



**BECAUSE DEFENDANT INVOKED HIS RIGHT TO COUNSEL WHEN HE WAS NOT IN CUSTODY HE COULD VALIDLY WITHDRAW HIS REQUEST WITHOUT THE PRESENCE OF COUNSEL (FOURTH DEPT).**

The Fourth Department determined defendant invoked his right to counsel when he was not in custody and therefore defendant could validly withdraw his request for counsel without the presence of counsel:

The Court of Appeals has stated that a defendant who asserts his or her right to counsel while out of custody may later withdraw that assertion without an attorney present and speak to law enforcement agents ... . A hearing court may infer that a defendant has withdrawn a request for counsel when the defendant's conduct unambiguously establishes such a withdrawal, which requires consideration of all relevant factors, including "whether defendant was fully advised of his or her constitutional rights before invoking the right to counsel and subsequently waiving it, whether the defendant who has requested assistance earlier has initiated the further communication or conversation with the police . . . , and whether there has been a break in the interrogation after the defendant has asserted the need for counsel with a reasonable opportunity during the break for the suspect to contact an attorney" ... . Here, defendant was repeatedly advised of his rights, including twice immediately before he resumed speaking with the police. Moreover, after an overnight break in questioning, defendant initiated the conversation with the police to inquire about taking a polygraph examination, and he provided his own transportation to the investigators' office. Consequently, we conclude that the court properly determined that defendant withdrew his assertion of his right to counsel ... . We reject defendant's contention that a different result is required because he did not cause the break in the interrogation. The relevant consideration is not which party caused the break in the questioning, rather it is whether there was "a reasonable opportunity during the break for the suspect to contact an attorney" ... , and in this case defendant had such an opportunity during the overnight break in questioning. [People v Brown, 2020 NY Slip Op 01981, Fourth Dept 3-20-20](#)