# NYS Court of Appeals Criminal Decisions for February 19, 2019

## People v. Thomas

This is a 4 to 3 decision, authored by Judge Stein, with Judge Fahey writing for the dissent, joined by Judges Wilson and Rivera. Here the court held that a resentence on a prior conviction, imposed after the original sentence is vacated, does not reset the date of sentencing for purposes of determining the date of a predicate felony sentence under the PL §70.06 (1)(b)(ii) *sequentiality* provision. This section requires that the sentence from a previous conviction be imposed prior to the commission of the present felony. In this People's appeal, the Second Department's affirmance of the CPL 440 motion grant was reversed. Under the recidivist felony statute, "sentence" means "original sentence," as opposed to a "resentence."

At bar, the defendant suffered two illegal 1989 second felony offender attempted robbery sentences based on two 1988 YO adjudications. These 1989 cases were erroneously utilized as predicates for a 1993 conviction. Years later, defendant successfully moved to vacate the sentences for his 1989 convictions. Defendant was resentenced on both matters. Defendant then successfully moved to vacate the 1993 conviction, as the *resentences* were not imposed prior to the commission of the 1993 conviction. In other words, the 1989 original sentences, now deemed illegal, were no longer valid as predicate sentences.

The court considered People v. Thompson, 26 NY3d 678, 687 (2016), People v. Boyer, 22 NY3d 15, 23-25 (2013) and People v. Bell, 73 NY3d 153, 165 (1989), in its analysis. As the dissent points out, Thompson, in considering the 10-year look back period, dealt with a violation of probation and the revocation of a prior sentence, not the nullification of a prior sentence (as in the present matter) and its replacement with an entirely new sentence. As set out in Thompson, however, PL §70.06 does not include "resentence" in its definition of "sentence." As noted in Bell, where invalidated convictions were deemed no longer valid to be used as predicates regarding the 10-year look back period, the pertinent sentence in determining a predicate felony is the one imposed as part of the "final judgment." In Boyer, the court ordered a resentencing in order to correct a Sparber (10 NY3d 457 [2008]) post-release-supervision ("PRS") clerical error. Under Boyer, the original sentencing date controls regarding the sequentiality of a prior offense. There is no difference between a so-called "plenary" resentencing where an illegal sentence is vacated and a clerical one where the PRS term is merely added.

Further, CPL 450.30 (3) distinguishes between "sentence" and "resentence" in the appellate realm. And CPL 1.20 (15) indicates that a judgment is comprised of a conviction and the sentence imposed thereon, and is "completed by imposition and entry of the sentence," without reference to a resentence. If the CPL treats these two concepts this

way, why would the PL treat it differently? The sequentiality requirement is satisfied even if the original sentence is later found illegal.

In sum, the refusal to reform and remain unchastened following the pronouncement of a sentence on a prior conviction is the reason for punishing a recidivist offender. People v. Morse, 62 NY2d 205, 219, 222 (1984); Boyer, 22 NY3d at 26. Just hearing the prior sentence, whether or not it is subsequently deemed illegal, should deter a defendant from future illegal conduct.

The dissent opines that it is the "currently-existing, legal sentence" that should control; the first legal sentence, not the original sentence. "Legality should prevail over chronology." An illegal sentence should not have an operative legal effect. Boyer simply corrected the flawed clerical imposition of PRS; it did not vacate the original sentence, unlike at bar. CPL 450.30 (3), relied upon by the majority, addresses issues of appeal only. Moreover, as the court observed in People v. Estremera, 30 NY3d 268, 269 (2017), under CPL 380.40, a defendant has an equal right to be present for sentencing *and* resentencing. The original sentences at bar for the 1989 convictions no longer exist; they have been replaced; the only legal sentences in place now are the resentences imposed in 2009 and 2012. The sequentiality principle was not complied with. The result here is unjust; defendant's prior illegal sentence is being used to increase his punishment.

## NYS Court of Appeals Criminal Decisions for February 21, 2019

## People v. Diaz

This is a 5 to 2 decision, authored by Judge Feinman, with Judge Wilson writing for the dissent, joined by Judge Rivera. There is no Fourth Amendment violation in law enforcement using the recordings of defendant's non-privileged phone calls made from Rikers Island against him in criminal proceedings. Inmates do not have a reasonable expectation of privacy (Katz v. US, 389 US 347, 361 [1967] [Harlan, J., concurring]) in these calls. *See also* People v. Johnson, 27 NY3d 199, 205-206 (2016) (finding no Sixth Amendment right to counsel violation in non-privileged Rikers Island inmate calls being recorded). The AD is affirmed.

Inmates are placed on notice that the facility is monitoring and recording outgoing inmate phone calls in three different ways: signs on the wall near the phones, in an oral message on the phone and in the inmates' handbook. The stated purpose for the NYC Department of Correction ("DoC") recording the calls was to further the security of the facility. Calls to attorneys, doctors and clergy are privileged. Inmates are routinely searched while in custody for safety reasons; the recording of the calls is no different.

The defendant was at Rikers Island for eight months and made about 1,100 calls. Four of these calls were recorded and used by law enforcement.

The majority concluded that there was no reason to believe that the recordings would not be subsequently used against the defendant in a criminal proceeding. The DoC's regulations permitted the DA's Office to request a copy of the recordings. The notice in question was not restrictive.

As **Judge Wilson** observes in **dissent**, the warnings to the inmates omitted any reference to law enforcement using the statements in a subsequent criminal proceeding. All that is told to the inmate is that the DoC needed to monitor the calls for *security* reasons (i.e., regarding potential smuggling of contraband, future crimes, escape and the protection of witnesses). The DA's Office has no role in jail security. There was no express notice of the recordings being turned over to law enforcement. A defendant's consent must equal the notice provided. An inmate's expectation of privacy while incarcerated is limited, but it exists. A warrant is necessary for law enforcement to use the recorded phone calls against inmates in a criminal proceeding.

The majority is assuming that there was implied consent and that there is a *diminished*, but existent, expectation of privacy for inmates (otherwise no notice and consent would be necessary at all). Indeed, although evasive searches of persons and cells are regularly done, inmates do not forfeit *all* constitutional rights when they enter a correctional facility in terms of due process, access to the courts, racial discrimination and the freedom to exercise religion. But because of security interests, a balancing must occur.

Inmates, who are obviously not free to leave, need to communicate with the outside world through these calls. Inmates need to speak to family, as well as assemble a defense and gather evidence, etc. Whatever consent can be attributed to inmates as implied, it is likely coerced. Certainly, there was no negotiation between the inmates and the DoC regarding the terms of the purported consent. *See also* Johnson, 27 NY3d at 208 (J. Pigott, concurring) (recognizing the "serious potential for abuse" in the relationship between Rikers Island and the DA's Office). Any reasonable consent must be reasonable in scope. Unfortunately, under the circumstances, inmates will ultimately be deterred from using the phones at all. *See again* Johnson, 27 NY3d at 211 (J. Pigott, concurring).

Judge Wilson also rejects any third-party consent argument. Lending a car to a friend to run to the store should not result in the car being used in a demolition derby. Under these circumstances, there should not be a forfeiture of *all* expectation of privacy. If the implied consent is for the DoC to provide security, then why does the prosecution need the recording? The prosecution is always free to contact the other person on the phone to investigate the information.

Cell phones are considered by Judge Wilson in this regard. The Supreme Court has recently recognized 4th Amendment rights in the privacy of the records establishing *public* movements through cell phone cell-site locations, even though a third party (a wireless carrier, *analogous to the DoC)* controls these records. *See* Carpenter v. US, 138 S.Ct.

2206, 2217 (2018); s*ee also* Katz, 389 US at 353 (addressing the interception of phone calls being made in a phone booth; effectively overruling the trespass-based premise of the 4th Amendment recognized in Olmstead v. US, 277 US 438, 464 [1928]). As invasive data may be in play, the true nature of the sought after info at issue must be considered.

Distinguishing the different forms of technology between today's gadgets and more traditional mediums makes little sense, as our founding fathers had no idea what was to come. Judge Wilson asks:

> Soon, it might not be unusual to see people walking down the street wearing X-ray goggles—will others have forfeited their expectation of privacy in whatever those goggles can see? … When advances in biotechnology enable tracking of our movements using biometrics that can be constantly read by satellites, will we have forfeited what expectation of privacy remains in our whereabouts? I offer those questions not to sound a dystopian alarm, but to underscore that when we apply old Fourth Amendment doctrine to new technologies and develop new rules based on those changes, we must extract the principle—and not the prior articulation—from the old doctrine. The map of a flat world worked for a time, but no longer.

In sum, the dissent astutely compares DoC's claims to the phone company in Carpenter and the majority's holding to the majority in Olmstead:

> Application of the third-party doctrine to internet service providers, social media sites, wireless phone carriers, credit card companies, medical insurers and so on would mean that the government may, without a warrant, obtain all that information and more simply because we have "voluntarily" disclosed it to a third party. Instead, Fourth Amendment law, and privacy law more generally, must adapt to times in which we, like Mr. Diaz, have no realistic choice but to divulge information to third parties for a specific purpose, yet retain our rights against the warrantless seizure of that information by the government. *(emphasis added)* Sadly, today's decision is another Olmstead.

**People v. Cisse**

This is a unanimous memorandum, affirming the AD. Defendant implicitly consented to his outgoing calls from jail being monitored and recorded. His non-privileged calls being recorded did not violate his right to counsel. *See again* People v. Johnson, 27 NY3d 199, 205-206 (2016). *See the lower court decision for more details (149 AD3d 435 [1st Dep't]).* Also, defendant's De Bour argument was rejected as a mixed question of law and fact; record support existed for the AD's determination.