NYS Court of Appeals Criminal Decisions for September 13, 2018

People v. Sanchez

This is a 5 to 2 memorandum, affirming the AD. The People sufficiently disproved in this homicide case the defendant's justification defense beyond a reasonable doubt. Prior First Department case law containing erroneous weight of the evidence standard language is not to be followed. The correct standard, from People v. Delamota, 18 NY3d 107, 116-117 (2011), People v Danielson, 9 NY3d 342, 348 (2007), People v. Romero, 7 NY3d 633, 643-644 (2006) and People v. Bleakley, 69 NY2d 490, 495 (1987), requires a determination as to whether an acquittal would not have been unreasonable based on all of the credible evidence. If not, the appellate court must weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony. Judges Wilson and Rivera dissented, concluding that the matter should be remitted to the AD in order to apply the correct standard (to afford the appellant the appellate review for which he is entitled). This review includes an appellate court independently assessing all of the proof and substituting its own credibility determination in place of the jury.

People v. Xochimitl

This is a 5 to 0 to 2 memorandum affirming the AD. Judges Rivera and Wilson filed separate concurrences related to their respective dissents in People v. Garvin, 30 NY3d 174, 205-221 (2017) (cert. denied, 10/1/18). The question of whether the police received voluntary consent to enter the apartment was a mixed question of law and fact; here there was support in the record for the lower court's findings. The legality of the police entering a home with the intent of effecting a warrantless arrest was not raised below.

Both Judges Rivera and Wilson continue their well-reasoned argument from Garvin in their concurrences, arguing that the police should not be entering homes for the sole purpose of effecting a warrantless arrest which leads to an involuntary consent (and is not justified by another warrant exception). Such conduct is intended to avoid the warrant requirement and leads to a violation of the defendant's indelible right to counsel under our state constitution. At bar, no less than ***seven*** police officers, some with bullet proof vests, arrived at the residence at 6 am. The elderly mother of the Spanish-speaking defendant (who was a homicide suspect with significant immigration issues) apparently stepped away from the doorway without speaking, she may have gestured for them to enter; this was interpreted as consent. Though at least one Spanish-speaking officer was present, he had no interaction with the mother. One officer

believed the mother only spoke Spanish; the other was not sure. A family member who was present testified that the police never asked for consent. As asked by Judge Wilson, "Do we really believe that the Fourth Amendment's drafters, fresh from experiences with British colonial rule, intended that taking a step or two back when confronted by a warrantless, armed police presence at your doorstep would vitiate that Amendment's guarantees? (More particularly, should we interpret New York's constitution that way?)" Judge Wilson also observed that there may have been cultural differences between the parties wherein the elderly woman's step back might be misinterpreted as voluntary consent to the officers' wishes. Indeed, when the police enter a home without a warrant, we are asking too much of everyone involved to attempt to recreate the scene. Just get a warrant. It serves the high function of interposing a magistrate between the police and the citizenry - - so that an objective mind might weigh the need to invade one's privacy to enforce the law. *See* McDonald v. United States, 335 US 451, 455-456 (1948) (for pertinent quote from the court).

NYS Court of Appeals Criminal Decisions for October 11, 2018

People v. Drelich

This unanimous memorandum reversed the Appellate Term in this successful People's appeal. The accusatory instrument was not jurisdictionally defective for the charge of patronizing a prostitute in the third degree pursuant to PL §130.00 (10). Giving the allegation a fair and "not overly restrictive or technical reading" (People v. Casey, 95 NY2d 354, 360 [2000]) and drawing reasonable inferences therefrom, the allegations herein established the reasonable cause standard. *See* CPL 100.40(4)(b). Apparently Mr. Drelich was said to have requested "manual stimulation" from a woman on a street corner for a specific amount of money at 2:25 am. The evidentiary defense that defendant was actually seeking to pay for *nonsexual* activity in the middle of the night on a street corner could be presented to a jury *(likely one with a sense of humor)*, but these allegations were sufficient to survive the motion to dismiss stage.

NYS Court of Appeals Criminal Decisions for October 16, 2018

People v. Crespo

This has not been a good year for defendants' requests to represent themselves *pro se*. *See* People v. SIlburn, 31 NY3d 144 (2018) (finding defendant's request to represent self *pro se* was not unequivocal). Here the People won a 4 to 3 decision, with the Chief authoring the majority opinion, as she did in Silburn. Judge Rivera authored the dissent and was joined by Judges Wilson and Fahey.

The majority here struts out the flowery language about how fundamental the right to represent one's self is. *See* People v. McIntyre, 36 NY2d 10, 14 (1974) (observing that it embodies "the right of an individual to determine his [or her] own destiny"); Faretta v. Califormia, 422 US 806 (1975). But that right is not absolute. At bar, it was asserted too late. For four decades, defendants were permitted under McIntyre to request going *pro se* prior to opening statements. The Crespo court, however, now says that the request must be made before jury selection, as it otherwise is being made after the commencement of trial. McIntyre's three-prong analysis for trial courts dealing with a *pro se* request is that it must be: (1) unequivocal / timely and (2) knowing / intelligent and (3) defendant may not engage in conduct which would prevent the fair and orderly exposition of the issues. Silburn crushed defendant's dreams regarding the first part of the first prong; Crespo now stamps out the second part of the first prong. If the first prong is not complied with, then the trial court's decision in the matter is reviewed under an abuse of discretion standard.

At bar, the defendant was on trial for attempted murder. He was so unhappy with his defense attorney that he gave the trial court an ultimatum: assign me a new attorney or I am not showing up for my own trial. Defense counsel attempted to be relieved as counsel. Eleven jurors were picked in defendant's absence. Defendant then appeared and requested to continue *pro se*. The court said it was too late. Defendant threatened to disrupt the proceedings if he was forced to be present, so the court excluded him from the proceedings. The remainder of the trial was conducted in defendant's absence. The AD reversed the conviction. The Court of Appeals reversed the AD.

So the request was untimely here because it was made after jury trial commenced. The majority opines in footnote 1 that the 1974 McIntyre decision cites (at 36 NY2d at 18) to the then newly enacted CPL 1.20 (11) *(indicating that a jury trial commences with jury selection)* when discussing the definition of "trial" as a signal that the definition of the commencement of a trial had changed since defendant McIntyre's 1971 trial. At that time, the former Code of Criminal Procedure applied. *See* CCP §388 (1) (indicating that the trial commenced with opening statements). The Court further notes that the Second Circuit also requires that a *pro se* request be made prior to jury selection. United States v. Stevens, 83 F3d 60, 66, 67 (2d Cir. 1996).

Judge Rivera offers another scathing dissent, noting that the majority utilizes People v. Antommarchi, 80 NY2d 247, 250 (1992), which recognized a defendant's right to be present for jury selection, a *material* stage of the proceedings, against defendant Crespo here. To say that jury selection is material and therefore a part of the trial for McIntyre purposes, turns caselaw meant to *protect* defendants' rights on its head. If a proceeding is so important as to require a defendant's presence, why is the defendant not entitled to make a decision of this importance during the proceeding? Defendant Crespo had made his dissatisfaction with his defense attorney known to the trial court some six months before trial. Making jury selection the official commencement of trial does not create certainty, as there will still be factual issues as to when the procedures actually began. There is no basis for concluding that New York trial courts have had chronic trouble with *pro se* litigants disrupting proceedings. In fact, most cases are pled out. *Stare decisis*, which promotes efficiency, stability and the concept of the Court as an institution, should have ended the majority's analysis.

NYS Court of Appeals Criminal Decisions for October 23, 2018

People v. Baisley

This unanimous memorandum affirmed the Appellate Term. Supreme Court had constitutional authority (NY Const., Art. VI, §7) to issue a support order in the context of a matrimonial proceeding. The parties mistakenly believed that the underlying order was issued by Family Court. The defendant's claim that Family Court has exclusive jurisdiction over criminal charges based on violations of its own support order is of no moment.

People v. Grimes

I apologize for the length of this summary, but this is a bad one. While Arjune was likely the worst decision for defendants in 2017, Grimes might take the trophy home for this year. In 2014, the Court in People v. Andrews, 23 NY3d 605, 614, held in part that it did constitute ineffective assistance of counsel or a violation of due process under the 6th and 14th amendments to the federal constitution where counsel fails to file with the Court of Appeals a criminal leave application ("CLA") within 30 days of service of the AD decision or a CPL 460.30 extension motion within a year after the CLA was due. In Grimes, the Court holds that the *state* constitution (art. I, §6) is not violated by these omissions either. The AD is affirmed and appellant's motion for a writ of error *coram nobis* ("CN") was properly denied. The Chief writes here for the 5-2 majority. Judge

Wilson authored the dissent, joined in by Judge Rivera. Rhetorical sharp elbows are thrown around in both opinions.

At bar, defense counsel was obligated under First Department Rule 606.5 (analogous to the other three judicial departments) to file a CLA with the Court of Appeals, but failed to do so despite assuring his client that he would. The CN motion in question relied upon People v. Syville, 15 NY3d 391, 398 (2010), wherein the Court held that CN relief was appropriate, in that the federal constitutional rights to due process and the effective assistance of counsel were violated where a notice of appeal was not timely filed to effectuate a first-tier appeal as of right with the AD, and no CPL 460.30 motion *(a codified form of CN relief enacted in 1977)* was filed. According to appellate counsel, the defendant could not have reasonably discovered the attorney's omission within the one-year CPL 460.30 time period. Again, Andrews rejected this argument for discretional second-tier appeals to the state's highest court.

The CN doctrine was expanded with the enactment of CPL to become a legal avenue where none other are available; not just the correction of fundamental or constitutional errors occurring at the trial level. Although most of the common law CN-type of relief was abrogated when the CPL was enacted, CPL 440 did not expressly abolish the common law writ of CN or necessarily embrace all of its prior or unanticipated functions. People v. Bachert, 69 NY2d 593, 599 (1987). Accordingly, CN relief was available in Syville for a so-called "Montgomery claim" *(which was largely superseded by CPL 460.30)* where a defendant loses the fundamental right to appeal through no fault of his (or her) own. Andrews, 23 NY2d at 610-611; People v. Montgomery, 24 NY2d 130, 132 (1969).

The majority held that, unlike the fundamental right to appeal a criminal judgment to the AD, there is no such right to appeal a non-capital criminal judgment to the Court of Appeals, which provides second-tier discretional review. Accordingly, there is no constitutional right to counsel in filing a CLA and the failure to file a CLA therefore does not constitute ineffective assistance. Though the right to counsel under art. I, §6 of our state constitution has long been interpreted more expansively than its federal counterpart, there is no such state constitutional right during post-conviction proceedings. However, once a state has granted defendants the right to a first-tier appeal, whether by statute or constitution, the process must be meaningful. In other words, due process under the 14th Amendment mandates that counsel be provided. But no such right, according to the majority, exists for second-tier review. Unfortunately, the majority does not find that the state constitution provides greater protections for the right to counsel than the federal constitution in this context, as the Court of Appeals has mirrored federal case law in analyzing due process protections for appellate review. Moreover, it was the legislature's prerogative to enact a one-year time limit for an extension motion in CPL 460.30.

The majority explained that there are different questions considered by the AD, as opposed to the Court of Appeals. While the former deals with individual errors, the high

court concerns itself with the bigger picture - - i.e., legal principles of major significance to the jurisprudence of our state, matters of significant public interest and judgments conflicting with US Supreme Court case law. For some reason, the majority attempts to use this reasoning to support the concept of indigent litigants having *less* protection by a competent attorney. Context is discussed. New York's right to counsel case law regarding self incrimination and involuntariness of statements, for instance, is not, according to the majority, implicated in this second-tier review. (This latter point is really lost on me. Why would these issues be any less important before Court of Appeals than they were before the AD?)

Finally, the majority mentions the miscarriage of justice exception (McQuiggen v. Perkins, 569 US 383, 392 [2013]) for the implicated procedural default in federal habeas litigation that would result from a CLA not being filed. Good luck to Mr. Grimes in federal court.

As Judge Wilson correctly observes in his dissent, the true question in this case was not whether every CLA applicant has the *constitutional* right to counsel. They already have that right through the rules of each AD, which require an assigned appellate attorney to file a CLA with the Court of Appeals if requested to do so by his or her assigned client. Approximately 98% of CLA's are filed by attorneys. The real question is whether the already assigned attorney should be held to the state effective assistance of counsel standard (which *is*, in fact, "broader and more powerful" than the federal one) when handling an application authorized by statute (CPL 460.10) to seek access for the indigent before the state's highest court.

Though the majority opines that trial-level case law regarding effective assistance of counsel is not relevant, in fact the Court of Appeals has required that appellate attorneys meet the same standard as trial counsel. People v. Stultz, 2 NY3d 277, 279 (2004). The majority's implications that the briefing in the AD and the often-thorough record on appeal make counsel's assistance in the CLA less important is a difficult pill to swallow in light of the complexity and difficulty in preparing a decent CLA. Further, as the AD and the Court of Appeals may be looking at different issues (i.e., error correction versus big picture), an attorney's assistance becomes even more important. The majority's fear of every post-conviction litigant needing an assigned attorney is without basis. Finally, our state's high court has had no hesitation in rejecting CN claims in the CPL 460.30 context: recall Andrews (2014), Perez (2014) and Rosario (2015).

More commentary: In People v. Arjune, 30 NY3d 347, 356 (2017) (cert. denied, 10/1/18), the Court held that it did not constitute ineffective assistance of counsel for trial counsel not to file a motion for poor person status with the AD. Now with the Andrews / Grimes line of cases and the Court only granting 1.1% of CLA's in 2017 (a fifteen-year low), it seems safe to predict that indigent criminal defendants in our state will likely be finding it harder and harder to secure a place at the appellate table. After all, if our state's highest court will not hold advocates for the indigent accountable when

they fail to properly seek access for their clients to the appellate courts, why would anyone expect such access to do anything but decrease?

Moreover, as Judge Wilson questioned in dissent, why are our standards going down the further up the judiciary food chain we go? Why would weightier and more significant issues having statewide importance not trigger *greater* protections by competent counsel who would be the ones applying to the court? Further, the majority's constant reference to review by the Court of Appeals as merely *second-tier* seems to imply a lesser importance to the singular work that the Court performs. To quote Judge Wilson:

> Yes, we accept only a small fraction of cases for review, but slim odds are not a reason to deny an indigent defendant the right to effective counsel once the State has required appellate counsel to prepare a CLA.

Finally, Judge Wilson makes sure we all are paying attention to the CN issue in general, as he points out the majority's concession that CN relief may still be had despite a statutorily imposed jurisdictional time limit being challenged (*see again* Montgomery, Syville and People v. Tiger, -- NY3d -- , 2018 NY Slip Op 04377 [2018] [Wilson, J., dissenting] [observing that Judge Garcia's concurring remarks regarding the limits of CN relief were not adopted by the majority]).