NYS Court of Appeals Criminal Decisions for March 24, 2020

People v. Tsintzelis
People v. Velez

These two cases are decided together in a memorandum, reversing the AD. Judge Rivera authors a concurrence, joined by Judge Wilson. The court ordered new trials in both cases, following its recent precedent in requiring DNA-related testimony to comply with Crawford v. Washington, 541 U.S.36 (2004). *See*, People v. John, 27 NY3d 294, 312-315 (2016); People v. Austin, 30 NY3d 98, 105 (2017); *see also*, Bullcoming v. New Mexico, 564 US 647, 666 (2011). A defendant has the constitutional right to cross-examine a testifying DNA analyst who witnessed, performed or supervised the generation of a DNA profile. Here, the DNA profile satisfied the primary purpose test and was testimonial. The analyst who testified failed to identify which stages of the DNA testing she was directly involved in or the extent of her independent analysis on the raw DNA-related data. Defendant's Confrontation Clause rights were violated. The errors in both cases were not harmless.

NYS Court of Appeals Criminal Decisions for March 26, 2020

People v. Hymes

This is a unanimous memorandum affirming the AD. The defendant's ineffective assistance of counsel argument, based on his attorney failing to object to the court not instructing the jury that the victim's out-of-court sexual abuse disclosures were only introduced for the purpose of explaining the investigatory process, was unpreserved. On this record, defendant failed to demonstrate an absence of strategic or other legitimate explanations for trial counsel's omissions.

People v. Perez

This is a 5 to 2 decision with Judge Feinman authoring the majority opinion. Judge Fahey wrote a concurrence and Judge Wilson authored the dissent, joined by Judge Rivera. The AD is affirmed. At issue is risk assessment instrument ("RAI") factor number 9, wherein defendant was assigned 30 points for a prior New Jersey ("NJ") conviction for public lewdness. This category allows for points where, among other scenarios, defendant has suffered a prior conviction or adjudication for a misdemeanor sex crime or

endangering the welfare of a child ("EWC") or any adjudication for a sex offense. *See*, 2006 SORA Guidelines, at 13; Corr. Law § 168-l(5)(b)(iii).

The defendant, while living in NJ, touched himself and flashed a 12-year-old and two others who were watching through a nearby apartment window. The offense he pleaded guilty to in NJ was not a registerable sex offense there. The 30 points for this factor put defendant into the moderate level 2 range.

Relying in part on North v. Board of Sex Off's of NY, 8 NY3d 745, 753 (2007) (addressing whether prior federal child porn conviction qualified under SORA based on its "essential elements"), the Court provides a full overview of the dreaded SORA regime. The argument relied upon by the majority was not preserved by the prosecution below. In fact, the DA's Office disavowed it. No matter though, the NJ offense to which defendant pleaded guilty was comparable to New York's EWC statute under the North "essential elements" test. Affirmed. *Here's something you didn't need to know: NJ criminal law doesn't use the word, "felony." They say "indictable" crime.*

Judge Fahey correctly asserts in his concurrence that the majority should have affirmed on a *preserved* prosecution argument, namely that the NJ and NY lewdness statutes are, using the North test, equivalent under the "misdemeanor sex crime" provision of RAI factor 9. The Court did not have jurisdiction to entertain the issue utilized by the majority.

The dissent from Judge Wilson starts off this way: "[i]f hard cases make bad law, botched cases make even worse law." This case made its way to the Court of Appeals "in a tortured form not likely to repeat itself." The dissent questions why the majority is condoning an unpreserved argument made by a prosecutor who was all over the place in this abrupt SORA hearing. Moreover, if you're going to compare statutes, why not, as Judge Fahey opined, go with NY's public lewdness statute since it was a NJ *lewdness* offense at issue? While PL § 245.00 doesn't require that the victim be a minor, according to the dissent, the offenses would still qualify as "analogous" under the North standard, but warranting only five points under risk factor 9.

NYS Court of Appeals Criminal Decisions for March 31, 2020

People v. Delorbe

Judge Garcia authored this affirmance of the First Department's affirmance of a summary CPL 440 denial. Though all members of the court agreed in the result, Judge Wilson authored a concurrence, joined by Judges Rivera and Fahey.

The defendant failed to preserve his ineffective assistance of counsel claim that his attorney did not object at the time of his guilty plea under People v. Peque, 22 NY3d 168, 176 (2013), in that the court failed to provide defendant with sufficient notice that his guilty plea may result in his deportation.

Defendant pleaded guilty to attempted second-degree burglary eight months after being provided a written notice indicating that his guilty plea may result in adverse immigration consequences, including removal. This is so because theft-related offenses qualify as aggravated felonies under 8 USC § 1101(a)(43). He was sentenced to 5 years in prison and filed a *pro se* CPL 440.10 motion, asserting that defense counsel failed to inform regarding his risk of removal.

The narrow preservation exception under Peque was inapplicable, as defendant had the opportunity to raise the issue previously. Under Peque, "deportation is a plea consequence of tremendous importance" and a court accepting a guilty plea must inform a defendant that he or she might be deported as a result of the plea. *See also*, People v. Suazo, 32 NY3d 491, 499-500 (2018). A defendant must preserve a challenge to the voluntariness of a plea and a due process violation claim stemming from the court failing to appraise the defendant in this regard. This is generally done through a motion to withdraw the plea prior to sentence (CPL 220.60(3)) or a motion to vacate the judgment after sentence (CPL 440.10). In a rare circumstance, a defendant will lack a reasonable opportunity to object to a fundamental defect which is clear from the face of the record. In this case, the record seems to indicate that defendant had actual knowledge of his immigration problem. The written notice handed to him at arraignment, while not sufficient to satisfy the court's Peque obligations *(a point emphasized in Judge Wilson's concurrence)*, gave the defendant the opportunity to ask questions regarding the immigration consequences of his guilty plea.

The defendant's direct appeal and his CPL 440 appeal were consolidated. Aside from the Peque claim being unpreserved, Supreme Court did not abuse its discretion in summarily denying defendant's *pro se* 440 claim of ineffective assistance of counsel for failing to properly advise of immigration consequences under Padilla v. Kentucky, 509 US 356 (2010).

Finally, Judge Wilson provides a nice footnote (note 1) regarding the requirement that waivers of constitutional rights require a certain level of knowledge to be deemed valid.

People v. Williams

Judge Fahey authored this opinion, which affirmed the AD. This is a companion decision to People v. Foster-Bey, also decided on March 31st. The defendant here was charged in a shooting death in NYC; the small amount of DNA recovered on the gun had more than one source. But the evidence of guilt was overwhelming. There was video placing him at the scene and his girlfriend testified he had her hide the gun.

Put your acronym hat on. Here the trial court committed harmless error in denying defendant's motion to preclude evidence of low copy number (LCN) DNA and forensic statistical tool (FST) evidence without first conducting a Frye hearing to determine if these principles / procedures have gained general acceptance in their respective fields. Frye v. US, 293 F. 1013, 1014 (DC Cir. 1923). The DNA-related evidence here was analyzed by the NYC Office of the Chief Medical Examiner (OCME). The OCME is the largest medical examiner's office in the country and has been around since 1918. They are known worldwide. Defense counsel have described them as somewhat arrogant.

As explained in the addendum to the opinion, LCN DNA testing analyzes amazingly small amounts of material, creating DNA profiles from almost immeasurably small samples by increasing the amplification cycles to essentially make more copies and allow analysis. The validation testing for utilizing the LCN method only approved the OCME doing this for potential DNA samples of at least 25 picograms for a multi-source DNA sample. A picogram is *really* small; try imagining a trillionith of a gram! Here only 17.2 picograms were tested. At the time of this investigation, the OCME was the only lab in the country that was employing the LCN method, and have since discontinued using it. (No red flags there.) The FST evidence was a computer software developed, and solely used by, the OCME to calculate DNA-related ratios.

It was the prosecution's burden to establish LCN DNA's general acceptance by the relevant scientific community. *See*, People v. LeGrand, 8 NY3d 449, 458 (2007). The trial court's abuse of discretion in denying defendant a Frye hearing regarding both the LCN DNA and FST evidence was harmless in light of the overwhelming evidence of defendant's guilt. People v. Crimmins, 36 NY2d 230, 241-242 (1975).

Judge Fahey does a nice job providing the reader with a full overview of LCN DNA as well as the principles behind Frye. The Chief Judge authored a concurrence. She has a personal interest in DNA stemming from her time as the DA in Westchester County, and has authored two recent Crawford-related DNA decisions for the Court. In this decision, the Chief stands up for the OCME and its legitimacy as a prestigious laboratory, including the oversight conducted of its activities by the Commission on Forensic Sciences and its DNA subcommittee.

People v. Foster-Bey

This memorandum affirmed the AD. This is a companion decision to People v. Williams, also decided on March 31st *(see above)*. This decision, like Williams, found the trial court committed harmless error in denying defendant's motion to preclude LCN DNA and FST evidence without first conducting a Frye hearing. This prosecution involved the non-fatal shooting of a NYC police officer. Only 16.3 picograms of DNA material on the gun was available for testing. There were several eyewitnesses and incriminating statements made by the defendant. As in Williams, the OCME investigated the DNA portion of the evidence. The defense claimed (correctly) that these methods had failed to be generally accepted in the scientific community. The trial court abused its discretion but this error was harmless in light of the overwhelming evidence of defendant's guilt. As in Williams, the Chief Judge concurred.

NYS Court of Appeals Criminal Decisions for April 30, 2020

People v. Middleton

This was the only criminal decision issued in April; a unanimous memorandum, affirming the County Court. The accusatory instrument, charging official misconduct under PL § 195.00, was not jurisdictionally defective. The defendant was an alcohol and substance abuse treatment aide at Great Meadows Correctional Facility who allegedly revealed info to an inmate regarding an incident that occurred at the facility (in violation of office policy). The accusatory instrument did not have to allege whether defendant intended to benefit herself or the inmates in taking the action in question.