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publication in the New York Reports.

No. 96
The People &c.,
Respondent,
v.
Isaac Diggins,
Appellant.

Roy L. Reardon, for appellant.
Sheryl Feldman, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed,
defendant's motion pursuant to CPL 440.10 to vacate the judgment
of conviction and sentence granted and the case remitted to
Supreme Court for further proceedings on the indictment.

It is well established that a defendant may not, by his

absence alone, "waive his right to effective assistance of counsel" (People v Aiken, 45 NY2d 394, 398 [1978]). Although a defendant's willful absence from trial surely hampers an attorney's ability to represent the client adequately and must be taken into consideration, under the circumstances of this case, we conclude that counsel's lack of participation during the jury trial amounted to the ineffective assistance of counsel. On this record, including defendant's cooperation with his attorney in formulating a defense before absconding, there was a "reasonable basis for an active defense" (United States v Sanchez, 790 F2d 245, 254 [2d Cir 1986]).

* * * * *

Order reversed, defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction and sentence granted, and case remitted to Supreme Court, New York County, for further proceedings on the indictment, in a memorandum. Chief Judge Lippman and Judges Graffeo, Pigott and Rivera concur. Judges Read and Smith dissent and vote to affirm, concluding that defendant's trial counsel pursued a protest strategy (see People v Diggins, 11 NY3d 518, 525 [2008]). Judge Abdus-Salaam took no part.

Decided May 30, 2013