

NEW YORK COURT OF APPEALS ROUNDUP

'WILKINS' ADDRESSES WAIVER OF RIGHT TO BE PRESENT AT SIDEBAR CONFERENCE

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On Jan. 12, 2022, the New York State Senate confirmed Gov. Kathy Hochul's nomination of the Hon. Shirley Troutman, and Judge Troutman took the oath of office as an Associate Judge of the Court of Appeals. Judge Troutman is the second Black woman to serve on the Court. She fills the vacancy created by Judge Eugene Fahey, who left the bench at the end of 2021 after reaching the mandatory retirement age of 70.

Prior to Judge Troutman's confirmation, in *People v. Wilkins*, the Court of Appeals considered whether a defendant can retroactively waive his right to be present at a sidebar conference where the trial court questions a prospective juror concerning issues of potential bias or hostility. In a majority opinion written by Chief Judge Janet DiFiore and joined by Judges Garcia, Singas and Cannatoro, the court affirmed the Appellate Division, Fourth Department's refusal to grant the defendant a new trial on the grounds that the defendant had not been present at the sidebar conference in violation of his rights pursuant to *People v. Antommarchi*, 80 N.Y.2d 247 (1992). The majority rejected the defendant's attempt to raise an objection on appeal where the defendant failed to object before the trial court and was present during later voir dire of the prospective juror without objection.

The court held in *Antommarchi*, that a new trial is required when a defendant is not present at a sidebar conference where the court questions a prospective juror concerning issues of bias or hostility. The purpose of the *Antommarchi* rule "is to provide defendant the opportunity to personally assess the juror's facial expressions and demeanor in order to provide meaningful input on the prospective juror's retention or exclusion from the jury." While a defendant can waive the right to be present, a defendant is not required to affirmatively assert her right to be present at the sidebar and an *Antommarchi* violation can be raised on appeal even if the defendant did not object at trial.

In this case, the court was presented with what it called "unique circumstances." During jury selection, a prospective juror asked to approach the bench where she was questioned in private about her general bias or hostility due to an unrelated prosecution against one of her family members. While it is undisputed that the defendant had a right to be present at the sidebar to witness the questioning of the prospective juror, the defendant, who was represented by counsel, was not present and remained seated at counsel table. At the conclusion of the sidebar, the prospective juror returned to the jury panel for the continuation of voir dire in open court.

Later that day, the People alerted the trial court that it had failed to advise the defendant and codefendant of their *Antommarchi* rights and obtain a waiver of their right to be present at sidebars. The trial court then advised both defendants that they have the right to be present at sidebars and that they can waive that right if they wished. The trial court also asked defense counsel whether their clients intend to continue remaining at counsel table during sidebars. According to the majority, “counsel acknowledged that the court had accurately described what had taken place thus far and explicitly waived defendant’s right to be present at any sidebar unless the court was notified otherwise. Defendant confirmed the waiver.” At the conclusion of voir dire, the co-defendant peremptorily challenged the prospective juror who participated in the sidebar at issue. The defendant did not object. After trial, the defendant was convicted and appealed.

On appeal, the Fourth Department rejected the defendant’s claim that his *Antommarchi* rights had been violated. 175 A.D.3d 867 (2019). One Justice dissented and voted to reverse and grant a new trial based on the defendant’s absence from the sidebar conference. *Id.* at 870. The dissenting Justice granted the defendant’s application for leave to appeal to the Court of Appeals.

The majority opinion began by reiterating a defendant’s “statutory right to be personally present at sidebar conferences involving the voir dire of prospective jurors concerning their ability to weigh evidence objectively.” The majority described this right as “critical,” but noted that “the statutory right to be present alongside defense could at a sidebar conference can be waived by a voluntary, knowing and intelligent choice, and the waiver can be either express or implied. The form of the waiver is ‘flexible’ and can be made by counsel.” The majority clarified that the court’s “holding in *Antommarchi* represented a dramatic shift away from the customary and established procedure of having defense counsel appear alone at sidebars and, as a result, was held not to be retroactive. However, prospectively, *Antommarchi* violations generally may be raised on appeal even absent an objection in the trial court.”

Guided by these principles, the majority rejected the defendant’s request for a new trial “based on the unique circumstances of the waiver given in this particular case.” According to the majority, the trial court informed the defendant of his *Antommarchi* rights, and the defendant explicitly waived those rights which represented “a demonstration that he trusted his attorney to convey to him the information imparted at that sidebar without requiring his presence.” The defendant was present during the later portions of voir dire that were conducted in open court so he could observe the demeanor of the prospective juror. Finally, the majority assumed that the defendant was given the opportunity to provide meaningful input when he convened privately with his counsel, his co-defendant, and co-defendant’s counsel to discuss any challenges to the prospective jury panel. “In sum, under the circumstances presented, defendant’s acquiescence to the continued voir dire of [the prospective juror] in open court, after he explicitly waived his *Antommarchi* rights and failed to object to his pre-waiver absence from the brief sidebar with [the prospective juror] despite being invited to object, renders his claim unavailing.”

Judge Eugene M. Fahey, joined by Judges Rivera and Wilson, dissented. Like the majority, the dissent began by reasserting *Antommarchi*’s recognition of “a fundamental right to be present during any material stage of the trial,” and because a defendant has a fundamental right to be present, a defendant’s “failure to object to being excluded from the side-bar discussions is not fatal to that claim.” The dissent argues that the majority’s rejection of the defendant’s request for a new trial because he “acquiesced” or “cured” the error by not objecting when he was informed about an *Antommarchi* violation that had already occurred, and because he participated in later voir dire regarding the prospective juror, is essentially “a holding that a defendant is required to preserve a claim regarding an *Antommarchi* violation for appellate review.” Such a

holding, in the dissent's view, is contrary to New York law and will impair a defendant's fundamental right to be present at material stages of the trial.

While the majority notes that its decision is based on the unique circumstances present here, a cautious criminal defendant who prospectively waives her right to be present at sidebar conferences during voir dire should make it clear that she has not waived that right with respect to prior sidebars in which she did not participate if she intends to raise the issue on appeal.

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