NYS Court of Appeals Criminal Decisions for December 17, 2019

People v. Patterson

This is a 4 to 3 memorandum, affirming the AD. Judge Fahey authored for the dissent, with Judges Rivera and Wilson joining. The trial court did not abuse its discretion in denying defendant's challenge for cause under CPL 270.20(1)(b). The prospective juror did not demonstrate preexisting opinions that might indicate bias. Because of this, an unequivocal assurance that she could be fair and impartial was unnecessary. People v. Johnson, 94 NY2d 600, 615 (2000); People v. Arnold, 96 NY2d 358, 363 (2001).

Judge Fahey disagrees in dissent, opining that the trial court had an obligation to "inquire further" to obtain unequivocal assurances that the prospective juror could be impartial. People v. Wright, 30 NY3d 933, 934 (2017). The point of securing an unequivocal assurance is to "purge" a previous opinion by expressly declaring that he or she will not be influenced by that prior opinion. Viewing the prospective juror's statements "in totality and in context," she voiced a preference to hear the defendant testify. The record was insufficient to purge the implication of her bias. The collective acknowledgement of the jury panel to follow the trial court's instructions was insufficient.

People v. McCullum

Not too much to be see here. This is a unanimous memorandum, affirming the AD. The "standing" issue for challenging the search of defendant's apartment was not preserved. *See*, C.P.L. 470.05(2).

People v. Mairena
People v. Altamirano

Two cases were combined in this decision, which affirmed the appellate courts. Judge Stein authored the majority decision and Judge Fahey wrote a concurrence. Judge Rivera wrote for the dissent, joined by Judge Wilson. The issue in both cases was whether the defendant was deprived of a fair trial where counsel depended on particular jury instructions confirmed by the trial court, presented summations and then had the instructions subsequently changed when they were given to the jury. Under the circumstances, the defendants believed that they were deprived of the right to an effective summation.

Mairena stemmed from a late night knife fight outside of a restaurant, which involved a machete. The defendant's theory was that he feared for his life so he swung at the victim with a knife. The victim died, according to the defendant, by falling on a broken glass bottle; alternatively, the defendant claimed to be justified in using deadly physical force. The court granted the defendant's request to instruct the jury that to convict him of manslaughter, the death had to have been caused by the box cutter that was involved. The defendant's summation reflected this expectation. The court, however, left this out of its charge. He was convicted of 1st degree manslaughter and 4th degree CPW.

In Altamiaro, which was a local appeal, defendant was convicted of 4th degree CPW for storing in his apartment a friend's unloaded, but operable, revolver. He cooperated with the police, and requested a temporary and lawful possession ("TLP") jury instruction. The court denied the request and counsel changed his theory in summation to a lame innocent possession theory. The court ended up giving the TLP instruction to the jury.

The errors regarding both defendants were harmless; the evidence of guilt in both cases was overwhelming. People v. Crimmins, 36 NY2d 230, 237, 241-242 (1975). The prejudice component of this analysis is whether a summation is materially affected by knowledge of the charge submitted. Neither case passed this inquiry.

Though agreeing with the result, Judge Fahey in concurrence argues that the constitutional harmless error standard (i.e., no reasonable possibility) should have been applied by the majority. The concurrence provides some great language on the singular importance of a defendant's summation, which is a basic element of both the adversarial fact-finding process and the effective assistance of counsel. Herring v. NY, 422 US 853, 857, 860, 862 (1975) (invalidating a NY statute that permitted trial court to completely deny a defendant's 6th Amendment right to present a closing argument). A summation permits the defendant to present his or her argument at a time where all of the evidence has been presented. The defendant has the right to know what the court will charge so as to prepare for summation.

In dissent, Judge Rivera also trumpets the unique importance of a defendant's summation in our adversarial system. It is a crucial opportunity to weave legal arguments and factual inferences for maximum persuasive impact on the jury. It is in summation that arguments are marshalled, clarified and sharpened. It is part of a criminal defendant's right to present a complete defense. Here the defendants prepared and delivered their summations in reliance on the judges' pre-summation jury charge determinations. Then the courts reneged on their promises. The errors were inherently prejudicial; these were structural errors; harmless error was inapplicable. The dissent believed that new trials should have been ordered.

NYS Court of Appeals Criminal Decisions for December 19, 2019

People v. Ellis

This is a 6 to 1 memorandum, affirming the AD. Judge Rivera dissented for reasons stated in the dissenting opinion in *People v. Ellis*, 166 AD3d 993, 997-1006 (2d Dep't 2018). Defendant's argument that it was error for him to be in prison garb during several days of jury selection is unpreserved. *See*, CPL 470.05(2). The trial court also did not err in denying defendant's challenge for-cause regarding the issue of implicit bias. There was no indication that the prospective juror had a professional or personal relationship with the People's witnesses or counsel. CPL 270.20(1)(c); People v. Branch, 46 NY2d 645, 651 (1979); People v. Colon, 71 NY2d 410, 418 (1988).

People v. Cook

This is a 5 to 2 decision, authored by Judge Garcia, affirming the AD. Judge Stein wrote the dissent, with Judge Rivera joining. The lower court did not abuse its discretion in granting the People's request to reopen a suppression hearing after the People rested (but prior to the court making a suppression decision).

The defendant was charged with robbing a cab driver at knife point in the Bronx. Money was demanded, the driver was cut, the vehicle crashed and the perpetrator fled. The police found defendant on a subway platform two blocks from the car accident, about four to five minutes after the police responded to the scene. Defendant matched the description provided by the victim. Defendant argued that the police did not have reasonable suspicion to execute a level-three intrusion under De Bour.

After resting their case, the People requested permission to reopen the hearing in order to call one of the officers who first spotted the defendant on the subway platform. Of the five people on the platform, the defendant was the only one matching the victim's description. Though the hearing was reopened, the defense was given leeway to cross-examine on the whether the new testimony was tailored to issues raised in the previous suppression argument.

This matter was distinguished from People v. Havelka, 45 NY2d 636, 643-644 (1978) and People v. Kevin W., 22 NY3d 287, 296 (2013), as the hearing court at bar had not yet issued a suppression decision. The DA is entitled to "one full opportunity" to present their evidence. In general, the prosecution should not be afforded a second opportunity to succeed once they have failed (thus, subjecting the defendant to multiple hearings). The People should also not gain the windfall of impermissibly tailored testimony on a remand. Absent a showing that the People were deprived of a full and fair opportunity to be heard,

they are precluded from reopening a suppression hearing to shore up their evidentiary or legal position. Otherwise, defendants' success at suppression hearings would be meaningless.

But prior to a dispositive decision by the suppression court, there is ostensibly no blueprint to tailor the reopened hearing testimony - - unless of course the court tips its hand about a perceived weakness in the People's proof. The court here did not abuse its discretion in granting the DA's request to reopen the hearing. Sounding a bit like the weighing of interests that led to the federal good faith standard for otherwise invalid search warrants (United States v. Leon, 468 U.S. 897, 915-922 [1984]), the majority notes that concerns about finality and the risk of tailored testimony must be balanced against the strong public policy in holding "culpable individuals responsible and protecting legitimate police conduct." Moreover, there is less required formality in a suppression hearing (CPL 710.60[4]) than in a trial (CPL 260.30).

The dissent argues that the suppression court indeed tipped its hand here and the People followed its lead. If the concern is to protect "legitimate" police conduct, then reopening a hearing does nothing to further the interests of seeking the truth, as a rehearing would include unreliable, tailored testimony. In other words, the reopening of the hearing does not assist the suppression court in determining whether police misconduct actually occurred. When the court winks and nods as to how it thinks the case should go, the People benefit, whether it be implicit or explicit guidance. Extended cross-examination is insufficient to remedy this error. The court here abused its discretion in granting the People's request. *See generally*, People v. Whipple, 97 NY2d 1, 3, 6-7 (2001) (addressing DA's request to reopen trial proof regarding omitted evidence relative to an element of the crime). Defendants in the wake of this decision will be in the untenable position of having their best arguments wiped out by suppression courts directing the People as to how to fix the problem with more testimony.

People v. Udeke

This is a 5 to 2 memorandum, affirming the Appellate Term. Judge Rivera authored the dissent, joined by Judge Wilson. The accusatory instrument charging second-degree criminal contempt, an "A" misdemeanor, was facially sufficient, as the allegations and reasonable inferences drawn therefrom provided reasonable cause that defendant intended to violate the "stay way" provision of the order of protection in question. He did this by being physically present in the close confines of a subway turnstile with his wife, the protected person in the order. Based on the record as a whole, defendant's "B" misdemeanor plea was voluntary as well.

The dissent argues that the non-citizen defendant's Sixth Amendment right to a jury trial was violated pursuant to People v. Suazo, 32 NY3d 491, 494 (2018), as the lower court effectively communicated that defendant was giving up the right to a jury by pleading

guilty to a "B" misdemeanor. (While that is technically true for any guilty plea, there was a preceding discussion about the right to a jury that implied that it did not apply to a "B" misdemeanor charge.) Here, the defendant was given the impression that his right to have a jury was up to the prosecution through its decision to offer a reduced plea. While CPL 340.40(2) prohibited NYC defendants from having a jury trial for "B" misdemeanors at the time of the plea, the Suazo decision was issued while Mr. Udeke's leave application to the Court of Appeals was pending. The decision thus applies to his case. Defendant's attempted 2nd degree criminal contempt conviction makes him deportable. *See*, 8 USC § 1227(a)(2)(E)(ii). Judge Rivera provides a nice survey here of the Court's guilty plea jurisprudence. *See e.g.*, People v. Lopez, 71 NY2d 662, 666 (1988); People v. Tyrell, 22 NY3d 359, 365 (2013) (requiring an affirmative record showing defendant's waiver of constitutional rights). As defendant was misinformed on this important constitutional right, the dissent opined that the guilty plea could not have been knowing, intelligent and voluntary.

People v. Britt

This is a 5 to 2 decision, authored by Judge Fahey. The dissent was authored by Judge Wilson, joined by Judge Rivera. The First Department is affirmed.

It was 11:15 pm in Times Square. Defendant was seen drinking out of a paper bag, apparently consuming alcohol in public in violation of a NYC ordinance. The police saw the defendant and followed him into a haunted house attraction (called "Times Scare"). Defendant was handcuffed and searched incident to arrest. He was ultimately found in possession of crack cocaine and 17 counterfeit bills (totaling $300), which were separated from his genuine money and wrapped in a rubber band. Defendant possessed an amount the majority described as a "large sum." It was not inadvertent. He made incriminating statements regarding the counterfeit currency. The People's expert from the Secret Service testified that individuals who pass counterfeit bills often separate them from their genuine currency. (The defendant failed to preserve his objection to the expert testimony. CPL 470.05(2); *see also*, People v. Tevaha, 84 NY2d 879, 881 [1994] [*beware trial attorneys:* the word "objection" alone deemed insufficient for preservation of issue].)

There was legally sufficient to support defendant's conviction for 1st degree criminal possession of a forged instrument ("CPFI") under PL § 170.30, which requires proving a complex *mens rea* mandating that the defendant knows that the instrument is forged *and* that he or she intends to defraud using the instrument. Just knowing that you possess a forged instrument is insufficient. The court distinguished People v. Bailey, 13 NY3d 67, 71-72 (2009), where the defendant had only $30 of counterfeit money in his possession.

There was also record support for the suppression court's determination that law enforcement had reasonable suspicion and therefore properly conducted a third-level De

Bour (40 NY2d 210, 223 [1976]) intrusion. This being a mixed question of law and fact, no further review was authorized.

Judge Wilson writes for the dissent. The defendant separating his counterfeit from his genuine money did not necessarily mean that he intended to spend the counterfeit bills, which were enclosed in a rubber band. If fact, these circumstances may have meant the opposite. There was no evidence that defendant attempted to use, was using, or had plans to use the counterfeit money. The majority's distinction from the Bailey case was based on the arbitrary fact of the defendant at bar possessing $270 more than defendant Bailey did. Unlike other statutes, there is no numerical presumption for committing CPFI. Separating the counterfeit money was not probative of his intent to defraud. The Secret Service expert only testified that defendants "a lot of times" separate the counterfeit money from the genuine bills. Judge Wilson pointed out that just having such a common denominator is as useless as saying that defendants who commit these types of crimes also wear pants a lot of the time - - does *that* fact become probative of guilt as well? Furthermore, the police only had reasonable suspicion, if they had even that, for defendant committing a *violation*, not a crime. *See*, De Bour, 40 NY2d at 223; People v. Moore, 6 NY3d 496, 498-499 (2006); CPL 140.50(1). The facts here only justified a level-two intrusion.

If you have the time, please read the last few pages of the dissent, where Judge Wilson argues persuasively for the decriminalization of low level crimes in neighborhoods having significant amounts of indigent and minority residents. The dissent addresses the defendant's personal background here, thus humanizing him. Here is how the opinion ends:

> As of today, it appears the law approves the forcible detention of people drinking from containers wrapped in paper bags and their imprisonment for years if they possess $300 of counterfeit money. Raise your hand if you think that is a good allocation of police resources and a wise expenditure of taxpayer dollars.