59 A.D.2d 558, 397 N.Y.S.2d 150
(Cite as: 59 A.D.2d 558, 397 N.Y.S.2d 150)

Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., Respondent,
v.
Rufus BOYD, Appellant.
Aug. 8, 1977.

Defendant was convicted in the Supreme Court, Kings County, of criminal sale of controlled substance in first degree and criminal possession of controlled substance in first degree, and he appealed. The Supreme Court, Appellate Division, Second Department, held that trial court committed reversible error in sealing courtroom without a hearing based upon information by the district attorney that only witness against defendant was still acting in undercover capacity.

Reversed and new trial ordered.

West Headnotes

[1] Criminal Law 110 635.11(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.11 Proceedings on Request for Closure
110k635.11(3) k. Hearing. Most Cited Cases
(Formerly 110k635)

Criminal Law 110 635.11(4)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.11 Proceedings on Request for Closure
110k635.11(4) k. Evidentiary Matters. Most Cited Cases
(Formerly 110k635)

Criminal Law 110 1166.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.7 k. Public or Open Trial; Spectators; Publicity. Most Cited Cases
(Formerly 110k1166.11(2), 110k1166.11)
Court, in prosecution for criminal sale of controlled substance in first degree and criminal possession of controlled substance in first degree, committed reversible error in refusing to hold a hearing on matter of sealing of courtroom and in sealing courtroom based solely upon information from district attorney that one witness against defendant was still acting in an undercover capacity. Penal Law § 220.00 et seq.; U.S.C.A.Const. Amends. 6, 14; Judiciary Law § 4; Civil Rights Law § 12.

[2] Constitutional Law 92 3856

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3856 k. Sixth Amendment. Most Cited Cases
(Formerly 92k268(4), 92k268(6))

Criminal Law 110 577.4

110 Criminal Law
110XVIII Time of Trial
110XVIII(B) Decisions Subsequent to 1966
110k577.4 k. Constitutional Guarantees; Speedy Trial in General. Most Cited Cases
(Formerly 110k573)

Criminal Law 110 635.1

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.1 k. In General. Most Cited Cases
(Formerly 110k635)
The Sixth Amendment to the Constitution guarantees to everyone accused of a crime the right to a speedy and public trial and by the Fourteenth Amendment the states are bound to give the accused these same rights. U.S.C.A.Const. Amends. 6, 14; Judiciary Law § 4; Civil Rights Law § 12.

[3] Criminal Law 110 918(1)

110 Criminal Law
110XXI Motions for New Trial
110k918 Errors and Irregularities in Conduct of Trial
110k918(1) k. In General. Most Cited
Where fundamental right to a speedy and public trial has been unjustly abridged, a new trial is mandated without an affirmative showing of prejudice. U.S.C.A.Const. Amends. 6, 14; Judiciary Law § 4; Civil Rights Law § 12.

[4] Criminal Law 110 635.1

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.1 k. In General. Most Cited Cases
(Formerly 110k635)

Criminal Law 110 635.9(4)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.9 Interests of Persons Affecting Propriety of Closure
110k635.9(4) k. Officers and Informants. Most Cited Cases
(Formerly 110k635)
Right to public trial is not absolute and there are exceptions; there are also standards for closing of courtroom where undercover police officer is about to testify. U.S.C.A.Const. Amends. 6, 14.

[5] Criminal Law 110 635.6(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(1) k. In General. Most Cited Cases
(Formerly 110k635)
Closing of courtroom is to be done sparingly and only in unusual circumstances. U.S.C.A.Const. Amends. 6, 14; Judiciary Law § 4; Civil Rights Law § 12.

[6] Criminal Law 110 1166.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.7 k. Public or Open Trial; Spectators; Publicity. Most Cited Cases
(Formerly 110k1166.11(2), 110k1166.11)
It is reversible error to close courtroom summarily if there are no unusual circumstances, as where there is no hearing and no finding, but only a brief conclusory recital for relief. U.S.C.A.Const. Amends. 6, 14; Judiciary Law § 4; Civil Rights Law § 12.

[7] Criminal Law 110 965

110 Criminal Law
110XXI Motions for New Trial
110k965 k. Proceedings at New Trial. Most Cited Cases
Words in indictment charging defendant with criminal sale of controlled substance in first degree and criminal possession of controlled substance in the first degree to effect of "each aiding the other and being actually present" did concern the theory of the case as presented to the grand jury and although not included in statutory definition of crimes charged, as such, trial court did not have power to delete or change those words, and at new trial defendant would have to be tried on theory expressed in original indictment or be tried on proper superseding indictment. Penal Law § 220.00 et seq.; CPL 200.70, subd. 1.

****151** Albert J. Brackley, Brooklyn (**Joel A. Brenner**, Bay Shore, of counsel), for appellant.

Eugene Gold, Dist. Atty., Brooklyn (Richard Elliot Mischel, New York City, of counsel), for respondent.

***560** Before MARTUSCELLO, J. P., and MARGETT, SUOZZI and O'CONNOR, JJ.

MEMORANDUM BY THE COURT.

***558** Appeal by defendant from a judgment of the Supreme ***559** Court, Kings County, rendered July 27, 1976, convicting him of criminal sale of a controlled substance in the first degree (two counts) and criminal possession of a controlled substance in the first degree (two counts), upon a jury verdict, and imposing sentence.

Judgment reversed, on the law and as a matter of discretion in the interest of justice, and new trial ordered.

Appellant and one Hasty Hyman were indicted jointly and charged with six counts of violating various provisions of article 220 of the Penal Law. A first joint trial resulted in an acquittal of Hyman on four of the counts. The jury could reach no verdict as to Hyman on the other two counts or as to appellant on any of the counts. A second joint trial was held, during which a severance was granted to Hyman, and the jury found appellant guilty on all six counts (two of which have merged as lesser inclusory counts).

Appellant raises many issues on this appeal. We find that two of the points raised by him are correct and that a new trial is required. The other contentions of appellant need not be considered.

The principal and only eye witness against appellant was Police Officer Veronica Hobbs, who worked as an undercover officer for New York City and who allegedly purchased heroin from him in Brooklyn on two occasions in 1974. She was no longer working for the New York City Police Department at the time of the trial, but was employed as an undercover agent in New Jersey. Her testimony at the second trial continued over several days and is recorded in hundreds of pages of the transcript.

****152** [1] Before Officer Hobbs took the stand, the Assistant District Attorney asked that the courtroom be sealed because "the request was made by the present employers of the undercover police officer". Counsel for appellant and counsel for Hyman both vigorously protested this on the ground that there was nothing in the record to justify this abridgement of the right to a public trial. Counsel for Hyman opposed the sealing of the courtroom as an attempt to bolster the People's case by attaching special significance to the testimony of Officer Hobbs. Counsel for appellant asked that a hearing be held on this matter (out of the presence of the jury) and that the trial court not grant the request of the Assistant District Attorney without evidence being presented. The trial court refused to hold a hearing and stated: "I have information from the District Attorney saying she's still acting in an undercover capacity. That being so, the Court will be sealed." This ruling constituted reversible error.

[2][3][4][5] The Sixth Amendment to the United States Constitution guarantees to everyone accused of a crime "the right to a speedy and public trial" (emphasis supplied). By the Fourteenth Amendment, the States are bound to give the accused these same rights (see Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491). This same right to a public trial is provided in this State by statute (see Judiciary Law, s 4; Civil Rights Law, s 12). Where this fundamental right has been unjustly abridged, a new trial is mandated "without an affirmative showing of prejudice" (see People v. Jelke, 308 N.Y. 56, 67, 123 N.E.2d 769). It is true, as respondent contends, that the right to a public trial is not "absolute" and there are exceptions (see, for example, exceptions listed in section 4 of the Judiciary Law), but there are also standards for the closing of the courtroom where an undercover police officer is about to testify. Also, the closing of the courtroom is to be done sparingly and only in unusual circumstances (see People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 286 N.E.2d 265).

[6] In People v. Hinton, supra, the Court of Appeals upheld the sealing of the courtroom in a narcotics case because (1) the undercover agent was still operating actively in the community, (2) other narcotics investigations were pending and (3) other targets of these narcotics investigations were present in the courtroom. It is reversible error to close the courtroom summarily if there are no unusual circumstances, the undercover agent was shown to be only in the same general area and there was no hearing and no finding, but only a brief conclusory recital for relief (see People v. Richards, 48 A.D.2d 792, 793, 369 N.Y.S.2d 162, 164; People v. Morales, 53 A.D.2d 517, 383 N.Y.S.2d 620; but, cf., People v. Rickenbacker, 50 A.D.2d 566, 374 N.Y.S.2d 672).

People v. Garcia, 41 N.Y.2d 861, 392 N.Y.S.2d 251, 360 N.E.2d 929, affg. 51 A.D.2d 329, 381 N.Y.S.2d 271, relied on by respondent, is distinguishable on its facts. In that case the public was excluded only for a "relatively brief period" while an undercover agent testified. Here, the greater part of a lengthy trial was held in private, and a request for a hearing had been made. The trial court abused its discretion in summarily closing the courtroom, and appellant is entitled to a new trial (see People v. Jelke, supra).

[7] Appellant argues on appeal that the trial court amended the theory of the indictment as to all six counts, in violation of CPL 200.70 (subd. 1), and thereby changed the strict common-law prohibition against all changes in a Grand Jury indictment by the court or by the prosecution (see Ex Parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849; Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 Ed.2d 252). (Appellant raised this objection at the trial only as to two of the six counts.) We find that the words in the indictment "each aiding the other and being actually present" do concern the theory of the case as presented to the Grand Jury (although, as respondent points out, the words are not included in the statutory definition of the crimes charged (see People v. Munroe, 190 N.Y. 435, 83 N.E. 476)). The trial court did not have the ****153** power to delete or change those words. At the new trial, appellant must be tried on the theory expressed in the original indictment, or be tried on a proper superseding indictment (see People v. Jackson, 20 N.Y.2d 440, 285 N.Y.S.2d 8, 231 N.E.2d 722; People v. Ercole, 4 N.Y.2d 617, 176 N.Y.S.2d 649, 152 N.E.2d 77).

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