public, including the press, is not prevented from being present during the charge; they are simply prevented from entering or leaving the courtroom during this period. The cases of *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 and *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629, insofar as they involved the complete exclusion of the press and public during portions of the proceedings, are inapposite. There is no such total exclusion involved here. This procedure is simply the exercise by the trial court of its power to impose a reasonable limitation on access to the courtroom so as to maintain a quiet and orderly atmosphere for a trial (*see, Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 581, n. 18, 100 S.Ct. 2814, 2830, n. 18, 65 L.Ed.2d 973).

The defendant's final contention, that the sentence imposed was harsh and excessive, is without merit (*see, People v. Suitte*, 90 A.D.2d 80, 85–86, 455 N.Y.S.2d 675).

134 A.D.2d 641

The PEOPLE, etc., ex rel. George SASSOWER, Appellant,

v.

SHERIFF OF SUFFOLK COUNTY, Respondent.

Supreme Court, Appellate Division, Second Department.

Nov. 30, 1987.

Appeal was taken from portions of judgment and order of the Supreme Court, Suffolk County. The Supreme Court, Appellate Division, 96 A.D.2d 585, 465 N.Y.S.2d 543, remitted the matter for hearing. On appeal after remand, the Supreme Court, Appellate Division, held that attorney's failure to appear at date set for hearing on petition to find him in contempt of court for noncompliance with turnover order in a probate proceeding constituted a voluntary waiver of his right to be present and offer evidence in his defense.

Affirmed.

1. Contempt ⇐60(1)

Attorney who was personally served with notice of date of contempt hearing and failed to appear must have been aware, by virtue of his experience and education, of consequences of nonappearance and thus had burden of coming forward with evidence to rebut inference that he waived his presence at evidentiary hearing.

2. Contempt ⇐60(1)

Hearsay testimony of attorney's former wife at contempt hearing in probate action, that a judge directed attorney to appear beforehand in another court to continue trial of a matrimonial action, did not negate inference that attorney had waived his presence at evidentiary hearing.

3. Contempt ⇐60(1)

Although attorney's affidavit indicated he had conflicting court commitments for date contempt hearing stemming from probate action was scheduled, there was no admissible evidence in record that attorney had requested and been denied an adjournment for the purpose of attending his contempt hearing, by either matrimonial trial in Bronx County or unidentified action in Kings County.

4. Contempt ⇐57

Intentional utilization of court appearances which conflict with scheduled hearing date on a charge of contempt for the purpose of avoiding a prompt hearing on the charge is equivalent to an outright refusal to attend the hearing and constitutes waiver.

5. Contempt ⇐57

Attorney who did not offer any testimony or documentary evidence that he had attempted to avoid or reschedule conflicting court appearances to enable him to attend his contempt hearing waived his presence at evidentiary hearing.

Exhibit "B"

6. Contempt ⇐57

Attorney's failure to appear at his contempt hearing constituted a voluntary waiver of his right to appear and offer evidence in his defense where his affidavit of actual engagement showed intention not to subject himself to an adjudication on the merits of contempt charges in probate matter unless similar charges were lodged and simultaneously litigated against a surrogate and public administrator, and his chosen method of service of the affidavit insured that request for an adjournment of the contempt hearing would not be timely received.

George Sassower, White Plains, pro se.

Reisman, Peirez, Reisman & Calica, Garden City (Robert M. Calica and Myra L. Paicwonsky, of counsel), for respondent.

Before WEINSTEIN, J.P., and RUBIN, EIBER and KUNZEMAN, JJ.

MEMORANDUM BY THE COURT.

Appeal by the petitioner, as limited by his notice of appeal and brief, from so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Gowan, J.), dated February 10, 1981, as denied his motion for summary judgment and thereupon dismissed a writ of habeas corpus. By order dated July 25, 1983, this court remitted the matter to the Supreme Court, Suffolk County, to hear and report, and held the appeal in abeyance in the interim (*see, People ex rel. Sassower v. Sheriff of Suffolk County*, 96 A.D.2d 585, 465 N.Y.S.2d 543). The Supreme Court, Suffolk County (Joseph, J.), has now complied.

ORDERED that the order and judgment is affirmed insofar as appealed from, without costs or disbursements.

Pursuant to an order of this court, this matter was remitted to the Supreme Court to hear and report on the issue of whether the appellant's failure to appear on March 7, 1978, the date set for the hearing on a petition to adjudge him in contempt of court for noncompliance with a turnover order in a probate proceeding, constituted a voluntary waiver of his right to be present and proffer evidence in his defense (*see, People ex rel. Sassower v. Sheriff of Suffolk County, supra*). Initially, we note that a prompt evidentiary hearing on this issue was obstructed for over three years by the appellant's numerous, meritless attempts to appeal directly to the Court of Appeals or collaterally attack this court's order dated July 25, 1983.

At an evidentiary hearing commenced on September 25, 1986, the appellant's former wife, who is an attorney, testified as a witness. According to the witness, on March 7, 1978, the appellant was of counsel for her client in the trial of a matrimonial action before Justice DiFede, in the Supreme Court, Bronx County. The action was captioned *Green v. Green* and the trial had been in progress prior to March 7, 1978. Since the testimony of a witness had not been completed on March 6, 1978, Justice DiFede directed the parties to return with counsel the next day to continue the trial. To her knowledge, the appellant was on trial before Justice DiFede the entire day of March 7, 1978. The witness conceded that she had not attended the trial of the matrimonial action on either March 6 or 7, 1978, but maintained that she knew the aforenoted facts were true from having read the trial transcript when the judgment in the *Green* action was on appeal. She recalled that the appellant was upset about Justice DiFede's direction that the trial proceed on March 7, 1978, because he had other court commitments for that date including a case for one of his clients that had been scheduled in Kings County for the same date and marked final. The witness stated that she personally called the Surrogate's Court, Suffolk County, on March 7 to advise the Surrogate, who was conducting the contempt hearing, that the appellant's affidavit of engagement was "on the way" and that he had been held over on trial in the Supreme Court, Bronx County. She did not recall the name of the individual she spoke with at that court.

The affidavit of the appellant referred to by the witness was dated March 6, 1978,

was served by mail, and was received by the Surrogate's Court, Suffolk County, on March 8, 1978. The bulk of the typed affidavit was an application to summarily dismiss the criminal contempt proceeding or, in the alternative, to adjourn the proceeding for at least five weeks so that the appellant could simultaneously bring on motions to hold the Surrogate (Signorelli, S.), and the counsel for the Public Administrator of the estate in question in contempt for reasons to be disclosed in the motion papers. In the last numbered paragraph of his affidavit, the appellant stated: "On March 7, 1978, deponent will be actually engaged in another court in Brooklyn, New York, and therefore cannot present this application in person". Below his signature, in handwriting, appears the statement "4:30 pm trial continued Supreme, Bronx".

The appellant appeared at the evidentiary hearing on September 25, 1986, and indicated that he intended to take the stand and testify in his behalf. However, upon the request of the attorney for the Public Administrator of the estate in question, the hearing was adjourned after the completion of the testimony of the appellant's former wife. On the adjourned hearing date, November 6, 1986, appellant did not appear despite numerous letters he previously dispatched to the court and his adversaries indicating his intention to appear and testify on that date. The attorney for the Sheriff of Suffolk County informed the hearing court that the appellant had telephoned him at 4:30 P.M. on November 5, 1986, and asked the attorney to advise the court that he would not appear at the hearing, would not request an adjournment, and wished to rest his case. The court denied the Public Administrator's and the Sheriff's applications to adjourn the hearing to enable each to subpoena the appellant to appear and testify. The hearing was concluded and the court found that the appellant's failure to appear on the date set for the contempt hearing did not constitute a voluntary waiver of his right to be present and proffer evidence in his defense because the appellant was engaged on trial in the Supreme Court, Bronx County. We disagree with the court's finding.

[1] As stated in our prior memorandum decision, the appellant was personally served with notice of the date of the contempt hearing and failed to appear. Since the appellant was then an attorney, he was surely aware by virtue of his experience and education of the consequences of nonappearance. Although the burden of showing voluntary absence constituting waiver is on the prosecution (*Matter of Whitley v. Cioffi*, 74 A.D.2d 230, 427 N.Y.S.2d 23), "the mere fact of absence may [as here] lend itself to the inference of waiver" (*Matter of Whitley v. Cioffi, supra*, at 233, 427 N.Y.S.2d 23). Consequently, the burden shifted to the appellant to come forward with evidence to rebut the inference that he waived his presence at the evidentiary hearing.

[2, 3] The hearsay testimony of the appellant's former wife at the hearing that Justice DiFede directed the appellant to appear before him in the Supreme Court, Bronx County, on March 7, 1978, to continue the trial of a matrimonial action, does not suffice to negate the inference of waiver. While the appellant's affidavit indicates that he had conflicting court commitments for March 7, 1978, there is no admissible evidence in the record that the appellant had *requested* and been denied an adjournment for the purpose of attending his contempt hearing, of either the matrimonial trial before Justice DiFede in the Supreme Court, Bronx County, or the unidentified action in Kings County.

[4, 5] The intentional utilization of court appearances which conflict with the scheduled hearing date on a charge of contempt for the purpose of avoiding a prompt hearing on the charge is equivalent to an outright refusal to attend the hearing and constitutes a waiver (*cf., People ex rel. Diamond v. Flood*, 100 A.D.2d 604, 473 N.Y.S.2d 558). Here, the appellant did not proffer any testimony or documentary evidence that he had attempted to avoid or reschedule the conflicting court appearances to enable him to attend his contempt hearing.

[6] The "strongest inferences that the opposing evidence will permit may be drawn against a party who fails to testify" (*see, American Nat. Bank & Trust of N.J. v. Alba*, 111 A.D.2d 294, 297, 489 N.Y.S.2d 285; *see also, Noce v. Kaufman*, 2 N.Y.2d 347, 161 N.Y.S.2d 1, 141 N.E.2d 529; *Dowling v. Hastings*, 211 N.Y. 199, 105 N.E. 194; *Isquith v. Isquith*, 229 App.Div. 555, 242 N.Y.S. 383). In this case, the appellant's affidavit of actual engagement evidences an intention not to subject himself to an adjudication on the merits of the contempt charge unless similar charges were lodged and simultaneously litigated against Surrogate Signorelli and the Public Administrator. Additionally, the appellant's chosen method of service of the affidavit, by mail after 4:30 P.M. on March 6, 1978, ensured the untimely receipt by the Surrogate's Court of his request for an adjournment of the March 7, 1978, contempt hearing. In view of these facts and the appellant's familiarity, as an experienced trial attorney, with court procedures, the Supreme Court erred in declining to draw, from the appellant's failure to testify at the hearing, the adverse inference that he intentionally chose to utilize court appearances which conflicted with the date of his contempt hearing for the purpose of delaying and avoiding the hearing. Based on this record, we find that the appellant's failure to appear at his March 7, 1978, contempt hearing constituted a voluntary waiver of his right to appear and proffer evidence in his defense. Consequently, the hearing court's report, dated November 6, 1987, is disaffirmed and so much of the order and judgment (one paper) of the Supreme Court, Suffolk County (Gowan, J.), dated February 10, 1981, as denied the appellant's motion for summary judgment and dismissed a writ of habeas corpus is affirmed.

133 A.D.2d 984

The PEOPLE of the State of New York, Respondent,

v.

Gerald HINKLEY, Appellant.

Supreme Court, Appellate Division, Third Department.

Oct. 29, 1987.

Defendant was convicted in the County Court, Rensselaer County, Dwyer, J., of criminal possession of weapon in third degree and bail jumping in second degree, upon his plea of guilty, and he appealed. The Supreme Court, Appellate Division, Harvey, J., held that by pleading guilty prior to obtaining order denying suppression motion, defendant had waived appellate review of the suppression issue.

Affirmed.

Criminal Law ⇐1026

By pleading guilty before obtaining order denying suppression motion, defendant had waived appellate review of the suppression issue.

Joseph F. Donnelly, Slingerlands, for appellant.

James B. Canfield, Rensselaer County Dist. Atty., Troy, for respondent.

Before MAHONEY, P.J., and WEISS, YESAWICH, LEVINE and HARVEY, JJ.

HARVEY, Justice.

Appeal from a judgment of the County Court of Rensselaer County (Dwyer, Jr., J.), rendered June 30, 1986, convicting defendant upon his plea of guilty of the crimes of criminal possession of a weapon in the third degree and bail jumping in the second degree.

When this matter was previously before us, we withheld decision in order to get a dispositive determination as to whether County Court ruled on defendant's sup-