NYS Court of Appeals Criminal Decisions for February 11, 2021

People v. Allen

This is a unanimous memorandum affirming the Fourth Department. Though not described in the Court of Appeals' decision, the defendant was convicted of fatally stabbing her boyfriend. There were interesting suppression issues addressed in the AD, including custody for *Miranda* purposes and the emergency doctrine justifying the entry of law enforcement into the defendant's residence. *See*, *People v. Allen*, 183 AD3d 1284 (4th Dep't 2020). The defendant raised justification as a defense. The Court of Appeals concluded, however, that the prosecution met its burden in establishing beyond a reasonable doubt the defendant's conduct was not justified. Particularly in light of the People's expert in crime scene reconstruction and blood stain pattern analysis, there was a valid line of reasoning and permissible inferences from which a rational jury could have found the People sufficiently disproved justification.

People v. Duval

This is a unanimous decision, authored by Judge Wilson. This residential search warrant, which included a clearly marked Bronx address, was facially valid for the entire residence. The First Department was affirmed. The motion court did not abuse its discretion in denying the suppression decision without a hearing. *People v. Mendoza*, 82 NY2d 415, 421 (1993). Inside the residence was, among other things, a handgun and ammunition. The defendant ultimately pleaded guilty to 3rd degree CPW and was sentenced to 2 to 4 years in prison.

The defense unsuccessfully argued the constitutional requirement of particularity in the warrant was insufficient, further claiming there were in fact three separate private residences at this location (one on each floor of the structure). *See*, U.S. Const., amend. IV; N.Y. Const., art. I, § 12; CPL 690.15(1)(a), 690.45(5). Moreover, *Groh v. Ramirez*, 540 US 551, 557-558 (2004), prohibits consideration of supporting materials not incorporated by reference and attached to the search warrant. As the majority observed, the motion court did not rely on other documents to cure a facial deficiency in the warrant; *Groh* is therefore inapplicable. No question of fact was raised entitling the defendant to a suppression hearing. There was one street address, one front door and one side door. Though a reasonable officer may under certain circumstances take further investigative steps to ensure the requested warrant "does not command an overbroad search," there was no suggestion that this was not a single-family residence. Multiple utility accounts, mailboxes and public records are factors an officer may consider. The defendant's supporting documents fell short in this regard.

People v. Badji

This is a 5 to 2 decision, with the Chief Judge writing for the majority. Judge Rivera authored the dissent, joined by Judge Wilson. The First Department affirmed the grand larceny and CPSP convictions, as did the Court of Appeals. The defendant's conviction for grand larceny in the 4th degree, PL § 155.30(4), was supported by legally sufficient evidence at trial, as the definition of "credit card" under PL § 155.00(7) does not require physical possession of the plastic tangible item itself; just using the account numbers is enough. But isn't that what identity theft is?

The defendant handled some financial and travel-related issues for a not-for-profit organization. He unfortunately bought items for himself, using the corporate account. There was no proof, however, that the defendant ever possessed the credit card in question, only the account numbers. For the definition of "credit card," PL § 155.00(7), enacted in 1969, refers to any "instrument or article" as defined under General Business Law ("GBL") § 511(1). This includes any credit card, credit plate, charge plate, courtesy card or other ID card or device. The GBL definition was amended in 2002 pursuant to GBL § 511-a to include "any number assigned to a credit card." 2002 also saw new legislation for identity theft and possession of personal ID information under PL article 190. The defense unsuccessfully argued that the latest GBL definition was inapplicable to his grand larceny charges.

The main thrust of the legislation in question was to keep pace with the onslaught of economic crimes and the evolving methods used to perpetrate credit card fraud. This coincides with the increase of online e-commerce, where the physical credit card has become obsolete. The 2002 amendment to the GBL was meant to prohibit ID theft and stem the tide of the illegal use of intangible information, conduct that could further theft and possession of credit cards. A criminal offense is not eliminated just because it may fall into more than one criminal category or overlapping statutes. The dissent focuses, among other things on the concept of "asportation," which the majority describes as an *ancient* common law larceny-related concept. Also rejected was the rule of lenity canon of construction, which requires a favorable interpretation of ambiguous statutes for defendants, as the accused must be provided fair warning of the prohibited conduct. Here, the law is unambiguous.

The dissent says that identity theft, PL § 190.79, was committed, not grand larceny in the 4th degree. The defendant never physically possessed a *tangible* credit card, i.e., an "instrument" or "article" pursuant to PL § 155.00(7). *See*, *People v. Aleynikov*, 31 NY3d 383, 398 (2018) (finding that "tangible" means "material or 'having physical form'"). The majority ignores the importance of "asportation," which includes the actual separation, not just the lessening of value, of property from its rightful owner. While the law has long recognized the importance of protecting intangible trade, military and financial information, the rule of lenity compels an interpretation of this ambiguous statutory scheme favoring the defendant. *See*, *Smith v. United States*, 508 US 223, 246 (1993)

(Scalia, J., dissenting) (explaining rule of lenity). PL § 155.00(7) does not specifically refer to the 2002 GBL amendment in § 511-a, which was codified as an "[a]dditional definition" of "credit card," nor was it amended after 2002. Moreover, PL § 155.00(7-c) defines "access device" which includes credit card numbers. The legislature knows how to refer to intangible numbers and how to distinguish between "possession" and "use." Also distinguished in the law is the theft of information, *e.g.*, PL §§ 190.77-190.84, as opposed to the theft of physical objects.

NYS Court of Appeals Criminal Decisions for February 18, 2021

People v. Gordon

This was an unsuccessful People's appeal. Judge Wilson authored the majority's opinion in this 4 to 3 decision. Judge Feinman, wrote the dissent which was joined by the Chief Judge and Judge Garcia. Here, the Supreme Court suppressed the evidence derived from a residential search warrant. The Second Department affirmed, as did the Court of Appeals.

Sadly, this was the last decision bearing Judge Feinman's name. His Honor officially retired from the Court on March 23rd, and then suddenly passed away on March 31st. He will be profoundly missed.

The police had information from a confidential informant that the defendant was selling heroin out of his home. The search warrant at bar authorized a search of the "entire premises" but did not specifically mention any vehicles parked on the premises as being subject to the authorized search. Yet, two vehicles, a Nissan parked in the driveway and a Chevy parked in the backyard, were both searched and yielded evidence of crimes: drugs, drug paraphernalia and a loaded handgun respectively. The only evidence of a crime inside the residence was a handgun. No drugs were recovered therein.

Under both the state and federal constitutions, a search warrant must be based on probable cause and describe with *particularity* the areas to be searched. The particularity requirement protects the magistrate's determination as to the scope of the warrant, in that it must be specific enough to leave no discretion to the executing officer. The legislature has also chimed in here. *See*, CPL 690.15(1) (delineating the "designated or described" categories of the premises, vehicle and (or) person to be searched). The Criminal Procedure Law does not imply that particularity regarding the "premises," CPL 690.15(1)(a), satisfied the "vehicle" component under subsection (1)(b). Probable cause for a residence does not include a separate residence, even if both are located on the same premises. *People v. Rainey*, 14 NY2d 35, 37 (1964). That vehicles are often in public view requires a more rigorous protection from invasions of privacy. The vehicles

searched at bar, which were not located inside a garage, consequently fell beyond the scope of the warrant.

The prosecution relies on *United States v. Ross*, 456 US 798, 820-822 (1982), for the proposition that under the US Constitution, a warrant to search the "entire premises" authorizes a search of automobiles parked on the property. The federal circuit courts concur. The majority, however, says that under the New York Constitution, the search warrant at bar was required to specifically describe the vehicles to be searched. *See*, *Rainey*, 14 NY2d at 38; *People v. Dumper*, 28 NY2d 296 (1971); *People v. Hansen*, 38 NY2d 17 (1975); *People v. Sciacca*, 45 NY2d 122, 127 (1978); *People v. Ponder*, 54 NY2d 160 (1981). The Court declines to follow the federal rule, relying instead on our state constitution, as "the proper safeguarding of fundamental constitutional rights requires" that the Court does so. Both the majority and the dissent treat us to a discussion about the glory days of the Court's state constitutional dive into Article I, § 12. *See*, *e.g.*, *People v. Harris*, 77 NY2d 434, 438-439 (1991); *People v. P.J. Video, Inc.*, 68 NY2d 296, 303-307 (1986) (recognizing the more rigorous, fact-specific standard of review for a magistrate determining probable cause under the NY Constitution, as opposed to the US Constitution).

A constitutional argument must be brought to the lower court's attention, litigated by the parties and addressed by the courts. A state constitutional argument must be couched in terms of the New York constitution providing more protections than its federal counterpart. *See also*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). Here, the defendant cited New York case law, which cited both the state and federal constitutions, with the defendant further arguing that the federal rule should not control. The majority, unlike the dissent, concludes the state constitutional argument was in deed preserved. **But criminal practitioners beware:** *see*, *People v. Page*, 35 NY3d 199, 203, fn 1 (2020) (finding Fourth Amendment issue not preserved; brutal result for the defendant); *Johnson v. Adirondack CF, et al.*, 36 NY3d 187, 197, fn 7 (2020) (finding state constitutional right to due process argument unpreserved); *People v. Garvin*, 30 NY3d 174, 185, fn 8 (2017) (where defendant only addressed federal 4th Amendment issue in lower court, with just a parallel NY Constitution citation in his suppression motion papers, making no argument that any substantive difference existed between the two constitutions; Court of Appeals only addressed federal issue).

The dissent states in critical terms it is black letter law that motor vehicles located on a premises subject to a search warrant are analogous to a container, not requiring a separate description. Federal jurisprudence and other state courts of last resort permit, under such circumstances, a search of an automobile, analogous to closets, chests, drawers and containers located within the premises. *See again*, *United States v. Ross*, supra. The idea that automobiles are mobile *and in public* only furthers this rationale. The dissent asks whether future lower courts issuing search warrants for a premises will have to delineate every backpack, rollable luggage, paper bag, locked trunk, lunch bucket and

orange crate on the premises in order for officers to execute a search of these items. The majority should have at least come up with potential factors to address regarding a defendant's relationship to the vehicle located on the premises, in case a third party is just visiting. Finally, regarding preservation, "a parallel citation" is not "the equivalent of principled state constitutional discourse."

NYS Court of Appeals Criminal Decisions for March 25, 2021

People v. Vasquez

This memorandum is a unanimous affirmance of the AD. The record supports the lower courts' determination that defendant was not entitled to a CPL 730 examination to re-determine his competency to proceed. *People v. Armlin*, 37 NY2d 167, 171 (1975); *People v. Morgan*, 87 NY2d 878, 880 (1995). The prosecutorial misconduct during cross-examination of a defense witness and in summation were harmless errors. *People v. Crimmins*, 36 NY2d 230, 242 (1975). The trial court did not abuse its discretion in denying the defense a last-minute request for an adjournment to interview a witness.

People v. McGhee

In this successful People's appeal, the Court of Appeals in a memorandum reversed the First Department regarding a *Brady* issue. The witness statement involving the shooter and his flight path, disclosed by the People *after* trial, was not material. *Brady v. Maryland*, 373 US 83, 87 (1963); *People v. Garrett*, 23 NY3d 878, 885 (2014). Here, there was a specific request for the evidence in question. Accordingly, materiality turns on whether there was a reasonable possibility that the result at trial would have been different had the evidence been timely disclosed. *People v. Vilardi*, 76 NY2d 67, 77 (1990); *People v. Giuca*, 33 NY3d 462, 476 (2019). Under the circumstances, the witness statement lacked impeachment value to cast any doubt on the fairness of the trial, and there was no reasonable possibility that the statement supported an alternative theory of defense, nor was there any likelihood that the statement would have led to additional admissible evidence. *People v. Ulett*, 33 NY3d 512, 521 (2019); *People v. Rong He*, 34 NY3d 956, 959 (2019).

NYS Court of Appeals Criminal-Related Decisions for March 30, 2021

Matter of the State of NY v. Donald G.

This unanimous memorandum is an expedited submission case under Court Rule 500.11. At issue is a Mental Hygiene Law article 10 proceeding. The respondent sex-offender won at trial, in that the jury did not find him to be a detained sex offender suffering from a mental abnormality. The trial court, however, granted the state's motion to set aside the verdict regarding a juror misconduct issue. The Fourth Department reversed that order. *See*, 186 AD3d 1127 (4th Dep't 2020). The Court of Appeals unanimously reversed the AD, as the trial court did not abuse its discretion as a matter of law.

People v. Perez

This memorandum unanimously affirmed the AD, vaguely observing there was no reasonable possibility that the admission of the disputed evidence contributed to the defendant's conviction. *People v. Mairena*, 34 NY3d 473, 484-485 (2019); *People v. Crimmins*, 36 NY2d 230, 237, 241-242 (1975).

People v. Viviani
People v. Hope
People v. Hodgdon

Three cases were combined here in a decision authored by Judge Garcia. Judges Stein and Rivera both concurred in the result. The Chief Judge did not participate. This was an unsuccessful People's appeal, affirming the AD. Despite the strong presumption favoring a finding of constitutionality, the Court here declared provisions of Executive Law § 552(1) and (2) facially unconstitutional to the extent they created a special prosecutor having concurrent authority with county district attorneys.

At issue is the Protection of People with Special Needs Act, enacted in 2012, which followed years of law enforcement not sufficiently prosecuting the physical and sexual abuse of individuals with special needs housed in state facilities. The powers created by Exec. Law § 552(2) were broad, giving the special prosecutor, appointed by the Governor, "concurrent authority with district attorneys to prosecute abuse and neglect crimes" committed against these vulnerable individuals. The law created a "Justice Center" and a statewide hotline, as well as a way to investigate and refer reports of abuse to law enforcement. The purpose and intent of the statute was clear.

County district attorneys have plenary authority to prosecute crimes. *See*, County Law § 700(1). They obtained statutory authority in 1818, constitutional authority in 1821 and *elective* constitutional authority in 1846. Though the local DA must be notified under § 552(2) regarding warrant applications and grand jury presentations, the Court still deemed this legislation an impermissible attempt to delegate or transfer independent prosecutorial authority to an unelected official (concurrent with county DAs). Coordination and scheduling is not consent. The Court is simply not authorized to rewrite the law to require that local DAs: *(1)* consent to special prosecutions under § 552, and *(2)* retain ultimate responsibility for these prosecutions. It is an essential function of the DA's constitutional office to determine whom, whether and how to prosecute crimes. No other statutory delegation affords this much authority to a non-constitutional officer, including local prosecutions (Exec. Law § 63(2)) and statewide organized crimes (Exec. Law § 70-a) prosecuted by the Attorney General and NYC-wide narcotics prosecutions headed by an ADA. *See*, Judiciary Law § 177-c.

Judge Stein observed in her **concurrence** that this ruling only applies to felonies prosecuted in superior court. The county DA is not required to have an office representative present for every quasi-criminal hearing in his or her county. State troopers handling speeding tickets are an example. *See*, *People v. Soddano*, 86 NY2d 727, 728 (1995); *People v. Czajka*, 11 NY2d 253, 254 (1962) (permitting non-ADA attorneys and administrative officers to prosecute traffic offenses). In such a scenario, the local DA is kept in the loop and retains the ultimate responsibility for the prosecution. Judge Rivera also authored a **concurrence**, opining the statute could be interpreted to allow § 552 special prosecutors to appear with the local DA's consent. This new authority was meant to supplement (*i.e.*, cooperate and assist), not supplant the local DA's efforts.