NYS Court of Appeals Criminal Decisions for November 16, 2017

People v. Hardee

This is a 4 to 3 memorandum, affirming the AD, with Judge Stein authoring the dissent, joined in by Judges Rivera and Wilson. The issue of whether the likelihood of a weapon being in a vehicle was substantial, and whether the danger to the officers who stopped the vehicle was actual and specific (People v. Carey, 89 NY2d 707, 711 [1997]; People v. Torres, 74 NY2d 224, 231 [1989]), was a mixed question of law and fact. Here, there was record support for the determination that circumstances existed justifying the limited search of the interior of the vehicle. People v. Mundo, 99 NY2d 55, 57-59 (2002).

The dissent, which was much longer and comprehensive than the majority's memorandum, set out the facts and the law in some detail. Defendant was pulled over after speeding and changing lanes without signaling. His fiancé was a front seat passenger. Once pulled over, defendant appeared nervous and admitted to officers to having consumed alcohol. He appeared "hyper." Defendant initially refused to exit the vehicle, but then did so peacefully. Once outside of the vehicle, defendant appeared nervous, but was cooperative during the frisk, which uncovered no weapons. While he was standing outside, defendant looked over his shoulder a couple of times toward the vehicle, against the officers' directions. When handcuffed, he appeared to tense up and resisted. The fiancé was directed to exit the vehicle as well. The officers entered the vehicle with a flashlight and observed a shopping bag on the floor, which defendant was said to have been looking at before. Inside the bag was a smaller black bag containing a firearm. The AD accepted the DA's argument that this constituted a legal protective search.

Absent probable cause, it is unlawful for the police to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has been eliminated. An exception exists allowing for a limited protective search of the vehicle for weapons where a proper inquiry or other circumstances lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officers' safety, which means a substantial likelihood of there being a weapon in the car. *See* Mundo, 99 NY2d at 57, 59 (where defendant absconded three times from police; search deemed legal); Torres, 74 NY2d at 230, 231, n 4 (where defendant was isolated from suspected location of weapon inside vehicle; search deemed illegal); Carey, 89 NY2d at 708, 711-712 (where bullet proof vest was found and defendant made furtive acts; search deemed legal); People v. Omowale, 18 NY3d 825, 825 (2011) (where driver failed to immediately stop vehicle and passenger was seen secreting something in the center console; search deemed legal).

Analyzing the "narrow" Torres exception, the dissenters found the officers' conduct to be illegal. Mere reasonable suspicion of there being a weapon inside the vehicle is insufficient to validate a protective search therein. Through objective supporting facts, there must be an actual and specific threat to the officers. This would mean the driver or the passenger having access to a weapon. The facts at bar were indistinguishable from Torres. The defendant did not evade the police, nor was his nervousness sufficient to justify the search. His subsequent resistance to being handcuffed may not be used as justification, as this conduct was not known by the officers when the search began (and as we know, searches must be reasonable at their *inception* and at every step along the way).

People v. Flores

This is a unanimous decision, authored by the Chief Judge, remitting for the lower court to specifically address a CPL 460.30 motion. The People v. Smith, 27 NY3d 643, 647 (2016) holding that recognized affidavits of errors as a jurisdictional requirement for taking a local criminal appeal is reaffirmed. At bar, there was a local court jury trial without a stenographer. Defense counsel made diligent efforts to secure a transcript of the electronically recorded proceedings for the appeal. He asked County Court to deem the electronic recordings as a sufficient substitute for the affidavit of errors, or alternatively, grant more time to file an affidavit of errors. The court denied the first request but failed to address the second one. Though the County Court lacked jurisdiction to entertain this appeal, as no affidavit of errors was ever filed, it is remitted for the court to address the extension motion.

Further commentary: As noted by the court in foot note 2, CPL 460.10(3)(a) has been amended to permit a local court defendant that chooses to file a notice of appeal within 30 days of sentencing (as opposed to an affidavit of errors within that time) 60 days from when a transcript of the electronically recorded proceedings are received by the defendant to file an affidavit of errors. CPL 460.30 appears to be still viable for motions for an extension of time. Also note that the Court of Appeals is again recognizing that appellate courts that are deprived of the requisite filings to take an appeal lack jurisdiction to hear the case. This is in contrast to the US Supreme Court's recent decision in Manrique v. United States 581 U.S. __ , 137 S.Ct. 1266, 1271-1272 (April 19, 2017), where the court all but held that the filing of a federal notice of appeal is *not* jurisdictional; instead requiring an objection by the government in order to address this defect on appeal.

People v. Estremera

This is a unanimous decision authored by Judge Wilson, reversing the AD. Unless voluntarily waived (People v. Rossborough, 27 NY3d 485, 488 [2016]), a defendant must be personally present under CPL 380.40 for a PL §70.85 re-sentencing following a PL §70.45 / Catu (4 NY3d 242, 245 [2005]) error, where the defendant was not orally informed by the court of post-release supervision at sentencing. PL §70.85, enacted in 2008, applies to sentences imposed between 9/1/98 and 6/30/08, and permits a defendant to have his or her original sentence with the DA's consent, or the withdrawal of the plea. The fact that a defendant may not have been adversely affected by not being present (i.e., where the re-sentence was a foregone conclusion) is of no moment. This is so because the right to be present for sentencing, which brings with it the opportunity to hear it and address the court, is "fundamental" and codified in C.P.L. 380.40. *See also* CPL 380.20 (requiring that sentence be "pronounced"); People v. Sparber, 10 NY3d 457, 469-470 (2008). Corr. Law §601-d (4)(a) also contemplates a defendant's presence, as it requires the appointment of counsel.

NYS Court of Appeals Criminal Decisions for November 20, 2017

People v. Arjune

From the standpoint of assigned criminal appellate practice, this is one of the most disappointing decisions in years. This was authored by Judge Stein, with Judge Rivera authoring the primary dissent, joined by Judge Wilson. The new rule: the failure of trial counsel to file a motion for poor person status with the AD, or to respond to a motion to dismiss an appeal as abandoned four years after the notice of appeal was filed, does not constitute ineffective assistance of counsel. The coram nobis denial by the Second Department is affirmed.

A notice of appeal was filed by counsel. Five years later, immigration proceedings were instituted against defendant. Appellant unsuccessfully moved to reinstate the appeal. A year later, he moved for a writ of error coram nobis. In support, defendant swore that his attorney did not speak with him regarding an appeal. He did not know that a notice of appeal was filed, and would have pursued his appeal if he had realized the immigration consequences facing him.

The court declined to expand People v. Syville, 15 NY3d 391, 394 (2010) here, which itself was a narrow expansion of CPL 460.30 for seeking permission to file a late notice of appeal. *See* People v. Andrew, 23 NY3d 605, 399-400 (2014). Crucially, this relief does not require the showing of a meritorious appellate issue. Syville, 15 NY3d at 398. Under Arjune, a defendant is not constitutionally entitled to the appointment of counsel

to assist in the preparation of a poor person application; it is not a critical stage of the proceedings. Ignoring the limitations of many unsophisticated inmates, the court recalled its previous observation that filing a poor person motion requires only "minimal initiative" on the part of the defendant. (Of course, this also means that it would not require too great an effort by *defense counsel* either.) A written notice of the defendant's rights is apparently enough. Somehow the court concluded that counsel not filing the motion for poor person relief, which is *required* under AD rules, was not inconsistent with the actions of a reasonably competent attorney. The court observed that the Supreme Court in Roe v. Flores-Ortega, 528 US 470, 478 (2000), did not require that a notice of appeal be filed unless clearly instructed otherwise. The majority further distinguished between failing to file the motion for poor person status and failing to file a notice of appeal, the latter of which, if not filed, forfeits the proceeding. This purported distinction again shows no recognition of the realities of how crucial the motion for poor person status really is. Moreover, the court looks squarely to the federal standard here, apparently not concerned with our state constitution's often greater protections for New York litigants (*see also* fn 7, where the majority fends off dissenting Judge Rivera's criticisms). All that a trial attorney has to do is provide a written warning regarding the poor person status issue. The Arjune court even implies that the court clerk's warnings may satisfy the "consult" requirement under Roe, apparently adopted by the majority here, regarding whether to take an appeal. This, of course, would contravene the local rules of all four judicial departments.

The majority was also overly critical of the supporting affidavits (and affirmations) submitted by the defendant and both his trial-level and immigration attorneys here as part of the coram nobis motion. The court found that they failed to contain non-hearsay proof regarding whether defendant was made aware of his right to appeal or whether his attorneys discussed the taking of an appeal with him prior to filing the notice of appeal. The defendant did not deny understanding the written form handed to him regarding taking an appeal *(which was missing from the record on appeal)*. The trial-level attorney's affirmation was described as "carefully worded," as he only indicated that he did not have contact with the client *after* the notice of appeal was filed. The immigration attorney's affirmation simply parroted defendant's affidavit. Defendant even had affidavits from his parents indicating that defendant had limited mental abilities. According to the majority, defendant failed to establish that he was unaware of his appellate rights, or how to seek poor person relief, or that counsel failed to comply with relevant court rules. According to the majority, instead of acting with due diligence to discover the alleged omission, defendant only became interested in his appeal when his immigration issues started.

Some cherry picking is necessary here. In footnote 7, the majority does acknowledge that "[n]othing in this decision should be read to minimize the importance of… state rules, … or to contradict our prior decision that a writ of error coram nobis may lie when the violation of court rules results in a complete deprivation of counsel on a People's appeal." These bread crumbs are small consolation for the rest of the opinion.

With regards to counsel not replying to the dismissal motion four years after the notice of appeal was filed, the majority feared burdening a trial attorney with a constitutional obligation for an infinite period of time.

In dissent, Judge Rivera correctly blasts counsel below for failing to comply with the AD's own rules, as well as the standards proffered by the ABA, the NYS Bar and the National Legal Aid and Defender Association. Professional standards are essential under Strickland's analysis for determining ineffective assistance of counsel. *See* 466 US 668, 688 (1984); *see also* Padilla v. Kentucky, 55 US 356, 366 (2010). As observed by the court in People v. Montgomery, 24 NY2d 130, 132 (1969), "there is no justification for making the defendant suffer for his attorney's failing." Moreover, the defendant had a fifth grade education with low, if any, literacy, as demonstrated by the psychological evaluation that was also submitted with the motion. The right to intermediate appellate review, as the court has many times recognized, is fundamental. It is the state's responsibility to "make that appeal more than a meaningless ritual." Evitts v. Lucey, 469 US 387, 394 (1985). Judge Rivera further observed the greater protections that our state right to counsel offers, as opposed to its federal counterpart (*see* dissent, fn 4). There is a "representation gap" between the notice of appeal being filed and the appeal being perfected; something that the Second Circuit's Rule 4.1(a), which makes the attorney that files the notice of appeal responsible until relieved by the appellate court, would alleviate. Attorneys are constitutionally required to make objectively reasonable choices. Counsel failed to do so here. This statement says it all: "Apart from the injustice suffered by defendant, the holding here risks disincentivizing compliance with the rules. Instead, we should be conveying their centrality to criminal legal practice."

Judge Wilson's brief dissent clarified the Roe requirement of "consult" regarding the right to appeal. This must be done by speaking to the client. A written form is not enough.

Further commentary: Since 1964, all four judicial departments have had local rules regarding the warning of defendants of the right to appeal. As of the fall of 2016, both the Second and Fourth Departments now require that trial counsel file a motion for poor person status when appropriate. CPL 380.55 was enacted in 2016, which permits assigned counsel to seek an order from the sentencing court designating defendant as still qualified for assigned counsel on appeal. This enactment was meant to streamline the assignment of appellate counsel. But now in Arjune, the Court of Appeals has taken a monumental step backwards for assuring that indigent litigants have timely access to intermediate appellate review. The coram nobis motion at bar frankly sounded more detailed and substantive than most that are filed. A very disappointing decision indeed.

People v. Helms

This People's appeal is a reversal authored by Judge Fahey, with Judge Rivera concurring (and Judge Feinman joining in). Here, defendant's prior (1999) Georgia burglary conviction satisfied the "strict equivalency test" for determining whether a prior conviction in another jurisdiction may serve as a predicate (violent) felony conviction under PL §70.04(1)(b)(i) (requiring that all of the essential elements of the prior felony be authorized in New York). The test requires a comparison of the statutory elements of the crimes from New York and the foreign jurisdiction. *See generally* People v. Muniz, 74 NY2d 464, 467-468 (1989). The underlying facts alleged in the foreign jurisdiction accusatory instrument are normally not considered; the exception being where the foreign statute renders criminal several different acts, some of which could constitute misdemeanors under New York law. Case law in the foreign jurisdiction is relevant to this determination.

At bar, the "without authority" clause of the Georgia statute was at issue: "*without authority* and with intent to commit a felony or a theft therein, he enters or remains within the dwelling house of another" (emphasis added). *See* Ga. Code Ann., former §16-7-1 (a). Georgia case law established that the culpable mental state was at least commensurate with New York's burglary statute and its "unlawfully" phrase. Judge Rivera, in her concurrence, in an apparent attempt to restrict the majority's holding for future cases, opined that there was no need to compare New York's law with Georgia's lesser included offense case law.

NYS Court of Appeals Criminal Decisions for November 21, 2017

People v. Smith

This is a unanimous memorandum reversing the AD and ordering a new trial. The trial court failed to adequately inquire into defendant's "seemingly serious request" to substitute counsel. The request was supported by specific factual allegations of serious complaints about counsel. A minimal inquiry into the nature of the disagreement or its potential for resolution was warranted. People v. Sides, 75 NY2d 822, 824-825 (1990).

People v. Dodson

This is a unanimous memorandum reversing the AD and remitting to County Court to afford defendant the opportunity to move to withdraw his guilty plea. The trial court had a duty to inquire into defendant's specific request for new counsel before proceeding to sentence. People v. Sides, 75 NY2d 822 (1990); People v. Porto, 16 NY3d 93 (2010).

People v. Kislowski

This is a unanimous memorandum reversing the AD and dismissing the violation of probation petition. The petition lacked sufficient allegations under CPL 410.70 regarding the time, place and manner of the purported VOP. The defendant's in-court questions posed to the court did not cure the deficiencies.