of the five consolidated appeals in *Sanchez* the trial courts sought to determine the circumstances surrounding the defendants' absences. *Id.* at 440-43, 482 N.E.2d at 57-59, 492 N.Y.S.2d at 578-80. *See also People v. Brooks*, 75 N.Y.2d 898, 899, 553 N.E.2d 1328, 1329, 554 N.Y.S.2d 818, 819 (1990) (trial court erred in proceeding to summations and jury charge in defendant's absence without making an inquiry

that the defendant's right to be present was not waived by his counsel's consent to proceed during the reading of the supplemental jury instructions in his absence.<sup>1372</sup>

The defendant was arrested and tried before a jury on charges he burglarized a gas station. At the close of the trial, and after the jury had been sequestered for deliberations, the court excused the defendant and his counsel with instructions to return at 2:30 pm. Approximately one hour later, the jury requested supplemental instructions from the court regarding intent and reasonable doubt.<sup>1373</sup> Shortly thereafter, the court provided the supplementary instructions to the jury in the absence of the defendant, but not before taking note of the defendant's absence, and receiving the consent of defense counsel.<sup>1374</sup>

The court began its analysis by noting that in addition to the constitutional mandates, Criminal Procedure Law section 310.30<sup>1375</sup> "makes a defendant's right to be present during instructions to the jury absolute and unequivocal."<sup>1376</sup>

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into absence and reciting facts and reasons relied upon in determining absence was deliberate).

1372. *Aguilar*, 177 A.D.2d at 201, 582 N.Y.S.2d at 385.

1373. *Id.* at 200, 582 N.Y.S.2d at 384.

1374. *Id.*

1375. N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1982). Section 310.30 provides in pertinent part:

At any time during its deliberation, the jury may request the court for further instruction . . . . Upon such a request, the court must direct that the jury be returned to the courtroom . . . and in the presence of the defendant, must give such requested . . . instruction . . . .

*Id.*

1376. *Aguilar*, 177 A.D.2d at 200, 582 N.Y.S.2d at 385. *See People v. Ciaccio*, 47 N.Y.2d 431, 436-37, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 373 (1979) (presence of defendant is constitutionally required when supplemental instructions are given to jury); *see also People v. Cain*, 76 N.Y.2d 119, 556 N.E.2d 141, 556 N.Y.S.2d 848 (1990). In *Cain*, after the jury had announced it found the defendant guilty on all counts, defense counsel requested that the jurors be polled. *Id.* at 122, 556 N.E.2d at 142, 556 N.Y.S.2d at 849. During the poll, juror number seven inquired whether he could speak to the trial judge in private. *Id.* Defense counsel for Cain then polled the jurors without incident. *Id.* The trial judge thereafter ordered the jury back into the deliberation room, stating: "Before I accept your verdict . . . [I want to review juror number seven's question]." *Id.*

However, this right is forfeited when a defendant deliberately causes himself to be absent from the courtroom after his trial has begun, whether or not he knows the trial will continue.<sup>1377</sup> However, before the trial court can legitimately find that defendant has forfeited the right, an inquiry and record of the findings must be made.<sup>1378</sup> Therefore, the defendant's constitutional and statutory rights were violated by the court's failure to make a proper inquiry into the defendant's absence before proceeding with the instructions.

The court then addressed the People's argument that the defendant's right to be present during the reading of the supplemental instructions was waived by defense counsel's consent to proceed. The court held that since there was no indication in the record that the defendant exercised a knowing, intelligent and voluntary waiver of his right to be present, or that he later ratified his counsel's waiver, counsel's waiver was "a nullity."<sup>1379</sup>

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Subsequently, juror number seven was brought to the judge's robing room and questioned in the presence of the defendant's attorneys, but absent the defendants. *Id.* The judge repeated his jury instructions on "acting in concert" to clarify the law for the juror. *Id.* at 122-23, 556 N.E.2d at 142, 556 N.Y.S.2d at 849. The trial judge then returned the entire jury to the courtroom and stated that "we've clarified Juror Number Seven's question . . . . I will now accept your verdict as recorded." *Id.* at 123, 556 N.E.2d at 142-43, 556 N.Y.S.2d at 849-50. The court of appeals held that the robing room conference, which included a "discussion of the applicable legal principles, constituted . . . the giving of 'further instruction[s]' within the meaning of CPL 310.30" and found that since defendant had an absolute right to be present, he is entitled to a reversal notwithstanding any lack of actual prejudice resulting from his absence. *Id.* at 124, 556 N.E.2d at 143-44, 556 N.Y.S.2d at 850-51.

1377. *Aguilar*, 177 A.D.2d at 200, 582 N.Y.S.2d at 385.

1378. *Id.* at 201, 582 N.Y.S.2d at 385.

1379. *Id.* See *People v. Windley*, 134 A.D.2d 386, 520 N.Y.S.2d 864 (1987) (defendant effectively waived right to be present during charge where defense counsel waived defendant's presence after being informed that defendant would be late and defendant later ratified his counsel's waiver upon inquiry by court). See also *People v. Parker*, 57 N.Y.2d 135, 141, 440 N.E.2d 1313, 1316, 454 N.Y.S.2d 967, 970 (1982) (holding that in order to effectuate a voluntary, knowing and intelligent waiver, the defendant must be

The United States Supreme Court, in *Snyder v. Massachusetts*,<sup>1380</sup> recognized that the presence of the defendant is required if “[i]t bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend.”<sup>1381</sup> The Court explained that this right is conditioned “to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”<sup>1382</sup> Thus, the *Snyder* Court cautioned that due process would not be extended to require the defendant’s presence “when [his] presence would be useless, or the benefit but a shadow.”<sup>1383</sup>

In construing *Snyder*, in *Larson v. Tansy*,<sup>1384</sup> the Tenth Circuit held that the “defendant’s presence in the courtroom during the instruction of the jury . . . would not have been useless [because the] defendant’s presence might have allowed him to provide assistance to his counsel.”<sup>1385</sup> In *United States v. Fontanez*,<sup>1386</sup> the Second Circuit held that the defendant’s exclusion from jury instructions violated his right to be present throughout his trial. As a result, the *Fontanez* court reasoned that the defendant’s exclusion “deprived [him] of the ‘psychological function’ of his presence on the jury during a crucial phase of his trial.”<sup>1387</sup>

Although the defendant has the right to be present during jury instructions, this right may be waived by the defendant’s absence. In *United States v. Sanchez*,<sup>1388</sup> the court stated that “[i]t has long been settled that a defendant charged with a crime may knowingly and voluntarily waive his constitutional right to be

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informed of the nature of the right to be present at trial and the consequences of failing to appear for trial).

1380. 291 U.S. 97 (1934).

1381. *Id.* at 106.

1382. *Id.* at 107-08; *see also* *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (defendant is only “guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure”).

1383. *Snyder*, 291 U.S. at 106-07.

1384. 911 F.2d 392 (10th Cir. 1990).

1385. *Id.* at 395.

1386. 878 F.2d 33 (2d Cir. 1989).

1387. *Id.* at 38.

1388. 790 F.2d 245 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986).

present . . . .”<sup>1389</sup> However, before proceeding with the trial in *absentia*, the court must determine the defendant voluntarily, knowingly, and *without justification* failed to be present at the designated time and place . . . .”<sup>1390</sup>

Therefore, under both the New York Constitution<sup>1391</sup> and United States Constitution,<sup>1392</sup> a defendant who voluntarily absents himself from the courtroom after his trial has begun forfeits his right to be present at all material stages of his trial.<sup>1393</sup> In order to determine whether forfeiture can be found, the court must inquire into the circumstances of the absence to determine if it was deliberate and must recite the facts and reasons it relied upon in reaching its determination in the record.<sup>1394</sup> If the court determines that the defendant’s absence was deliberate and continues to proceed in the defendant’s absence, but fails to recite on the record the facts and reasons it

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1389. *Id.* at 248; see *Taylor v. United States*, 414 U.S. 17, 20 (1973) (voluntary absence from ongoing trial constitutes waiver of right to be present).

1390. *Sanchez*, 790 F.2d at 249 (emphasis added) (quoting *United States v. Tortora*, 464 F.2d 1202, 1209 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); see also *Taylor*, 414 U.S. at 10 n.3 (defendant may voluntarily waive his right to be present at trial, but court must clearly establish voluntariness); *Polizzi v. United States*, 926 F.2d 1311, 1319 (2d Cir. 1991) (court must make factual determination on record regarding whether defendant’s absence was made knowingly and voluntarily); *United States v. Mera*, 921 F.2d 18, 20 (2d Cir. 1990) (“The trial judge in his sound discretion determines whether a defendant’s absence constitutes a waiver . . . . The district court must determine: 1) whether the defendant’s absence is knowing and voluntary, . . . and 2) whether ‘the public interest . . . clearly outweighs that of the voluntarily absent defendant . . . .’” (citations omitted)).

1391. N.Y. CONST. art. I, § 6.

1392. U.S. CONST. amend. VI.

1393. See *People v. Sanchez*, 65 N.Y.2d 436, 443, 882 N.E.2d 56, 59, 492 N.Y.S.2d 577, 580 (1985) (“Forfeiture, unlike an express waiver which involves an evaluation of defendant’s state of mind, occurs by operation of law and as a matter of public policy.”).

1394. See *People v. Brooks*, 75 N.Y.2d 898, 899, 553 N.E.2d 1328, 1329, 554 N.Y.S.2d 818, 819 (1990) (dismissing indictment because court failed to inquire, and recite on record, reasons it relied on in determining defendant’s absence from trial was deliberate).

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relied upon in reaching that determination, any resulting conviction will be reversed.

