



September 21, 2012

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Bench Conference During Trial May Violate Defendant's Right To Be Present During All Critical Stages Of Criminal Proceedings

In *Zamora v. State*, S12A0847 (September 10, 2102), appellant contended that his right to be present during trial was violated by the dismissal of a juror as a result of a bench conference in which appellant did not participate. The issue arose when during voir dire, when asked if he had ever been arrested, one of the venireman disclosed only that he had a ten-year-old DUI arrest; he was selected as a juror. However at the end of the second day of trial, the court learned that the juror was on probation as a felony first offender. The juror was ultimately dismissed. Appellant contended that the discussion of dismissing a juror, and the ultimate removal of the juror, during bench conferences violated his right under the Georgia Constitution to be present during all critical stages of the criminal proceeding against him.

The Court noted that it has long held that the Georgia Constitution guarantees criminal defendants “the right to be present, and see and hear, all the proceedings which are had against him on the trial before the Court.” *Wade v. State*, 12 Ga. 25, 29 (1852). Further, it has been established that “proceedings at which the jury composition is selected or changed are . . . critical stage[s] at which the defendant is entitled to be present.” *Sammons v. State*, 279 Ga. 386, 387 (612 S.E.2d 785) (2005). Accordingly, the Court held that appellant clearly had a constitutional right to be present during the proceedings at which one of the jurors trying his case was removed.

The Court stated that while appellant was in the courtroom during the bench conferences at which the particular juror was discussed and dismissed, appellant did not “see and hear” those proceedings and thus was not “present.” The Court stated that the colloquies between the court, counsel, and the juror might as well have been in chambers and that contrary to the State’s assertion, that the discussions of the juror took place in “open court,” the transcript indicated that the discussions were “on the side” in “bench conferences.”

However, the Court noted, while appellant had a right to hear what was said during the bench conferences, the defendant “may personally waive his right to be present at a stage in the trial, or counsel may waive this right for the defendant. But ‘in order for the waiver of counsel to be binding on the defendant, it must be made in his presence or by his express authority, or be subsequently acquiesced in by him.’” The Court found that it was evident that appellant did not personally waive his right to be present during the bench conferences, and trial counsel did not waive appellant’s right to be present in his presence or with his express authority. Furthermore, the Court found that the question of appellant’s acquiescence in not participating in the bench conferences was close and that the Court was uncertain as to this question.



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Ultimately, the Court found that it did not need to decide that question to resolve the case because at the motion for a new trial hearing, in appellant's presence, his new appellate counsel and the prosecutor asked his trial counsel to read relevant parts of the trial transcript regarding the removed juror, and they questioned trial counsel about the juror's status as a felony first offender and reasons for his removal from the jury. Appellant's new counsel and the prosecutor did not focus on the juror's dishonest answer during voir dire, but appellant knew at a minimum by that point - if not earlier from conversations with his trial counsel or new counsel or review of the trial transcript - that the juror's removal had been discussed during the trial in appellant's absence and resulted from the court, the prosecutor, and trial counsel learning that the juror was a felony first offender. Despite this knowledge, appellant did not voice any objection to the trial court, directly or through his new counsel, regarding his absence from that portion of the trial. Instead, the first time appellant contended that his right to be present was violated was in his appeal brief before the Georgia Supreme Court. Under these circumstances, the Court concluded that appellant acquiesced in the limited trial proceedings that occurred in his absence.