NYS Court of Appeals Criminal Decisions for March 22, 2018

People v. Johnson

Quick unanimous memorandum. Any error in the trial court's suppression decision was harmless. Claims of prosecutorial misconduct are without merit.

People v. Brooks

This is a unanimous memorandum, affirming the AD. Defendant was convicted of drowning and strangling his girlfriend. Three issues to address. The trial court's Frye error employed on the foundation of the defense expert testimony was harmless. *See generally* People v. Wesley, 83 NY2d 417, 422 (1994); Frye v. United States, 293 F. 1013, 1014 (DC Cir. 1923) (addressing whether accepted scientific principle or procedure has gained general acceptance in its specified field). The People's 11 character witnesses, establishing a relationship between defendant and the victim, were addressed by jury instructions explaining that limited purpose; the testimony was not introduced to show propensity to engage in illicit conduct. Finally, the double hearsay testimony regarding defendant's threat towards the victim, made a month before the crime, was erroneously admitted, as Molineux evidence must be in admissible form; but it was harmless.

People v. Sanchez

This is a 5 to 2 memorandum, with Judge Wilson authoring the dissent, joined in by Judge Rivera. This is a successful People's appeal, reversing the AD. The trial court's refusal to give a justification jury instruction was proper. Even viewing the evidence in a light most favorable to the defense, there was no reasonable view of the evidence that defendant could not safely retreat at the time that deadly physical force was used. *See* Penal Law §35.15 (2)(a). The jury could not rationally conclude that defendant's reactions were those of a reasonable person acting in self-defense. The dissent explored the testimony a bit more, concluding that the facts, when viewed most favorable to the defense, revealed that the jury could have reasonably concluded that defendant was protecting himself and his friends, who were threatened by 10 to 15 people outside a restaurant (thus warranting a justification charge). As Judge Wilson opined, "[t]he jury would have been free to reject that defense, but we should not do so on this appeal."

NYS Court of Appeals Criminal Decisions for March 27, 2018

People v. Perez

This is a 5 to 2 memorandum, affirming the AD. Judge Rivera authored the dissent, joined in by Judge Wilson. The suppression court correctly denied defendant's motion. The police were on a "vertical" patrol, investigating for violations in a NYC public housing building, which sat in a high crime area. The building had a history of drugs and trespass activity. Defendant observed the police about eight feet away as he was exiting an elevator. He then got back on the elevator, ignoring the officer's request to hold the door. The police followed the defendant up to his apartment on the ninth floor. The defendant held his head down in his hooded sweatshirt, with his right arm in an unnatural stiffened position. His right arm sleeve had a large undefined bulge. The clothing here matched the description of a machete-wielding armed robber, learned about by the police *after* defendant was searched.

As law enforcement's compliance with De Bour is a mixed question of law and fact, and there was record support for the lower court's determinations, the issue is beyond the high court's review.

In dissent, Judge Rivera observed that the police did not possess reasonable suspicion, as required under Terry and De Bour, to stop and frisk appellant. In fact, there was no information that appellant had done anything wrong. Appellant was entitled to not respond to the police upon their inquiry as to where he lived and whether he was armed. He had the right to be left alone. People v. Howard, 50 NY2d 583, 590 (1980).

Judge Rivera notes that approximately 400,000 people reside in NYC public housing facilities. As far as this being a mixed question, the Court must be careful not to minimize its role in setting forth the proper legal standards in cases challenging the propriety of police encounters with the public. The building being known for crime, the observance of a nondescript bulge in defendant's clothing, defendant's arm being stiff (and positioned straight down) and the defendant walking away in response to officers' questions is not enough to justify the officers' conduct here. "Innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand." People v. Moore, 6 NY3d 496, 500 (2006), quoting People v. De Bour, 40 NY2d 210, 216 (1976).

In footnote 3, Judge Rivera cites to a 2016 NYC Bar Association lecture by former Chief Judge Wachtler on the occasion of De Bour's 40th anniversary, questioning the continued validity of the De Bour doctrine, particularly regarding the often difficult distinguishing between levels 2 and 3. Here, even if there was an objective credible reason to follow appellant to the ninth floor, there was no justification for the intrusion reaching a level 3 encounter. "Where, as here, police have no advance information about any criminality ascribed to an individual, and that person stands motionless and

silent when approached, the police may not stop and detain, nor grab and place the person under arrest, even if his shirtsleeve has a nondescript bulge." Without such a prohibition, the potential for abuse *in the street*, as opposed to what happened here within an apartment building, is evident.

Some closing thoughts from Judge Rivera on the direction the Court has been heading in Fourth Amendment jurisprudence: "Our Court's recent approach to police interactions with the public, both on the streets and private property — including the decision in the instant appeal — risks authorizing the escalation of police-initiated encounters where a person exercises the right to be left alone, giving license to violations of the right to privacy. I believe the Court is charting a dangerous course, one that has the potential to render appellate judicial review meaningless, imperil individual liberty, and diminish civil rights." Amen.

People v. Boyd

This is another 5 to 2 memorandum, affirming the AD. Judge Rivera authored the dissent, joined in by Judge Wilson. Defendant was prosecuted for possessing an air rifle (or BB gun), as well as a firearm. Though there was incriminating evidence to convict him of possessing the BB gun, the trial court properly dismissed that count, upon the DA's application, as a non-inclusory offense. *See* CPL 300.40 (6)(a). Both the BB gun and the firearm were recovered in defendant's vicinity (under a van). The majority noted that the jury was still free to credit defendant's theory that he possessed the BB gun and not the firearm. Defendant admitted to possessing the BB gun, but not the firearm, though he was purportedly seen holding a gun in each hand. The jury was only given the higher of the two charges, the CPW charge.

The majority also quickly disposed of third-party culpability and summation misconduct issues, neither of which were substantively addressed by the dissent.

According to the dissent, the trial court's error permitted the jury to consider prejudicial testimony irrelevant to the counts submitted, including an admission to possession of the BB gun. The dismissal of the BB gun count removed defendant's only defense from consideration, namely that he only possessed that object. Now the jury could not compromise in defendant's favor; since the jury had the admission to a dismissed charge, all that was left was for the panel to compromise the *other way* - - convict on the CPW charge. This is "reverse nullification." The dismissal of the BB gun count denied defendant the right to present a complete defense. *See generally* Chambers v. Mississippi, 410 US 284, 294 (1973). Judge Rivera explains that jury nullification, or the jury's power to dispense mercy, should not be allowed to interfere with the jury's primary fact-finding function.

Judges gained the ability to decide what charges to dismiss a century ago; prior to that time, it was solely up to the prosecutor. But this discretion of the court is not boundless,

as shown in the lesser-included-offense ("LIO") statute, CPL 300.50. LIO's were originally permitted to help prosecutors, but they also protect defendants. The CPL does not require that a non-inclusory lesser count be submitted to the jury, but its dismissal is subject to an abuse of discretion review. *See* People v. Leon, 7 NY3d 109, 114 (2006). A court may dismiss such a count where it *cannot* be supported by a reasonable view of the evidence, thus where the inclusion of the charge would only interfere with the jury's performance of its duty. At bar, the non-inclusory charge was in fact supported by sufficient evidence. Its dismissal hurt the presentation of the defense, as the jury only had evidence to convict for a dismissed count. Their only choice was to convict of the higher (remaining) count: CPW. The jury could only be confused by this situation, which permitted a compromise verdict of guilty. This confusion was apparently exacerbated when the jury was denied during deliberations the ability to examine *both* pistols, wherein it was obviously seeking to consider all of the facts together.

NYS Court of Appeals Criminal Decisions for March 29, 2018

People v. Teri W.

This is a unanimous decision authored by Judge Wilson. The defendant was 17 years old when she was convicted of a sex offense, carried out with a male co-defendant against a 15 year old girl. Defendant was adjudicated as a youthful offender ("YO"). She complained on appeal that her 10-year probation term *(authorized under Penal Law §65.00 (3)(a)(iii) before it was amended in 2013, as it constituted a "sexual assault")* contravened the YO sentencing parameters under Penal Law §60.02 (2), which requires that a felony YO adjudication be subject to "E" level sentencing (which generally caps probation sentences at 5 years). The legislature has set out designations for various E felony violent, sex and drug offenses since the YO statute was enacted in 1971. For instance, "E" felony sex offenses now carry a 10-year probation term. The legislature intended to treat sexual assaults *(which is a term of art that includes other sex offenses)* differently from non-sex offenses, be it a YO adjudication or not. Penal Law §65.00 (3)(a)(iii) does not conflict with any other statute, including the YO regime. The court also noted that as a YO offender, defendant still did not have to register under SORA and was subject to discretionary early release from the probation department.