NYS Court of Appeals Criminal Decisions for April 2, 2019

People v. Rodriguez

This is a 5 to 2 memorandum, affirming the AD, with Judges Rivera and Wilson dissenting. The defendant breached a written cooperation agreement by refusing to testify regarding a burglary for which defendant had knowledge. Defendant confessed to his role in a murder and assault, and cooperated in those prosecutions involving other perpetrators. The agreement broadly referenced defendant being required to cooperate regarding any other investigation. County Court deemed the agreement breached. Defendant unsuccessfully moved to withdraw his guilty plea; the court did not abuse its discretion in denying the motion. Defendant's sentence was enhanced from the term that would have been imposed had the cooperation agreement been kept to.

In dissent, Judge Rivera observed that the burglary matter was not explicitly referenced in the cooperation agreement. Defendant neither understood nor intended the agreement to include the burglary matter, which he had even expressed fear about during the course of the proceedings. Traditional rules of contract construction should apply. The agreement did not require unlimited cooperation.

People v. Tapia

This is a 4 to 3 decision, affirming the AD. The Chief authored the majority's opinion, with Judge Wilson writing for the dissent, joined by Judges Rivera and Fahey. The police officer here honestly admits to not recalling the pre-arrest events leading up to an assault - - and to not having his recollection refreshed by his grand jury testimony. The certified transcript of the grand jury testimony is moved into evidence under the past recollection recorded exception to the hearsay rule. The declarant officer testified at trial, thus, according to the majority, neutralizing any 6th Amendment Confrontation Clause issue. The opportunity for cross-examination of a live witness, regardless of how ineffective the examination ultimately is, is the point. The procedure of testing evidence through this method is what is guaranteed, not the actual reliability of it. The prior testimony was provided at a time when the witness had knowledge of the events. It was a true and accurate statement of facts given at that time. The trial jury was instructed that the grand jury testimony was not independent evidence itself, but rather just auxiliary to the live testimony provided at trial. Moreover, the memory of a witness is a proper subject of cross-examination.

The past recollection recorded exception to the hearsay prohibition requires that: (1) the witness had first observed the matter recorded; (2) the recollection was fairly fresh at the time when it was recorded; (3) the witness was able to testify that the record is a correct

representation of his or her knowledge and recollection at the time it was made; and (4) the witness had sufficient present recollection of the info recorded. This statement is only meant to be received as a supplement to the oral testimony presented to the trier of fact; its admissibility is left to the sound discretion of the trial court. People v. Taylor, 80 NY2d 1, 8 (1992). The court below did not abuse its discretion.

Judge Wilson in dissent opined that the admission of the officer's grand jury testimony violated CPL 670.10, which allows, only under specific and limited circumstances, the admission into evidence of prior testimony *(taken when subject to cross-exam at a trial, felony hearing or CPL 660 examination)* where the witness is unable to be present for trial. Only three scenarios apply: death, illness or incapacity. Otherwise, the state must have exercised due diligence where a witness cannot be found or returned to the jurisdiction. The majority considered the witness at bar unavailable because of his inability to remember.

As Judge Wilson observed, testimony is generally inadmissible unless both the witness and opposing counsel were in the room where it happened. *See* People v. Ayala, 75 NY2d 422, 429 (1990) (prior Wade hearing testimony inadmissible under CPL 670.10; limited prior cross-exam; not permitted under the statute); People v. Green, 78 NY2d 1029, 1331 (1991) (child-witness testified at grand jury to seeing a shooting, but could not recall it years later at trial; prior testimony improperly admitted under CPL 670.10; new trial ordered); *but see* People v. Geraci, 85 NY2d 359, 366 (1995) (unavailability of witness caused by defendant; grand jury testimony admissible). It is irrelevant whether the officer-witness' testimony at bar qualified under the prior recollection recorded exception. The majority erroneously reads CPL 670.10 to mean that any prior testimony of a witness that is able to testify can be admitted. The jury being able to consider the memory loss of a witness is irrelevant here because the prior testimony was provided when his memory was fresh.