McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title J. Prosecution of Indictments in Superior Courts--Plea to Sentence
Article 260. Jury Trial--Generally (Refs & Annos)

McKinney's CPL § 260.20

§ 260.20 Jury trial; defendant's presence at trial

Currentness

A defendant must be personally present during the trial of an indictment; provided, however, that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct.

Credits
(L.1970, c. 996, § 1. Amended L.1971, c. 789, § 1.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by William C. Donnino

Defendant's Presence Not Required

Informing a deliberating jury, in the absence of the defendant, that the date of the charged crime as recited in the court's pre-deliberation instructions was incorrect, and informing them of the correct date as set forth in the indictment, did not violate the defendant's right to be present at all material stages of a trial. *People v. Scott*, 25 N.Y.3d 1107, 35 N.E.3d 476, 14 N.Y.S.3d 308 (2015).

PRACTICE COMMENTARIES

by William C. Donnino

Introduction

Defendant's Presence Required

Trial

Introduction

The federal Due Process Clause guarantees a defendant "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." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). *See also Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (the defendant has the right to be present when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge"). By contrast, the federal Due Process Clause does not "assure the privilege of presence when presence would be useless, or the benefit but a shadow." *Snyder v. Massachusetts*, 291 U.S. at 106-107. Also, "[n]o doubt the privilege may be lost by consent or at times even by misconduct." *Id.* at 106.

By the terms of the instant New York statute, the defendant has a right to be present at trial and not to be excluded, absent "disorderly and disruptive" conduct which precludes the continuation of the trial in the defendant's presence. New York's decisional law has of course followed the requirements of due process; but, more importantly, the application of the instant statute has been held to guarantee a defendant the right to be present in some instances in which the federal Due Process Clause does not. *See People v. Morales*, 80 N.Y.2d 450, 456, 591 N.Y.S.2d 825, 606 N.E.2d 953 (1992).

For New York, the statutory term "trial" incorporates both any "material stage" of the trial [*People v. Turaine*, 78 N.Y.2d 871, 872, 573 N.Y.S.2d 64, 577 N.E.2d 55 (1991)], as well as any "ancillary proceeding" for which the defendant's presence is "substantially and materially related to the ability to defend," including proceedings at which the defendant "can potentially contribute," or at which the defendant's presence would ensure "a more reliable determination" of the proceeding. *People v. Roman*, 88 N.Y.2d 18, 25-26, 643 N.Y.S.2d 10, 665 N.E.2d 1050 (1996) (internal quotation marks and citation omitted).

The Court of Appeals has explained that "the distinction between core segments of trial and ancillary proceedings is important for a State law analysis because a defendant usually has an unfettered right to attend trial--regardless of his or her potential contribution--but only a qualified right to attend ancillary proceedings" *People v. Morales*, 80 N.Y.2d at 457.

Defendant's Presence Required

Trial

The "material" stages of a trial at which a defendant's presence is required include "the impaneling of the jury, the introduction of evidence, the summations of counsel, and the court's charge to the jury," including "any further instructions given to the jury after they have retired to deliberate." *People v. Mullen*, 44 N.Y.2d 1, 4, 403 N.Y.S.2d

470, 374 N.E.2d 369 (1978). *See also* *People v. Brooks*, 75 N.Y.2d 898, 554 N.Y.S.2d 818, 553 N.E.2d 1328 (1990); *People v. Mehmedi*, 69 N.Y.2d 759, 513 N.Y.S.2d 100, 505 N.E.2d 610 (1987).

On the presence of the defendant at the questioning of jurors during the impaneling of a jury, the Court of Appeals has taken a nuanced approach. A court may question "prospective jurors in a defendant's absence if the questions relate to juror qualifications such as physical impairments, family obligations and work commitments (citation omitted). The court may not, however, explore prospective jurors' backgrounds and their ability to weigh the evidence objectively unless defendant is present. Defendants are entitled to hear questions intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses and the venire person's answers so that they have the opportunity to assess the juror's 'facial expressions, demeanor and other subliminal responses' " (citation omitted). *People v. Antommarchi*, 80 N.Y.2d 247, 250, 590 N.Y.S.2d 33, 604 N.E.2d 95 (1992). *See also* *People v. Sloan*, 79 N.Y.2d 386, 583 N.Y.S.2d 176, 592 N.E.2d 784 (1992); *People v. Velasco*, 77 N.Y.2d 469, 568 N.Y.S.2d 721, 570 N.E.2d 1070 (1991).

As a practical matter, questions about a juror's qualifications can morph into a juror's comment about his or her inability to be objective. Thus, the trial court must do such questioning in the defendant's presence, or, if the court chooses to do the questioning in the absence of the defendant, the court must not pursue an answer relating to a juror's ability to be objective until such time as that juror can be questioned about same in the presence of the defendant. *People v. Camacho*, 90 N.Y.2d 558, 664 N.Y.S.2d 578, 687 N.E.2d 396 (1997).

A defendant may waive the right to be present at the questioning of the jurors. *See* *People v. Velasquez*, 1 N.Y.3d 44, 769 N.Y.S.2d 156, 801 N.E.2d 376 (2003); *People v. Flinn*, 22 N.Y.3d 599, 984 N.Y.S.2d 283, 7 N.E.3d 496 (2014) (the defendant's lawyer may communicate to the court, outside the defendant's presence, the defendant's decision to waive the right to be present during voir dire). Once a defendant waives the right to be present at the questioning of the jurors, the trial court may refuse to allow the defendant to rescind the waiver. *People v. Williams*, 92 N.Y.2d 993, 684 N.Y.S.2d 163, 706 N.E.2d 1187 (1998). Notably, however, a court may not summarily refuse to accept a defendant's waiver of the right to be present at the impaneling of a jury; a defendant may "believe that in his presence jurors will be less likely to be truthful about biases.... [and] [t]here may also be a concern ... that jurors who witness defendant being accompanied to sidebar conferences by courtroom security personnel will infer that he is incarcerated." *Id.* at 996.

Ancillary proceedings

A defendant's presence has been held to be required at "ancillary" pre-trial and in-trial evidentiary hearings to determine the admissibility of evidence in order to permit a defendant to "confront adverse witnesses and advise counsel of any inconsistencies, errors or falsehoods in their testimony." *People v. Turaine*, 78 N.Y.2d at 872 (the defendant had the right to be present at an in-trial hearing to determine the admissibility of evidence that the defendant had sought to intimidate a witness); *People v. Anderson*, 16 N.Y.2d 282, 266 N.Y.S.2d 110, 213 N.E.2d 445 (1965) (a defendant has the right to be present at a pre-trial suppression hearing).

Although a hearing may not involve the taking of testimony or other evidence, if the hearing involves "factual matters about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the People's position," the defendant has a right to be present. *People v. Dokes*, 79 N.Y.2d 656, 660, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (the defendant had the right to be present at a pre-trial hearing to determine whether he could be cross-examined about certain prior "bad acts" or criminal convictions pursuant to *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413 (1974); *People v. Ventimiglia*, 52 N.Y.2d 350, 438 N.Y.S.2d 261, 420 N.E.2d 59 (1981) (a defendant has the right to be present at a hearing to determine whether evidence should be admitted pursuant to *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901).

Defendant's Presence Not Required

A defendant's presence is not required by federal due process when "presence would be useless, or the benefit but a shadow." *Snyder v. Massachusetts*, 291 U.S. at 106-107; *People v. Rivera*, 94 N.Y.2d 908, 910, 707 N.Y.S.2d 620, 729 N.E.2d 339 (2000). That normally translates into proceedings where the issue "involves only questions of law or procedure" [*People v. Rodriguez*, 85 N.Y.2d 586, 591, 627 N.Y.S.2d 292, 650 N.E.2d 1293 (1995)] and the defendant accordingly has "nothing of value to contribute." *People v. Williams*, 85 N.Y.2d 945, 947, 626 N.Y.S.2d 1002, 650 N.E.2d 849 (1995).

Thus, for example, a defendant's presence is not required: (1) at that part of an audibility hearing where a court listens to the subject recording [*People v. Rivera*, 94 N.Y.2d 908, *supra*]; or (2) at a sidebar conference on the legal question of whether an evidentiary door has been opened [*People v. Rodriguez*, 85 N.Y.2d 586, *supra*]; or (3) at defense counsel's motion to withdraw a motion to controvert findings of the defendant's competency "based upon counsel's legal judgment that the defense has an insufficient basis to contest them" [*People v. Williams*, 85 N.Y.2d at 947]; or (4) at a precharge conference where the parties discussed "a stipulation concerning the contents of a medical record," the scheduling of the trial, and the court's final instructions to the jury, and where a motion to dismiss charges was heard and decided [*People v. Velasco*, 77 N.Y.2d 469, 568 N.Y.S.2d 721, 570 N.E.2d 1070 (1991)]; or (5) at a discussion of the sufficiency of a readback [*People v. Rodriguez*, 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658 (1990)].

Similarly, a defendant's presence is not be required at a non-testimonial hearing which does not involve an issue about which the defendant has "special knowledge" or otherwise has something of value to contribute. *See People v. Morales*, 80 N.Y.2d 450, 456-457, 591 N.Y.S.2d 825, 606 N.E.2d 953 (1992). Thus, for example, a defendant did not have the right to be present: (1) at an examination of a child to determine whether she could testify under oath [*Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *People v. Morales*, 80 N.Y.2d 450, *supra*]; or (2) at the questioning of a seated juror for possible disqualification to serve [*People v. Harris*, 99 N.Y.2d 202, 753 N.Y.S.2d 437, 783 N.E.2d 502 (2002)]; or (3) at a hearing to determine whether a courtroom should be closed because of the fears of a witness [*People v. Frost* 100 N.Y.2d 129, 135, 760 N.Y.S.2d 753, 790 N.E.2d 1182 (2003)].

Waiver or Forfeiture of Right to be Present

A defendant may choose for tactical or other reasons to waive his or her presence at a trial or ancillary proceeding. *Cf. People v. Williams*, 92 N.Y.2d 993, 684 N.Y.S.2d 163, 706 N.E.2d 1187 (1998) (a defendant, who for sound tactical reasons wanted to waive his presence during the interview of prospective jurors, was entitled to do so; but once the defendant waived his presence, he was not entitled to rescind that waiver after the voir dire commenced).

The waiver of the right to be present at trial or an ancillary proceeding must be "voluntary, knowing and intelligent." Accordingly, the defendant must at a minimum be aware of the right to be present and the consequences of choosing not to be present or failing to appear at a hearing or trial. *See People v. Parker*, 57 N.Y.2d 136, 454 N.Y.S.2d 967, 440 N.E.2d 1313 (1982). It is thus advisable for a court at arraignment or other appropriate appearance to advise a defendant of his or her right to be present at the proceedings, including hearing and trial, and that if he or she deliberately fails to appear when required, any proceeding, including a hearing and trial, can and will continue in his or her absence.

Notwithstanding the failure to so advise a defendant expressly, a defendant can forfeit the right to be present when he or she deliberately absents himself or herself from a hearing or trial after it begins. *See Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973). The Court of Appeals is in accord with that view and has further held that a forfeit of the right to be present can take place when the defendant deliberately absents himself after being told that the hearing or trial is actually about to begin. *See People v. Sanchez*, 65 N.Y.2d 436, 444, 492 N.Y.S.2d 577, 482

N.E.2d 56 (1985) ("There is no significant difference between the misconduct of a defendant who deliberately leaves the courtroom shortly after the trial begins and that of a defendant who does so after he has been told that the trial is about to begin."); *People v. Smith*, 66 N.Y.2d 755, 497 N.Y.S.2d 363, 488 N.E.2d 109 (1985); *People v. Redzeposki*, 7 N.Y.3d 725, 818 N.Y.S.2d 182, 850 N.E.2d 1157 (2006). *Compare Crosby v. U.S.*, 506 U.S. 255, 262, 113 S.Ct. 748, 753, 122 L.Ed.2d 25 (1993) (the Federal Rules of Criminal Procedure "prohibit[ ] the trial in absentia of a defendant who is not present at the beginning of trial").

It matters not that a defendant who is deliberately absent from a trial which is in progress is at liberty during the trial or is incarcerated and deliberately refuses to permit correction authorities to produce him in court; either defendant may forfeit the right to be present at the continued trial. *See People v. Epps*, 37 N.Y.2d 343, 372 N.Y.S.2d 606, 334 N.E.2d 566 (1975).

A defendant may also forfeit the right to be present when he "conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom." CPL 260.20. In that instance, the defendant may be removed if, "after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct." *Id. See Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (the trial judge properly removed the defendant from the courtroom when his conduct was so "noisy, disorderly, and disruptive that it [was] exceedingly difficult or wholly impossible to carry on the trial"); *People v. Byrnes*, 33 N.Y.2d 343, 352 N.Y.S.2d 913, 308 N.E.2d 435 (1974) (the trial court properly excluded the defendant during the testimony of the complainant after the defendant engaged in multiple outbursts, had been warned he would be excluded, and then engaged in threatening conduct when the complainant entered the courtroom); *People v. Johnson*, 37 N.Y.2d 778, 375 N.Y.S.2d 97, 337 N.E.2d 605 (1975) (the defendant turned over a table and laid himself on the floor during the testimony of an identification witness). Given the apparent need to warn a defendant of the consequences of misbehavior before he or she is excluded from the courtroom, it is advisable that the trial court do so at the beginning of each trial.

Once a defendant is excluded from the courtroom during the trial, it is advisable that allowances be made for defense counsel to communicate with the defendant, if not continuously during the trial, at periodic intervals. *See People v. Byrnes*, 33 N.Y.2d at 350. If practicable, a closed circuit television set up, allowing the defendant to see and hear a witness from a remote location should be employed. The court should also instruct the jurors that they are not to consider the defendant's conduct in court or the defendant's exclusion from the courtroom in reaching their verdict; and the court may inquire of the jury collectively whether any juror could not follow that instruction and whether any juror could not continue to be fair in reaching a verdict. *See People v. Cosby*, 271 A.D.2d 353, 354, 708 N.Y.S.2d 58 (2000) (the defendant was disruptive and thus was excluded from the courtroom; the jury was so instructed and questioned collectively; no juror indicated he or she could not follow the court's instructions; and the court accordingly "properly declined to reward defendant's violent and disruptive conduct with a mistrial").

Restraints

During a jury trial, a defendant cannot appear in physical restraints which are visible to the jury "absent a court determination that they are 'justified by an essential state interest ... specific to the defendant on trial.' Such essential state interests include 'physical security, escape prevention, [and] courtroom decorum'." *People v. Clyde*, 18 N.Y.3d 145, 938 N.Y.S.2d 243, 961 N.E.2d 634 (2011), *citing Deck v. Missouri*, 544 U.S. 622, 624 and 628, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). *See People v. Palermo*, 32 N.Y.2d 222, 344 N.Y.S.2d 874, 298 N.E.2d 61 (1973) (a disruptive defendant was properly gagged). Because the defendant may have a sound reason for not instructing the jury about restraints, "where a defendant fails to request an instruction regarding his restraints, a court is under no obligation to instruct the jury to disregard them." *People v. Rouse*, 79 N.Y.2d 934, 935, 582 N.Y.S.2d 986, 591 N.E.2d 1172 (1992).

An error in restraining a defendant may be harmless. *People v. Clyde*, *supra*; *People v. Cruz*, 17 N.Y.3d 941, 936 N.Y.S.2d 661, 960 N.E.2d 430 (2011) (error was not harmless).

Curing the Mistaken Absence of the Defendant

If a hearing is mistakenly conducted in the absence of a defendant, that error may be cured by a de novo hearing in the presence of the defendant. *People v. Roman*, 88 N.Y.2d 18, 643 N.Y.S.2d 10, 665 N.E.2d 1050 (1996).

Notes of Decisions (754)

McKinney's CPL § 260.20, NY CRIM PRO § 260.20
Current through L.2024, chapters 1 to 49, 61 to 105. Some statute sections may be more current, see credits for details.

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