NYS Court of Appeals Criminal Decisions for May 4, 2021

People v. Anderson

This is a unanimous (six-judge) memorandum affirming the AD. The facts involved a fatal gang-related shooting carried out by a 14-year-old. Justification was his main defense at trial. *See*, PL § 35.15(1), (2)(a); *People v. Goetz*, 68 NY2d 96, 106 (1986). The trial court did not abuse its discretion in denying the defendant a *Frye* hearing regarding the science of adolescent brain development and behavior. *Frye v. United States*, 293 F. 1013, 1014 (D.C. 1923); *People v. Lee*, 96 NY2d 157, 162 (2001).

NYS Court of Appeals Criminal Decisions for May 6, 2021

People v. Brown

This is a 4 to 2 memorandum, affirming the AD, with Judge Fahey concurring in the result and Judges Wilson and Rivera dissenting. The sentencing proceedings at bar were abrupt and confrontational between the defendant and the court. However, the defendant's valid waiver of appeal encompassed his unpreserved claim of being deprived of his CPL 380.50 right to speak prior to sentence being imposed.

The right to speak before being sentenced is a "deeply rooted" and "substantial" one, long recognized in our state as well as in the federal system. *See former* Code of Crim. Pro. § 480; Fed. R. Crim. P. 32(a)(1). But defendant's appellate argument does not fall among the narrow class of nonwaivable defects that undermine the integrity of the criminal justice system or that implicate a public policy concern transcending the individual interests of the particular defendant to obtain appellate review. *See generally*, *People v. Muniz*, 91 NY2d 570, 574 (1998). Valid appeal waivers may encompass issues that have not reached "full maturation" such as harsh and excessive sentence and YO denial claims. Moreover, CPL 380.50 claims do not fall under the illegal sentence exception to preservation.

Judge Wilson's **dissent** is a great read. Citing everything from the capital trial of Socrates to English 17th century common law, the right of the convicted to speak prior to being sentenced is a critical stage in a criminal proceeding. It treats the soon to be imprisoned as a person rather than an object. Furthermore, Mr. Brown's plea agreement, which included a waiver of appeal, implied an understanding that he would be permitted, as all defendants are, to speak at sentencing. The waiver did not foreclose challenging future errors, including this issue, being raised on appeal. This issue should be considered among the narrow category of rights that survive an appeal waiver, a "substantial" legal

right necessary for protecting the innocent. Further, the AD may consider CPL 380.50 statements in evaluating whether to reduce a sentence. Parole boards consider these statements as well. There's nothing like speaking up for yourself. Even, the most persuasive of counsel may not articulate all the unique components of mitigation as well as a defendant might. CPL 380.50 statements help to mete out appropriate punishment and provide the defendant one unfettered opportunity to address the court and make a public statement, which may touch on justification, explanation, sympathy, disgust and (or) sorrow.

Indeed, "[t]he cost to the judicial system of granting [the defendant] the right to allocute is the cost of transporting him [or her] to and from court. The cost to the system of turning its back on a statutory and common-law right is the loss of confidence in the system itself." Moreover, as observed by Judge Wilson:

> "[w]hen courts deprive defendants of a final opportunity to speak on their own behalf, they deny them even the minimal modicum of dignity that the allocution affords, and the possibility of presenting a narrative of their life that goes beyond their worst acts. Instead of hearing what Mr. Brown wanted to say, we have only a record of the immense anger and disillusion he felt when the judicial system pulled the rug out from under him. Why should Mr. Brown, or anyone reading the court transcript or this dissent, have confidence that the Court system operates by its own rules? I do not fault the sentencing court, which may have simply been confused, distracted, overburdened or inattentive, but two appellate courts, with the luxury of time to read the transcript, the briefs and the statutes, have decided that the rules do not matter. I dissent because Mr. Brown had the right to speak his mind at sentencing, did not waive that right, and I, for one, would have liked him to enter prison thinking the courts treated him fairly."

People v. Slade
People v. Brooks
People v. Allen

Three local court cases are decided here in a 4 to 2 decision, authored by Judge Garcia. Judges Rivera and Wilson filed separate dissenting opinions. The People won all three appeals. The *Slade* appeal was affirmed and the *Brooks* and *Allen* matters, both prosecution appeals, were reversed. These cases involve the participation of translators in the preparation of documenting information from first-party witnesses with limited English-proficiency in support of local court accusatory instruments. The question is whether the translators' role created a hearsay defect requiring the dismissal of the instruments. No facial defect was evident from the four corners of these instruments. The

majority declined to impose additional barriers to language-challenged crime victims participating in the criminal justice process.

The finder of fact at trial conducts a truth finding process. A misdemeanor complaint, however, serves merely as a basis for commencement of a criminal action, permitting arraignment and temporary control where a prima facie case has not yet been made. A local court prosecution requires that an information be filed, stating facts of an evidentiary character, either in the fact section or in a supporting deposition, providing reasonable cause that the defendant committed the offense charged. Further, non-hearsay allegations must be presented establishing, if true, every element of the offense charged and the defendant's commission thereof. *See*, *People v. Casey*, 95 NY2d 354, 360 (2000); CPL 100.15(3); 100.40(1)(c). These requirements are in place as there is no independent Grand Jury-like body to review the document. At issue here is the non-hearsay allegation requirement, which is resolved by facial examination of the instrument. This requirement may be waived, however, as it does not implicate the basic rights of the accused, such as notice. *Casey*, 95 NY2d at 366. Moreover, defects that do not appear on the face of the instrument are "latent deficiencies" that do not require dismissal.

As of 2011, approximately 2.5 million NYS residents had limited English proficiency. Residents in our state speak 168 distinct languages and countless dialects. Unlike in civil practice, *i.e.*, CPLR 2101(b), however, the CPL does not require a certificate of translation to create a facially sufficient instrument. *See again*, CPL 100.15; 100.40; *but see*, 22 NYCRR 200.3 (addressing papers "filed in a criminal court;" referencing CPLR 2101). A certificate of translation further does not convert a complaint into an information. In the case of defendant *Slade*, because the contemporaneously-filed certificate of translation was not incorporated or referenced in the complaint, the document did not create a "facial defect" otherwise undetectable in the accusatory instrument. As to both defendants *Brooks* and *Slade*, these were at best "latent" deficiencies, neither of which entitled the defendants to a speedy trial dismissal. In *Allen*, however, the complainant noted in her supporting deposition that she had her statement read to her in Spanish by a police officer. But an interpreter is no more than a "language conduit" (or an agent of the declarant); the translation thus did not create an additional layer of hearsay. Allen's motion to dismiss was thus erroneously granted.

Judge Rivera opined in **dissent** that the prosecution's trial-readiness in these three cases was illusory. The misdemeanor complaints did not include sufficient documentation of nonhearsay factual allegations to convert them to informations prior to the expiration of the CPL 30.30 deadlines. Nearly a third of New Yorkers speak a language other than English at home. *See also*, dissent fn 3 (itemizing the ten most common non-English languages spoken in NYS). Indeed, an accusatory instrument is a nullity without proof that the deponent understood and adopted the allegations ascribed to him or her. A translator's qualifications in performing this service must be articulated in a certificate of translation. Law enforcement officers often speak too fast and use unfamiliar terminology,

all of which may be lost in translation. As limited English proficiency presents potential barriers to accessing important government programs and services, as well as accessing the justice system, the state is obligated to provide language access in both criminal and civil matters. The majority's ruling permits the prosecution to hide the fact that a translator was involved in the creation of the accusatory instrument. As the criminal system is largely based on guilty pleas, this effectively takes away a defendant's ability to address the issue. If the police can utilize the service of translators, surely the courts can do the same.

Judge Wilson in his **dissent** analogized the process of creating an accusatory instrument using a translator to the child's game of telephone, as the line between mischaracterization and translation rests upon the skill of the translator. Affirmations regarding perjury and the anti-hearsay rule for local court accusatory instruments are intended to protect against this. It hurts crime victims too, as language barriers result in the underreporting of crimes, including domestic violence matters. The CPL should not protect only those affluent in English. Even an eventual acquittal after trial cannot undo the time a falsely accused criminal defendant spends in pretrial detention. *See generally*, *People v. Tiger*, 32 NY3d 91, 112-118 (2018) (J. Wilson, dissenting). The resources to provide competent certificates of translation already exist.

NYS Court of Appeals Criminal Decisions for May 27, 2021

People v. Mabry

This is a brief unanimous memorandum reversing the AD. Supreme Court in Queens County erroneously denied the defendant's suppression motion, as the People failed to establish the validity of the warrantless search of Mr. Mabry's backpack under the guise of a search incident to arrest. There was insufficient evidence that the backpack was in the defendant's "immediate control or grabbable area." *People v. Gokey*, 60 NY2d 309, 312 (1983); *People v. Wheeler*, 2 NY3d 370, 373-374 (2004) (addressing protective sweep doctrine).

People v. Iverson
People v. Cucceraldo

These two local court appeals brought by the People were both affirmed. Judge Garcia authored the unanimous opinion for the Court. The Suffolk County District Court Traffic and Parking Violations Agency ("TPVA") erroneously filed default judgments against the defendants who properly entered not guilty pleas but later failed to appear for trial on their traffic infractions. Both defendants were warned in writing that a sentence could be

imposed *in absentia* if they failed to appear. The TPVA, created to assist the overburdened criminal courts in the NYC area, is an official "criminal court" under CPL 10.10(3)(a). The CPL obviously governs its procedures. VTL § 1806(a)(1) only permits a civil default where a defendant fails to initially appear for court. The statute was meant to motivate an appearance and an entry of a plea on traffic infractions. Moreover, VTL Article 2-A, which permits default judgments, only applies to Traffic Violation Bureaus ("TVB"), which are administrative tribunals that only apply a clear and convincing evidence evidentiary standard. The CPL does not govern TVB proceedings, and appellate review is had only through a CPLR Article 78 application. A TPVA, on the other hand, is subject to basic criminal procedure parameters, including an appeal to the Appellate Term. In sum, the TPVA here did not have the statutory authority to render default judgments under the circumstances.