**BENCH CONFERENCES – CRIMINAL CASES - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

Tain, now that you are “retired guy,” have you worked your way into a group of folks who gather at the local breakfast place, early every morning, to drink coffee and solve all of the world’s problems?”

*No…..*

Today, we are going to discuss the topic of bench conferences in some detail.

*We have discussed this topic as part of other episodes where we discussed criminal trial procedure but we wanted to address bench conferences in a very specific manner because they have been the subject of numerous appeals – and some very recent appeals.*

**HOW THIS ISSUE USUALLY COMES TO PASS**

Your trial is moving along fine and, all of the sudden, a lawyer stands and asks to approach the bench

Now, all of the judge’s “Spider Senses” should be tingling

You do not really want to go through the exercise of having the jurors excused from the courtroom (that process always takes 20-30 minutes by the time all of the jurors use the restroom, etc.)

But you do not know what the lawyers want to talk about…it could be logistics, scheduling, or other mundane time management issues.

On the other extreme, it could be a substantive objection or motion

I will tell you that I do not allow the lawyers to approach the bench during a criminal trial. Ever. And they know that.

Tain?

Before we get too deep into how we handle those types of situations, let’s review the law and discuss the logic behind my prohibition of bench conferences/sidebars or whatever other name may be applied to them.

**THE LAW SURROUNDING BENCH CONFERENCES IN GENERAL**

“The Georgia Constitution guarantees a criminal defendant the right to be present, and see and hear, all the proceedings which are had against him on the trial before the Court.” *Reed v. State*, 2022WL4085942, S22A0530 (Ga. 9/7/2022), citing  *Steen v. State*, 312 Ga. 614, 617 (2021) and *Zamora v. State*, 291 Ga. 512, 517-18 (2012).

The defendant has the right to be present – not merely in the room – during every “critical stage” of the proceedings.

This right “attaches at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure.” *Reed*, supra, citing *Nesby v. State*, 310 Ga. 757-758 (2021).

**WHERE THE RULE DOES NOT APPLY**

With that fundamental rule in place, there are some “situations” where the failure to accommodate the defendant’s right to be present do not result in reversible error

The right of the defendant to be present “does not extend to situations where the defendant's presence bears no relation, reasonably substantial, to the fullness of his opportunity to defend against the charge, and thus would be useless, or the benefit but a shadow.” *Champ v. State*, 310 Ga. 832, 840 (2021)

“Such situations include bench conferences that deal with questions of law involving essentially legal argument about which the defendant presumably has no knowledge, or with procedural or logistical matters.” *Reed*, supra, citing *Champ*, supra, and *Haywood v. State*, 292 Ga. 771, 774 (2013).

While discussions dealing with procedure or logistics do not usually implicate the “right to be present” issue, the record must reveal that is actually what was discussed during the bench conference

Some of you may be better than me at remembering to put that on the record at the conclusion of each bench conference but I will admit that during a jury trial, my mind is on 100 things and none of those 100 things involves putting the subject of a bench conference on the record

 Maybe that is why I simply decided years ago to outlaw them

Admittedly, I may be sending the jury out repeatedly during the trial but I personally do not trust myself to remember to document bench conferences

**PRESUMED PREJUDICE**

If the right to be present is not waived by the defendant, a direct violation is ***presumed prejudicial and requires a new trial.*** *Hardy v. State*, 306 Ga. 654, 660 (2019).

“However, there is a critical difference between the right protected by the Georgia Constitution and the corresponding federal constitutional right. Under governing United States Supreme Court precedent, denial of the federal constitutional right to be present is subject to harmless error review on appeal. By contrast, under our case law, a denial of the right to be present guaranteed by the Georgia Constitution is not. A violation of the Georgia Constitution's right to be present is presumed to be prejudicial. Thus, absent a valid waiver by the defendant, a violation of the right to be present enshrined in the Georgia Constitution triggers reversal and remand for a new trial whenever the issue is properly raised on direct appeal.” *Peterson v. State*, 284 Ga. 275, 279 (2008).

**WAIVER**

“[T]he right to be present belongs to the defendant, and he is free to relinquish it if he so chooses. A defendant may relinquish his right in several ways: if he personally waives the right in court; if his counsel waives the right at his express direction; if his counsel waives the right in open court while he is present; or, as seen most commonly in our case law, if his counsel waives the right and the defendant subsequently acquiesces to that waiver.” *Champ v. State*, 310 Ga. 832, 841 (2021).

“Acquiescence occurs if a defendant is aware of the proceedings taking place in his absence but remains silent, so long as he had sufficient information concerning the matters occurring outside his presence for his silence to be fairly construed as consent.” *Reed*, supra, citing *Steen*, at 617, *Champ*, at 841 and *Burney v. State*, 299 Ga. 813, 820 (2016).

Waivers can be express or implied through acquiescence. Obviously, a waiver cannot be implied where the defendant had no knowledge of what was being discussed. (In essence, it has to be a “knowing” waiver)

 But where the topic of the bench conference is put on the record and both sides are given the opportunity to comment and no objection is made – that constitutes an express waiver that will survive appeal.

“The right to be present is waived if the defendant personally waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver.” *Brewner*, at 11, citing *Burney v. State*, 299 Ga. 813, 820 (2016).

**VOIR DIRE**

The term “critical stage” includes voir dire *Young v. State*, 312 Ga. 71, 79 (2021)

“Nevertheless, not every bench conference that occurs during the voir dire process necessarily implicates a defendant's right to be present. Conferences may occur during voir dire that involve legal argument or merely procedural or logistical matters, which do not implicate that right.” *Reed*, supra, citing *Champ*, at 840 and *Nesby*, at 759.

Many times, I have had to correct lawyers who indicated to jurors that if they had an issue they would like to discuss in private or outside the presence of the other jurors, they merely needed to let the judge know and we would accommodate such a request

In the way that statement is worded, I would interrupt and not allow for that misconception to continue

Now, to be clear, if there is a circumstance that begs for some level of privacy during voir dire, the way I handle that is to identify the juror and then, once we have concluded questioning of the other jurors, we bring that juror back into the room and discuss the issue in open court but outside the presence of the other potential jurors

In *Reed*, the trial judge asked if any jurors had hardship requests and, with at least one such request, allowed the potential juror to approach the bench. The colloquy was recorded by the court reporter. There was a question whether the judge’s decision to release that juror based upon a medical hardship was done in open court or as part of the discussion at the bench.

Regardless, the defendant was not part of that discussion – he was not at the bench during the conversation about that juror’s medical situation

In *Champ*, the Supreme Court of Georgia held that the defendant had a right to be present at bench conferences involving or related to direct discussions between the trial court and prospective jurors and decisions to remove prospective jurors. *Champ*, at 840.

Both of those cases were decided based upon waiver of the right to be present due to the lack of objection by either the defendant or his counsel.

What an interesting concept – thinking that a defendant would be expected to make an objection on the record while simultaneously being represented by counsel

In most other contexts, we would not allow a defendant to make such an objection

***Batson/McCollum Challenges***

Calling the lawyers to the bench after jury selection to inquire whether there were any *Batson* or *McCollum* challenges seems to be another place where trial judges allow for bench conferences to occur

 I think that is very dangerous

Hopefully, no judges are attempting to conduct actual *Batson* hearings as bench conferences – I think the issue is asking whether there is a *Batson/McCollum* motion in the bench conference setting and, if so, conducting the actual hearing in open court, outside of the presence of the jurors

**EVIDENTIARY RULINGS**

There are cases where the trial court made a ruling on an evidentiary issue (i.e. whether the defendant’s witnesses opened the door to character evidence, admissibility of evidence, etc.) where the defendant was not present

Most of the cases seem to find that while those hearings are a part of a trial, some may not be a “critical stage”

For example, in *Brewner v. State*, 302 Ga. 6, 10-11 (2017), the judge announced his ruling on a 404(b) motion outside the presence of the defendant. The Supreme Court of Ga. found that if all rulings had to be made in open court and in the presence of the defendant, judges could never issue written orders or rulings. They found that was clearly not the case and, therefore, there was no violation where the judge issued a ruling outside of the defendant’s presence.

Word of Wisdom – if you are ruling on a motion during the actual trial, do it in the presence of the defendant. It is just too easy to avoid this entire issue on appeal

**COMMUNICATION WITH JURORS**

The cases dealing with the defendant’s right to be present included cases where the trial judge left the bench and went into the jury room to discuss things with the jurors.

 I hope this strikes everyone as being a no-no

Judges are expected to forego any ex parte communication with the jurors.

“We state again: ‘[a]ll communications with the jury are to be discouraged except in open court with all persons present...’” *Hanifa v. State*, 269 Ga. 797, 807 (1998).

This prohibition has led to us telling you in other episodes that judges should only communicate with jurors through written notes that are marked as court exhibits and made a part of the record.

In *Brewner*, supra, the trial judge received a note during the lunch break from a juror who had a family emergency. The judge made the decision to release the juror and then immediately reported the decision to the lawyers after court resumed after the recess. The defendant was admittedly not present when the decision was made. But neither was the prosecutor, defense counsel or anyone else.

The judge inquired whether either party objected and all lawyers agreed there was no objection. Now ***that*** is a waiver.

**OPTIONS IN HOW TO HANDLE THESE ISSUES**

As mentioned earlier, Wade does not allow for any bench conferences. I send the jury out and we discuss things in full voice, in the presence of the defendant and on the record

The other option is to allow for bench conferences, and:

1. Make a record of what was discussed after the bench conference is concluded; or
2. Invite the defendant, counsel and court reporter to the bench to ensure that the substance of the conference is a part of the record

Frankly, my security folks do not want defendants approaching the bench

And my court reporter would have a coronary if she was expected to move microphones around, etc.

Then you have the issue of ensuring that you speak loud enough for the conversation to be taken down but not too loud so that the jury overhears

It is far easier to adopt the “Wade Rule” and allow the jury to step out and consider whatever issue is to be addressed in full voice, in the presence of the defendant, and on the record

Sidenote – We have a colleague who sent Wade a recent “911” text. In a trial, the judge had the jury come back into the courtroom and, in the presence of the jury, noted that the defendant was present, “unshackled”

Obviously, the judge never intended to make that statement in the presence of the jury – particularly the “unshackled” portion

It worked out but there was an immediate motion for mistrial

I bring this up to make a larger point – it is a good idea to make a record after a recess of who is present once you get back on the record

It is easy to forget that the record may well be silent on the issue of who is present/not present following a recess – better for the judge to make a statement on the record to ensure everyone is following along

Just make sure you are not talking about restraints or the lack thereof in the jury’s presence

So, that’s all for our episode dealing with bench conferences in criminal cases

To recap, we have discussed that the defendant’s right to be present extends to all critical stages of the trial

While the right exists under both the US and the GA constitutions, under the GA Constitution, there is presumed prejudice when there is a violation of the defendant’s right to be present

The defendant can waive his/her right to be present, either expressly or through acquiescence. But make a record!

You can conduct bench conferences but the substance of that conference must make its way to the record – or be prepared to attempt to create it all as part of the motion for new trial

The outline is full of statutory and case citations and that outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell…the Thompson Twins was not a 2 person band. At times, they had up to 7 members but were best known as a trio between 1982-1986. Now you know.*