NYS Court of Appeals Criminal Decisions for November 20, 2018

People v. Manragh

This is a unanimous memorandum (in the result), affirming the AD. Judge Rivera filed a concurrence, with Judge Fahey joining in. Defendant's complaint that the People failed to provide the grand jury with notification of the defendant's request to call a witness (CPL 190.50[6]) is not a "constitutional defect implicating the integrity of the process." People v. Hansen, 95 NY2d 227, 231 (2000); People v. Pelchat, 62 NY2d 97, 108 (1984) (complaint of prosecution knowing of patently insufficient evidence to indict, and then concealing that fact, survives guilty plea). The issue was thus forfeited by defendant's guilty plea, which was voluntarily entered. County Court did not improvidently exercise its discretion in denying defendant's motion to withdraw his guilty plea under CPL 220.60(3).

(The US Supreme Court has recently discussed what issues are automatically forfeited by the entry of a guilty plea. *See* Class v. US, 138 S.Ct. 798, 803-806 [2018] [holding that the challenge to a statute's constitutionality is not automatically forfeited by the entry of a guilty plea].)

The concurring judges criticized the majority for emphasizing the lack of merit in defendant's *underlying* argument. Forfeiture and merits analyses should be kept separate, as it would otherwise add an additional burden on defendants who claim that an issue implicates the integrity of the grand jury process. Such a fundamental issue is distinct from the factual elements of the charged crime, and instead goes to the heart of the process. Here the defendant's argument did in fact implicate the integrity of the process, as a defendant's request placed a mandated statutory burden on the People to place the request before the grand jury. *(If the grand jury rejects the DA's position on the propriety of calling a particular witness, the DA may move to quash the grand jury subpoena.)* The majority's approach puts the cart before the horse; only if it is an issue of a fundamental nature should the merits be considered. The majority's decision flies in the face of CPL 210.35(5), which permits dismissal where the integrity of the grand jury proceeding is impaired and prejudice *may* result from that impairment.

People v. Garland

This is a 5 to 2 memorandum, affirming the AD, with Judge Wilson authoring the dissent, joined in by Judge Rivera. *(This was scheduled as an SSM case, meaning that no oral argument or regular briefing was permitted; seems strange since there was enough discussion for two judges to dissent.)* There was legally sufficient evidence to establish the element of "serious physical injury" ("SPI") under the 1st degree assault

statute (PL §120.10[1]; *see also* PL §10.00[10] [definitional section]). Defendant was said to have fired five shots into a crowd, striking a teenage bystander in the leg. Two bullet fragments remained in the victim's leg, lodged near a blood vessel. If the fragments were removed, neurological deficit, numbness, weakness and bleeding, among other things, could result. He was on crutches for two months, and had other physical impairments even years later. The jury acted rationally in finding that SPI was established.

As the dissent points out, PL §10.00(10) defines SPI as a physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. Here there was no neurovascular damage, no fractures, no nerve damage, no numbness and no major motor function deficits. The bullet did not hit the femoral artery. The possible effects of the injury were insufficient to meet the statute. At 9:30 pm on the night in question, the victim described his pain as a ten out of ten. By 11:50 pm, it was a zero out of ten. He was discharged the same evening. No pain meds were necessary. There was no permanent disability that resulted from the incident. Caselaw indicates that even multiple stab wounds and gun shots do not automatically trigger the SPI standard. Someone who shoots into a crowd deserves to be harshly punished. But it is the legislature's prerogative to enact statutes criminalizing conduct depending on the level of injury. SPI was not proven at bar.

People v. Watts

This is a unanimous decision, authored by Judge Fahey. Possessing a counterfeit concert event ticket, a "written instrument" under PL §170.10, qualifies as criminal possession of a forged instrument under PL §170.25. The First Department is affirmed. A written instrument "does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status." While an event admission ticket is a revocable license and a permission slip subject to retraction, it does still affect a legal right, albeit limited. A ticket holder may under certain circumstances recover the price of the ticket in an action for breach of contract (for instance if one were to be wrongly ejected from the event). The ticket affects one's legal rights and status, and imposes legal obligations on others. An event ticket, like a gift card, traveler's check and personal check, provides monetary value to the physical possessor of the document.

NYS Court of Appeals Criminal Decisions for November 27, 2018

People v. Jones

This is a unanimous memorandum (in result), with Judge Rivera authoring an informative 24-page concurrence. The AD is affirmed. This decision addresses components of New York's version of the 1970 federal Racketeer Influenced and Corrupt Organization Act ("RICO") statute. New York's 1986 law is called the Organized Crime Control Act ("OCCA"), which created under PL §460.20 the class "B" felony of enterprise corruption. At issue was the requirement of defendant's knowledge of an independent ascertainable structure and enterprise, separate from the underlying criminal conduct.

Organized crime is difficult to prosecute under the general principles of accomplice liability and conspiracy. It is often characterized by a complex sophisticated hierarchy that insulates those pulling the strings behind the scenes. The aim is to reach the higher ups of a criminal organization (i.e., the kingpin or bosses). The OCCA is not meant to target the *ad hoc* group of three bandits who wake up one day and decide to do some bank robberies. Instead this law is aimed at those that run the organized entity that continues on, the engine that runs the enterprise, the administrative arm of the corrupt business that facilitates a variety of different crimes. Otherwise legitimate businesses are often infiltrated and used as an engine for the carrying out of crimes.

Over 30 states have enacted what are sometimes known as "baby RICO" statutes. Ours places a much heavier burden on the prosecution in order to use the statute, as opposed to the often criticized and over used federal RICO law (*see* footnote 5 of the majority's decision). For instance, in New York the prosecution is required to file a statement attesting to the prosecution being appropriate, and the defense may move to dismiss where the prosecution is inconsistent with the OCCA legislative findings. Moreover, the OCCA requires that the defendant participate in a pattern of criminal activity associated with the enterprise, meaning 3 criminal acts, 2 of which must be felonies other than conspiracy. RICO only requires 2 criminal acts and conspiracy *is* permitted.

At bar, defendant was prosecuted in a purported motor cycle theft ring, where another individual would distribute the cycles stolen by defendant. While each sale was conducted in a common manner (including defendant communicating with and compensating a distributor), the defendant stole without direction from a superior. There was no hierarchy of authority or a system of ascending command that directed and approved of its members' actions. Though the People argued that there was collective decision-making involved, there was no ascertainable structure of an organization. The identifiable organizational structure must be distinct from the underlying crimes with a defining purpose, and must exhibit the capacity to exist after

the occurrence of the criminal transaction. Here there was insufficient evidence of defendant's knowledge of the existence and nature of a criminal enterprise; instead, defendant served only his own interests.

People v. Suazo

This is an important 5 to 2 decision, authored by Judge Stein, with Judges Garcia and Wilson authoring separate dissents. The First Department is reversed and a new trial is ordered. In an issue of first impression, the court held that a non-citizen defendant that establishes that a charged crime carries the potential penalty of deportation is entitled to a jury trial under the Sixth Amendment, notwithstanding that the maximum authorized sentence is a term of imprisonment of less than 6 months. Defendant was convicted in this ugly domestic violence case of attempt-level crimes for assault, obstruction of breathing, contempt and menacing.

We have a jury trial system as a barrier between the government and its citizenry. Community participation is utilized in our justice system because of fears of unchecked governmental power. Pursuant to CPL 340.40, however, defendants prosecuted within New York City for a class "B" misdemeanor are not entitled to a jury trial. A "B" misdemeanor authorizes at most 90 days in jail. Case law indicates that a crime that authorizes a sentence of no more than 6 months constitutes a "petty" crime, as opposed to a "serious" crime, wherein a jury trial is an entitlement. In other words, the severity of the legislative maximum penalty reflects the seriousness of the crime. But the presumption of a crime being deemed petty may be rebutted where other punishment (such as deportation under the Immigration and Nationality Act [8 USC §1227]) is sufficiently severe to trigger protection under the Sixth Amendment.

The People argued that unlike probation and imprisonment ordered in state court, federal deportation issues are civil collateral consequences to the criminal proceeding -- analogous to other important issues impacted by agencies outside of the court's control, such as voting, travel and SORA determinations. But the majority finds that deportation is a penalty of the utmost severity. Administrative detention of noncitizens for immigration purposes closely resembles criminal incarceration and can last for years; it is intimately related to the criminal process. There were over 143,000 such administrative arrests in 2017. Deportation or removal are drastic measures that directly impact one's financial, familial and employment status, as well as the liberty associated with being a resident of this country. It is an onerous penalty that has a grave impact on people's lives and frequently occurs. *See generally* People v. Peque, 22 NY3d 168, 176, 189, 192-193 (2013). The seriousness of deportation consequences compels defense counsel to properly advise clients in the context of entering a guilty plea. Padilla v. Kentucky, 559 US 356, 374 (2010).

The federally imposed penalty of deportation is practically automatic for many NY criminal convictions. It is inextricably intertwined with the state criminal justice process. Further, the majority recognizes that their holding will require that an immigration determination be made in CPL 340.40-mandated nonjury trial prosecutions of low-level NYC misdemeanors. It will be the defendant's burden to make an appropriate showing.

Judge Garcia in dissent opines that the *local* legislature, which reflects society's judgment about which particular crimes are deemed serious and enacts the sentencing statute, should control what is petty and what is serious. Another sovereign, be it state or federal, should not be in charge of this. Bureaucratic federal immigration law should not override NYS criminal law. Most state courts agree with this principle. The majority's reference to Padilla is misplaced, as defense counsel must provide his/her client with subjective info relevant to that client's unique circumstances that may include both direct and collateral consequences in determining whether to enter a guilty plea. The penalty analysis relevant to the case at bar, however, addresses the legislature's objective view, not a particular defendant's knowledge. Further, immigration law is complex and the courts will now be charged with a tremendous burden in having to deal with these issues in NYC B-misdemeanor prosecutions. The majority's rule is unworkable. Are deportable and removable scenarios equally as serious? And what about the loss of federal housing rights after being convicted of a state drug misdemeanor? And what of the busy NYC criminal court parts which have to administer this holding? This case will have ramifications.

Judge Wilson in a separate dissent, while agreeing with the majority's view of the seriousness of deportation, points out that the majority's holding would effectively deem federal immigration admin procedures, which do not afford the right to a jury trial, unconstitutional. Only the US Supreme Court can do this.

More commentary: As was the case with Padilla, the Suazo decision will further compel the criminal defense bar to obtain greater expertise in the area of immigration law. Furthermore, the court makes a passing reference in footnote 10 to potential concerns defense counsel may have in revealing a client's immigration status in open court. Though the court does not elaborate further, if you are concerned about your client getting picked up by federal agents and carted away after a court proceeding, this will likely have a chilling effect on a defendant exercising his/her Sixth Amendment right to a jury. Further, the majority observes in footnote 1 that for whatever reason the defendant did not raise NYS constitutional or Equal Protection arguments regarding the troubling depravation of *only NYC defendants* of the right to a jury trial for "B" misdemeanors. It would seem this latter line of argument might have potential.