NYS Court of Appeals Criminal Decisions for June 9, 2020

People v. Ball

This unsuccessful People's appeal is a unanimous SSM (fast tracked) affirmance, relying exclusively on the reasons set out in the 3-2 AD decision in People v. Ball, 175 AD3d 987 (4th Dep't 2019). Onondaga County Court properly dismissed the indictment, as the DA ignored the defense request to instruct the grand jury on justification in this homicide prosecution. *See*, PL §§ 35.15 (use of physical force); 35.20(3) (use of force during burglary); CPL 190.25(6) (necessary or appropriate instructions required).

People v. Harris

This is a unanimous reversal of the AD's affirmance of an order denying suppression. It's another dreaded chapter in the LaFontaine saga, as the AD affirmed on a ground different from what the suppression court relied on. The defendant argued for suppression based on People v. Gokey, 60 NY2d 309 (1983), in that exigent circumstances were needed to justify a warrantless search of the suitcase defendant was carrying. The suppression court found Gokey was inapplicable and made no findings regarding whether exigent circumstances existed. The AD, however, affirmed, finding that Gokey applied but that exigent circumstances in fact existed. The AD only has jurisdiction where an error or defect "adversely affected the appellant." CPL 470.15(1). *See*, People v. LaFontaine, 92 NY2d 470, 474 (1998); People v. Nicholson, 26 NY3d 813, 825 (2016). Though the AD did not err in finding that Gokey applied, the issue upon which it relied was not decided adversely to appellant. People v. Muhammad, 17 NY3d 532, 547 (2011). The matter was thus remitted to Supreme Court, NY County.

NYS Court of Appeals Criminal Decisions for June 11, 2020

People v. Page

This successful People's appeal is a 5 to 2 decision, authored by Judge Feinman. Judge Fahey authored the dissent, with Judge Rivera joining. The Fourth Department's affirmance of Supreme Court's suppression order is reversed. At issue is the application of People v. Williams, 4 NY3d 535 (2005), and the limits of peace officer and citizen's arrest authority under CPL 2.15, 140.25, 140.30, 140.35 and 140.40.

CPL 2.10 and 2.15 list over a hundred individuals who qualify as "peace officers." These are narrowly defined powers for officers who have either "special duties" or "a geographical area of employment." Peace officers do not necessarily work in general law enforcement, but do have a limited need for police powers, which concomitantly require a determination of various levels of suspicion. A citizen's arrest, on the other hand, requires under CPL 140.30 that the offense *in fact* be committed. For offenses less than a felony, the conduct must also occur *in the presence* of the arresting citizen. In other words, whatever mistrust is presently in the air for general law enforcement right now, we trust others even less to carry out these often consequential 4th Amendment intrusions.

Here, a federal Customs and Border Protection ("CBP") agent pulled over an erratic and arguably dangerous driver by utilizing emergency lights in the grille of his unmarked truck. There appeared to have been a number of VTL violations committed. After pulling over defendant's vehicle, the CBP agent waited in his truck until a Buffalo Police Department ("BPD") officer arrived. The BPD officer and the CBP agent approached the defendant's vehicle together, with the CBP agent only observing (and not interacting with) the driver. The CBP agent left the scene after other BPD officers arrived. After the CBP agent had left, the BPD recovered a gun from the defendant's vehicle following a search.

In Williams, two Buffalo Municipal Housing Police ("BMHP") peace officers (as recognized under CPL 2.10 [17]) pulled over a vehicle for a seatbelt violation outside of their geographical jurisdiction. The officers ordered the defendant out of his vehicle and required him to open his mouth, which contained crack cocaine. The Court of Appeals affirmed the lower court's suppression of evidence. The BMHP officers were not conducting a citizen's arrest; rather, they were peace officers acting under color of law "with all the accouterments of official authority." Williams, 4 NY3d at 539. Peace Officers' statutory powers are specific and limited. They cannot just default to wearing the citizen's arrest hat when convenient to justify their conduct, which in Williams was carried out under the guise of being general law enforcement officers.

At bar, defendant also successfully moved to suppress, arguing that: (1) the CBP agent was not vested with peace officer powers under CPL 140.25, and (2) Williams instructs that this was not a valid citizen's arrest because emergency lights were used to effectuate the vehicle stop. Supreme Court ruled that although the agent *was* a peace officer under CPL 2.15, he was not acting pursuant to his special duties under CPL 140.25(1)(a). The actions were not a citizen's arrest under CPL 140.30 because emergency lights were utilized in the stop. According to the lower court, under Williams, the agent acted under the color of law with all the accouterments of official authority.

The Court of Appeals was having none of that. The CBP agent, actually a "federal marine interdiction"("FMI") officer, did not specifically qualify as a peace officer under CPL 2.15, which covered "federal law enforcement [peace] officers" but excluded the FMI category of CBP agents under CPL 2.15(7). The court observed that the statute was amended in 2014, years after the creation of the Department of Homeland Security, which consequently carved up a number of federal agencies (including Customs and the INS).

Accordingly, as the CBG agent was not a peace officer; there was no violation of any "peace officer" special duties and CPL 140.25 was not violated. Critically, the court observed in foot note 1 (and elsewhere) that no state or federal constitutional arguments had been presented. So this was just a technical statutory issue.

In dissent, Judge Fahey pointed out the illogical consequence of the majority's holding:

> The majority's reading of Williams results in the absurd state of affairs that a law enforcement official, acting outside the official's geographical area of employment, may not use emergency lights to effect a traffic stop, if the official is considered a peace officer, but is permitted to use emergency lights to effect a traffic stop if the official is not a peace officer. There is no conceivable policy justification for such a mismatch. *(emphasis added)*

As Judge Fahey observed, the concept of a citizen's arrest goes back to medieval England, when there was apparently a shortage of law enforcement officers to go around *(those were the days!)*. As time went on, the law would distinguish between government and non-government actors making these intrusions into the lives of citizens. In the majority's ruling, says the dissent, law enforcement's ability to effect arrests under the guise of a citizen's arrest is expanded here. A reasonable person would believe that the CBP agent inside his unmarked vehicle was either a peace or police officer; the actual legal status of the arresting officer is irrelevant. It is the outward characteristics of official authority that is pertinent. The law is meant to deter vigilantism and ensure that those whom society has chosen to protect them may be readily identified as such. CPL article 140 is designed to protect a citizen's state and federal constitutional rights to be free from unreasonable searches and seizures. *See*, US Const., Amend. IV; NY Const., art. I, § 12. The majority's statutory interpretation falls short of this mission.

The bottom line might be this: unlike this CBP agent, private citizens don't have emergency lights in the grille of their cars to effectuate and induce vehicle stops. Moreover, much of the concern regarding peace officers is their lack of training and, frankly, skin in the game. A fully trained career law enforcement officer may have a lot to lose, at least *in theory*, for violating the law. The same is not likely true for the typical peace officer, for instance, the "dog control officers for the Town of Brookhaven" (CPL 2.10 [56]). So when a full time federal agent performs acts that plainly implicate the 4th Amendment, how can his or her conduct not be subject to at least the same scrutiny *(statutory, constitutional or otherwise)* as we would place on the acts of a part time "dog officer"? To even imply that the federal agent here was effectuating a "citizen's" arrest using his unmarked vehicle is like LeBron James removing his Lakers jersey and playing a pickup game against *me*; just two "citizens" playing some ball.

NYS Court of Appeals Criminal Decisions for June 23, 2020

People v. Lang

This is a unanimous reversal of the Third Department based on a violation of CPL 270.25(2). In this homicide jury trial, a sitting (sworn) juror failed to appear for the ninth day of the proceedings. In such a situation, a trial court is obligated to make a "reasonably thorough inquiry" on the record into the juror's absence and ascertain when he or she will be reappearing. If the court determines there is no reasonable likelihood of the juror reappearing or if he or she has not done so within two hours of the scheduled time to appear, the court may presume the juror to be unavailable. However, the court must further provide the parties with an "opportunity to be heard" and place on the record the court's findings and determination. *See*, People v. Jeanty, 94 NY2d 507, 512, 516 (2000). This issue was properly preserved at trial through timely and thorough objections, as well as through a mistrial motion. The trial court failed in its obligations here, only providing a limited and inaccurate opinion on the situation. A new trial was ordered.

NYS Court of Appeals Criminal Decisions for June 25, 2020

People v. Hemphill

This is a 6 to 1 affirmance of the First Department, with Judge Fahey alone in dissent. The defendant pursued a third-party guilt defense of his homicide charge, stemming from the shooting death of a two-year-old in the Bronx. There was no obligation on the part of the DA's office to inform the grand jury ("GJ") of exculpatory evidence that identified a third party as the perpetrator. *See generally*, People v. Mitchell, 82 NY2d 509, 513-514 (1993).The trial court also did not abuse its broad discretion in permitting evidence of a third party pleading guilty to a lesser charge than homicide (a weapon count).

You really need to read Judge Fahey's dissent to understand the case. Apparently, the trial court also denied the defendant's request to call the court reporter from a 2007 GJ presentation. A completely unreliable prosecution witness (Gonzalez) identified a third party (Morris) as the shooter. Morris went to trial and ended up with a mistrial. A DNA test regarding physical evidence motivated the DA to abandon their prosecution of Morris. But Gonzalez recanted and pointed the finger at defendant (Hemphill), who was then placed on trial. Gonzalez did not identify Morris by name before a 2006 GJ. However, she explicitly told a 2007 GJ that Morris was the man. Defense counsel mistakenly impeached Gonzalez with the wrong GJ transcript. The trial court permitted the People to call the 2006 GJ court reporter as a witness, but denied the defense the same request regarding

the 2007 GJ court reporter. The trial court thus prevented defendant from effectively impeaching the lying witness and exposed defense counsel to unfair criticism by the prosecutor for purportedly fabricating GJ testimony. The prosecutor seized on these favorable events in their summation. The jury, armed with the wrong impression about this unreliable witness, convicted the defendant. In short, the trial jury was kept from learning that Gonzalez had specifically identified Morris as the shooter by name under oath. Doesn't sound very fair.