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Appellate Division Holds Defendant Not Entitled to Conviction Reversal Although Denied His Right to Counsel at Suppression Hearing

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ety of issues recently dealt with by the New York courts. In *People v. Jones*, the Appellate Division, Second Department, held that although the trial court erred in compelling the defendant to proceed at his suppression hearing in the absence of counsel, such error did not require reversal of his convictions. Rather, the court ordered a *de novo* suppression hearing as the means of remedying any prejudice to the defendant.

In *Dioguardi v. St. John's Riverside Hospital*, the Appellate Division, Second Department, restricted a party's right to depose a nonparty witness. Interpreting CPLR 3101(a)(4), the court held that a defendant in a medical malpractice action could not depose the plaintiff's treating physician absent an affirmative showing that the deposition might yield information not already available from the medical records or other sources.

In *McGowan v. McGowan*, another case from the Appellate Division, Second Department, the court expanded the definition of "marital property" in the Domestic Relations Law to include an educational degree acquired during the marriage. The court analogized such an educational degree to a professional license attained during the marriage and held that, like a license, a degree is subject to equitable distribution.

Finally, this issue examines the decision of the Court of Appeals in *State Farm Mutual Automobile Insurance Company v. Amato*. The court held that a police vehicle was not a "motor vehicle" for purposes of section 3420(f) of the Insurance law, thereby relieving New York City of the obligation to provide such vehicles with uninsured motorist coverage.

It is hoped that the analysis of these issues in *The Survey* will be of interest and assistance to the New York practitioner.

DEVELOPMENTS IN THE LAW

Appellate Division holds defendant not entitled to conviction re-

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Estates, Powers and Trusts Law (McKinney) ..... EPTL
General Business Law (McKinney) ..... GBL
General Municipal Law (McKinney) ..... GML
General Obligations Law (McKinney) ..... GOL
D. Siegel, New York Practice (1978 & Supp. 1987) ..... SIEGEL
Weinstein, Korn & Miller, New York Civil Practice (1988) ..... WK&M
The Survey of New York Practice ..... *The Survey*

versal although denied his right to counsel at suppression hearing

Criminal defendants have the constitutional right to be represented by counsel when legal proceedings are instituted against them.[1] Courts have found that this right exists at every critical stage of the proceedings.[2] Furthermore, some courts have held the

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[1] *See* U.S. CONST. amend VI. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*; *see also* N.Y. CONST. art. I, § 6 ("[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel.") *Id.*

The sixth amendment requires courts to appoint counsel for indigent defendants charged with felonies. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963). The *Gideon* Court held that the sixth amendment right to counsel is incorporated in the due process clause of the fourteenth amendment and hence is binding on the states. *Id.* at 342-43. In order for such a provision in the Bill of Rights to be binding on the states, the provision must be "fundamental and essential to a fair trial." *Id.* at 342 (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)). While concurring with the *Betts* Court's analysis of the incorporation doctrine, the *Gideon* Court overruled *Betts* in concluding that the guarantee of counsel was such a fundamental right and was therefore incorporated into the fourteenth amendment. *Id.* The *Gideon* Court explained "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. The Court, therefore, concluded that both federal and state courts must provide indigent criminal defendants with counsel. *Id.* at 345.

[2] *See* Kirby v. Illinois, 406 U.S. 682, 690 (1972); People v. Settles, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978); People v. Cooper, 101 App. Div. 2d 1, 7, 475 N.Y.S.2d 660, 665 (4th Dep't 1984). Once a criminal proceeding has passed from an "investigatory to [a] prosecutorial stage," the accused has a constitutional right to counsel at all "critical stages" thereafter. *Id.* "The purpose of [this] 'critical stage' right to counsel" is to protect the defendant who is "immersed in the intricacies of substantive and procedural criminal law." People v. Ridgeway, 101 App. Div. 2d 555, 560, 476 N.Y.S.2d 940, 944 (4th Dep't 1984) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)), *aff'd*, 64 N.Y.2d 952, 477 N.E.2d 1095, 488 N.Y.S.2d 641 (1985); *see also* Powell v. Alabama, 287 U.S. 45, 69 (1932) (defendant "requires the guiding hand of counsel at every step in the proceedings against him."); People v. Cunningham, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980) (admission into evidence of damaging statements by defendant while under custodial arrest in absence of counsel is reversible error where defendant specifically requested counsel); People v. Ciaccio, 47 N.Y.2d 431, 436, 391 N.E.2d 1347, 1349, 418 N.Y.S.2d 371, 373 (1979) ("In every criminal proceeding, a defendant has an absolute right to be present, with counsel, 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge' ") (quoting Snyder v. Massachusetts, 291 U.S. 97, 106 (1933)). The *Cunningham* court observed: "This court has consistently exercised the highest degree of vigilance in safeguarding the right of an accused to have the assistance of an attorney at every stage of the legal proceedings against him." *Cunningham*, 49 N.Y.2d at 207, 400 N.E.2d at 363, 424 N.Y.S.2d at 423-24.

Both preliminary hearings and suppression hearings are "critical stages" in the criminal process. *See* People v. Hodge, 53 N.Y.2d 313, 318, 423 N.E.2d 1060, 1062, 441 N.Y.S.2d 231, 234 (1981) (preliminary hearing); People v. Speller, 133 App. Div. 2d 865, 865, 520 N.Y.S.2d 418, 419 (2d Dep't 1987) (suppression hearing).

right to trial counsel so fundamental that its violation does not subject a conviction to harmless-error analysis, but rather invariably constitutes reversible error.[3] Recently, however, in *People v. Jones*,[4] the Appellate Division, Second Department, held that, while it was error to compel a defendant to proceed without counsel at his suppression hearing, reversal of his convictions was not warranted.[5]

In *Jones*, the defendant pleaded guilty to attempted robbery and was convicted by a jury of robbery and criminal possession of a weapon.[6] Prior to his trial, the defendant moved to have certain evidence suppressed.[7] The court granted a suppression hearing, but the defendant's assigned counsel failed to appear.[8] Nevertheless, the hearing proceeded in the absence of defense counsel, and the trial court denied the defendant's motion.[9]

After his convictions, the defendant appealed to the Appellate Division, Second Department.[10] A divided Appellate Division panel refused to reverse the convictions despite the fact that the trial court committed an error of constitutional dimension when it pro-

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[3] *See, e.g.*, Glasser v. United States, 315 U.S. 60, 76 (1942). In *Glasser*, the Supreme Court set aside a conviction because the trial court had appointed an attorney to represent codefendants despite their potentially divergent interests. *Id.* The Court found that the "degree of prejudice" resulting from the error need not be determined because "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.*; *see also* People v. Felder, 47 N.Y.2d 287, 295-96, 391 N.E.2d 1274, 1278, 418 N.Y.S.2d 295, 299 (1979) (reversible error where defense counsel at trial was layman representing himself as attorney). *But cf.* Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (violation of right to counsel at preliminary hearing to determine whether to present case to grand jury may be subject to harmless error analysis); *Speller*, 133 App. Div. 2d at 865, 520 N.Y.S.2d at 419 (not necessarily reversible error where right to counsel denied at suppression hearing).

[4] 145 App. Div. 2d. 648, 536 N.Y.S.2d 164 (2d Dep't 1988).

[5] *Id.* at 649, 536 N.Y.S.2d at 165.

[6] *Id.* The defendant, Tyrone Jones, "pleaded guilty to attempted robbery . . . on condition that he would receive a sentence concurrent to that imposed upon his conviction" for robbery and criminal possession of a weapon. *Id.* at 652, 536 N.Y.S.2d at 167 (Lawrence, J., dissenting).

[7] *Id.* at 648-49, 536 N.Y.S.2d at 165. The evidence consisted of identification testimony, certain statements made by the defendant to law enforcement officials, and certain physical evidence. *Id.*

[8] *Id.* at 649, 536 N.Y.S.2d at 165. At the hearing, the court indicated that if the defendant did not agree to proceed in the absence of counsel, his motion to suppress would be dismissed. *Id.* at 651, 536 N.Y.S.2d at 167 (Lawrence, J., dissenting).

[9] *Id.* at 649, 536 N.Y.S.2d at 165.

[10] *Id.* at 648, 536 N.Y.S.2d at 165. The defendant's appeal was based on an alleged denial of his constitutional right to the effective assistance of counsel. *Id.* at 650, 536 N.Y.S.2d at 166 (Lawrence, J., dissenting).

ceeded with the suppression hearing in the absence of the defendant's attorney.[11] The majority relied on the case of *People v. Speller*.[12] In *Speller*, a Second Department case involving similar facts, the court held that where a defendant is denied the assistance of counsel at a suppression hearing, the appropriate corrective action is to hold the appeal in abeyance and order a *de novo* suppression hearing in which the defendant will be represented by counsel.[13] Consequently, the *Jones* majority upheld the convictions and ordered a new suppression hearing.[14] In dissent, Justice Lawrence argued that the defendant's convictions should be reversed,[15] asserting that a motion to suppress evidence is a "crucial step" which often dictates the outcome of a criminal trial.[16] The right to the assistance of counsel at such a hearing, according to Justice Lawrence, is "fundamental and absolute."[17] The dissent noted that Jones' statement that he would continue with the suppression hearing without counsel did not constitute a valid waiver of his right to counsel.[18] Furthermore, Justice Lawrence argued that a deprivation of the defendant's right to counsel at a suppression hearing is never subject to harmless-error analysis.[19] Consequently,

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[11] *Id.* at 649, 536 N.Y.S.2d at 165. The court stated that the only issue to be addressed was the "nature of the appropriate corrective action." *Id.*

[12] 133 App. Div. 2d 865, 520 N.Y.S.2d 418 (2d Dep't 1987). The *Jones* court noted that the argument for reversal was more compelling in *Speller*, because there the defendant pleaded guilty after the suppression motion was denied, making it "difficult to gauge" the influence the denial had on the defendant's decision to plead guilty. *Jones*, 145 App. Div. 2d at 650, 536 N.Y.S.2d at 166. Therefore, the court in *Jones* declared that it was bound by *Speller*. *Id.*

[13] *See Speller*, 133 App. Div. 2d at 865, 520 N.Y.S.2d at 419.

[14] *Jones*, 145 App. Div. 2d at 650, 536 N.Y.S.2d at 166. Justices Thompson, Weinstein, and Harwood concurred in the memorandum decision. *Id.* Justice Lawrence dissented in a memorandum decision in which Justice Brown concurred. *Id.* (Lawrence, J., dissenting).

[15] *Id.* (Lawrence, J., dissenting).

[16] *Id.* at 650-51, 536 N.Y.S.2d at 166 (Lawrence, J., dissenting) (quoting People v. Anderson, 16 N.Y.S.2d 282, 287, 213 N.E.2d 445, 447, 266 N.Y.S.2d 110, 113 (1965) (quoting People v. Lombardi, 18 App. Div. 2d 177, 180, 293 N.Y.S.2d 161, 164 (2d Dep't), *aff'd*, 13 N.Y.2d 1014, 195 N.E.2d 306, 245 N.Y.S.2d 595 (1963))).

[17] *Id.* at 652, 536 N.Y.S.2d at 167 (Lawrence, J., dissenting) (quoting Glasser v. United States, 315 U.S. 60, 76 (1941)).

[18] *Id.* at 651, 536 N.Y.S.2d at 166 (Lawrence, J., dissenting). Justice Lawrence asserted that "at no time did the hearing court 'ascertain that the [appellant] appreciated the risks of self-representation.'" *Id.* (Lawrence, J., dissenting) (quoting People v. Sawyer, 57 N.Y.2d 12, 20, 438 N.E.2d 1133, 1137, 453 N.Y.S.2d 418, 422 (1982), *cert. denied*, 459 U.S. 1178 (1983)). In order for a waiver of counsel to be effective, the defendant must waive the right knowingly and intelligently. *See* People v. Berdicia, 67 App. Div. 2d 879, 879, 413 N.Y.S.2d 681, 681 (1st Dep't 1979).

[19] *Jones*, 145 App. Div. 2d at 652, 536 N.Y.S.2d at 167 (Lawrence, J., dissenting). *See*

the dissent concluded that, since the defendant's constitutional rights were violated, he was entitled to a new trial preceded by a new suppression hearing.[20]

It is submitted that the reasoning employed by Justice Lawrence in his dissent in *Jones* properly reflects the predominant view that the criminal defendant's right to counsel is a fundamental tenet of our judicial system.[21] It is suggested that the majority deviated from this theory by reasoning that reversal was not warranted where "no determination [was] being made as to whether the trial court erred in denying suppression."[22] Although the majority did not expressly apply a harmless-error analysis, it implied that the error was rendered harmless by reasoning that the denial of the defendant's right to counsel was irrelevant if the decision to deny the suppression was proper.[23] It is proposed that, in effect, the majority improperly employed a harmless-error analysis in determining the constitutional validity of Jones' convictions when instead it should have applied a per se rule of reversal.[24]

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generally Note, *Invalid Waivers of Counsel as Harmless Errors: Judicial Economy or a Return to* Betts v. Brady?, 56 FORDHAM L. REV. 431, 450 (1987) ("Invalid waivers of counsel should not be subject to harmless error analysis").

[20] *Jones*, 145 App. Div. 2d at 652, 536 N.Y.S.2d at 167 (Lawrence, J., dissenting). Prior to *Jones*, the Court of Appeals had concluded that when inquiry into the effect of deprivation of counsel would amount to "pure speculation," the proper corrective action is to order a new trial. People v. Hodge, 53 N.Y.2d 313, 321, 423 N.E.2d 1060, 1064, 441 N.Y.S.2d 231, 235 (1981).

[21] *See* Powell v. Alabama, 287 U.S. 45, 68-71 (1932); *supra* notes 1-2 and accompanying text. The *Powell* Court identified the importance of the aid of counsel as follows:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

Powell, 287 U.S. at 69.

[22] *Jones*, 145 App. Div. 2d at 649, 536 N.Y.S.2d at 165.

[23] *See id.*

[24] *Cf.* Chapman v. California, 386 U.S. 18, 22-23 (1967). In *Chapman*, the Supreme Court stated that some constitutional errors require automatic reversal while others are subject to harmless error analysis. *Id.* at 22. The Court noted three rights "so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23. These rights were (1) freedom from a coerced confession (citing Payne v. Arkansas, 356 U.S. 560, 561 (1958)); (2) the right to counsel (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)); and (3) the right to an impartial judge (citing Tumey v. Ohio, 273 U.S. 510, 535 (1927)). *Id.* at 23 n.8. The Court went on to identify the standard to be utilized when and if harmless error analysis is to be applied to a constitutional error, stating that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

Harmless-error rules were developed to alleviate the number of reversals of lower court decisions resulting from trivial errors.[25] It is suggested, however, that an extension of harmless-error analysis to a violation of a fundamental constitutional right, such as the right to counsel, is unsupported by both the history of its development[26] and the weight of authority.[27] Furthermore, it is also suggested that statutory authority for harmless-error analysis fails to support its application to the violation of constitutional rights.[28] While the goal of harmless-error analysis—conserving judicial resources—is compelling, it is submitted that it does not justify violating constitutional rights in the process.[29]

Moreover, it cannot be said that the defendant waived his right to counsel. Although a criminal defendant has the constitutional right to represent himself in a criminal trial,[30] he must do

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New York courts have also adhered to the *Chapman* rule that violation of the right to counsel should not be subject to harmless error analysis. *See* People v. Felder, 47 N.Y.2d 287, 296, 391 N.E.2d 1274, 1277-78 418 N.Y.S.2d 295, 299 (1979); People v. Narayan, 76 App. Div. 2d 604, 612, 431 N.Y.S.2d 556, 561 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 106, 429 N.E.2d 123, 444 N.Y.S.2d 604 (1981). LaFave and Israel identify two types of analysis to be employed when applying harmless error rules. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 26.6, at 996 (1985). The first deals with structural errors in a proceeding. *Id.* If this type of error is violative of a substantive right, it automatically requires a new trial regardless of the strength of the evidence supporting the conviction. *Id.* The other type of analysis relates to evidentiary errors. *Id.* This is the type of error which traditionally receives harmless error analysis. *Id.* It is submitted that the majority erroneously classified the violation of Jones' right to counsel as within the latter category, when in reality it should have been classified in the former—a violation of a substantive constitutional right—and therefore should have resulted in an automatic reversal. *See id.*

[25] *See* Note, *supra* note 19, at 438. Harmless error rules serve an important social function since the reversal of a conviction results in substantial costs to society. *See* United States v. Mechanik, 475 U.S. 66, 72 (1986). In *Mechanik*, Justice Rehnquist noted that reversal "forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place." *Id.*

[26] *See supra* note 24.

[27] *See supra* note 3 and accompanying text.

[28] *See* Note, *supra* note 19, at 438. Today all fifty states have harmless error rules of some kind. *Id.* at 439. Both the federal and New York state harmless error statutes provide that harmless error analysis applies only to those errors not affecting the substantial rights of the parties. 28 U.S.C.§ 2111 (1982); CPL § 470.05(1) (McKinney 983).

[29] *See* Stacy & Dayton, *Rethinking Harmless Constutional Error*, 88 COLUM. L. REV. 79, 85 (1988). According to the Supreme Court, harmless error analysis promotes the efficient use of judicial resources. *See* United States v. Hasting, 461 U.S. 499, 509 (1983). "The goal [of harmless error analysis is to]. . . 'conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.'" *Id.* (quoting R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 81 (1970)).

[30] *See* Faretta v. California, 422 U.S. 806, 819 (1975); People v. Davis, 49 N.Y.2d 114, 119, 400 N.E.2d 315, 316, 424 N.Y.S.2d 372, 375 (1979).

so "knowingly and intelligently" in order to effectively waive his right to counsel.[31] This requirement for a valid waiver is necessary to assure that a criminal defendant appreciates the risks of proceeding *pro se*.[32] As Justice Lawrence pointed out in his dissent, the defendant's statement that he would proceed with the suppression hearing clearly was not made "knowingly and intelligently"[33] and, therefore, did not meet the requirements for a valid waiver of counsel.

The *Jones* court's reliance on the *Speller* decision by-passed the opportunity to correct a dangerous precedent in New York law. In addition, if the court had reversed Jones' convictions, a message would have been sent out to trial courts that the Appellate Division refuses to condone such constitutional violations, thereby deterring future transgressions of the right to counsel. It is urged that by refusing to apply a per se rule of reversal, the *Jones* court has paved the way for the future use of harmless-error analysis to situations where it is clearly inapplicable.

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CIVIL PRACTICE LAW AND RULES

CPLR 3101(a)(4): To force disclosure of information possessed by a nonparty witness, the litigant must show that the sought after

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[31] People v. McIntyre, 36 N.Y.2d 10, 17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974); *see also* People v. Williams, 96 App. Div. 2d 740, 740, 465 N.Y.S.2d 332, 334 (4th Dep't 1983) (court must determine whether defendant's decision to represent himself was "knowing and intelligent"). Several statutory provisions authorize the court to permit a defendant to proceed *pro se* "if it is satisfied that [the defendant] made such a decision with knowledge of the significance thereof." *See* CPL § 170.10(6) (information or misdemeanor complaint), § 180.10(5) (felony complaint), § 210.15(5) (indictment) (McKinney 1982).

[32] *See* People v. Sawyer, 57 N.Y.2d 12, 21, 438 N.E.2d 1133, 1138, 453 N.Y.S.2d 418, 423 (1982), *cert. denied*, 459 U.S. 1178 (1983). The *Sawyer* court stated that prior to allowing the defendant to proceed *pro se* the court should "undertake a sufficiently 'searching inquiry' of the defendant to be reasonably certain that the 'dangers and disadvantages' of giving up the fundamental right to counsel have been impressed on the defendant." *Id.* (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

[33] *See supra* note 18 and accompanying text.