NYS Court of Appeals Criminal Decisions; October 7, 2021

People v. Gaworecki

This is a unanimous reversal of the Third Department, authored by Judge Fahey. The defendant's 2nd degree manslaughter conviction for selling heroin which resulted in an overdose (the day after the drug sale) was based on legally insufficient evidence. Unique blue glassine bags, found in both the defendant's vehicle and the decedent's bedroom, were used in the distribution of what was known to be a particularly potent batch of heroin. The County Court granted the defendant's dismissal motion. The AD, however, agreed with the People on appeal and reversed. The Court of Appeals now reverses the AD.

Observing that the appellate review of legal sufficiency is deferential but not meaningless, the Court found the competent evidence at bar, if accepted as true, would not establish every element of the offense charged. The Court addresses the *mens rea* definitions of recklessness and criminal negligence under PL § 15.05. Manslaughter in the 2nd degree requires that a defendant recklessly cause a death, meaning he or she was ***aware of and consciously disregarded*** a substantial and unjustifiable risk that death would result. *See*, PL § 125.15(1); PL § 15.05(3). The risk in question must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in that situation. Criminally negligent homicide, on the other hand, occurs where the defendant ***fails to perceive*** a substantial and unjustifiable risk that death will result, where disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in that situation. *See*, PL § 125.10; PL § 15.05(4); *see also*, *People v. Asaro*, 21 NY3d 677, 684 (2013). Indeed, manslaughter requires some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death. *See*, *People v. Boutin*, 75 NY2d 692, 696 (1990). One-time heroin sales are normally not enough to meet these standards. *See, e.g.*, *People v. Pickney*, 38 AD3d 217 (2d Dep't 1972), *affd without opinion* 32 NY2d 749 (1973).

Here the evidence was legally insufficient for either manslaughter or criminally negligent homicide. That the defendant knew the heroin he sold was potent was not enough. Others had survived after having consumed this substance, which caused no previous overdoses. This case was a natural follow up to *People v. Li*, 34 NY3d 357, 368 (2019), where the Court of Appeals found legally sufficient evidence for 2nd degree manslaughter involving a Queens doctor who recklessly prescribed opioids to two known addicts who overdosed. Medical practitioners and family members of the decedents warned defendant Li, a licensed medical doctor, of the grave risks involved. *Id*. at 361. Despite this, he prescribed opioids without a documented medical basis. In other words, the prescriptions the defendant wrote, just days before the deaths, created a high probability of overdose and death. *Id*. at 365-368. In the *Li* dissent, Judge Wilson warned of applying this doctrine

to common drug dealers. *Id*. at 375. In contrast to defendant *Li*, Mr. Gaworecki's general knowledge of the injuriousness of drug-taking was insufficient.

People v. Carmona

This is a unanimous memorandum modifying the AD. The Supreme Court erred in denying the defendant a hearing pursuant to *People v. Rodriguez*, 79 NY2d 445, 453 (1992), to determine whether the pre-trial identification procedure was merely confirmatory. Further, the AD erroneously relied on trial testimony to overcome the suppression court's error. The case is remitted to Kings County.

People v. Timko

This is a brief memorandum unanimously reversing the Appellate Term. The accusatory instrument is dismissed, as it failed to provide reasonable cause to believe the defendant communicated a threat to cause physical harm to (or unlawful harm to the property of) the complainant or his or her family. *See*, PL § 240.30(1)(a).

NYS Court of Appeals Criminal Decisions; October 12, 2021

People v. Torres
People v. Lewis

This is a combined unanimous affirmance of the Appellate Term authored by Judge Garcia. Judge Wilson wrote a concurrence for both appeals. These cases involve fatal pedestrian and bicyclist accidents in Manhattan.

Because many pedestrians and bicyclists die each year in traffic-related accidents, NYC has a "Right of Way Law" making it a misdemeanor for drivers who fail to exercise due care (a mere negligence *mens rea*) in causing physical injury to a pedestrian or bicyclist. *See*, Admin. Code of NYC § 19-190(a)-(c); *see also*, VTL § 1146(c)(1) (state law only making such conduct a violation).

The NYC ordinance is not unconstitutionally vague (under the *federal* Due Process Clause) and is not preempted by state law. While a local government is authorized to enact laws though its police power relating to the public welfare, they must be consistent with the NY Constitution and other laws of the state. Here, there was no intent for Penal Law ("PL") § 15.15(2) to preempt the *mens rea* issue. PL § 5.05(2) indicates the PL

governs provisions outside of the PL unless otherwise expressly provided. PL § 15.05's opening provision indicates its definitions, which the majority says is a non-exhaustive list, are applicable only to "this chapter." Strict liability is contemplated in PL article 15. Moreover, ordinary negligence, while not explicitly listed as a potential *mens rea*, is not inconsistent with article 15. Indeed, New York does have strict liability crimes. *See, e.g.*, VTL § 1146; Agr. Mrks Law § 370 (dangerous animal criminal liability).

PL article 15 does not explicitly require a *mens rea*. Rather, PL § 15.15(2) says that where a statute is silent on *mens rea*, it should not be interpreted as strict liability. But the Right of Way ordinance is not silent on this issue. Even though this local law provides a stricter punishment than its state counterpart, there was no conflict between the ordinance and VTL § 1146. There was no preemption.

In his **concurrence**, Judge Wilson questions the authority of NYC to criminalize a traffic infraction. Under VTL § 155, a traffic infraction is not a crime. VTL § 1800 says local law violations are traffic infractions. These two state provisions thus preempt NYC from criminalizing traffic violations. *(Moreover, NYC had previously lobbied for change in the law, thus showing its awareness of the nature of the law.)* The state law's legislative history, dating back to 1934, supports the conclusion that the legislature sought to remove the stigma of a criminal conviction for traffic infractions. Without this distinction, practically everyone who drives a car in our state would have a criminal record. This would result in an unduly administrative burden for the state and embarrassment for much of the citizenry. Finally, Judge Wilson pointed out this was still an open question, thus encouraging future litigants to address the issue.

People v. Shanks

This is a robust and unanimous reversal of the Third Department, authored by Judge Fahey. The Court here reverses the defendant's insurance fraud-related convictions as he was deprived of a fair trial. The trial court erroneously deemed Mr. Sanks's Sixth Amendment right to counsel forfeited because of the defendant's purported lack of cooperation with his attorneys.

The defendant went through no less than ***7*** assigned attorneys, 5 because of ethical conflicts, illness or the attorney's departure from the state, but just 2 because of disagreements with counsel. After number 7 was relieved as counsel, the trial court would only assign *standby* counsel for the defendant. *See*, *People v. Silburn*, 31 NY3d 144, 152 (2018) (recognizing standby counsel is not a co-counsel). In other words, Mr. Shanks was compelled to represent himself *pro se*. This led to a bit of a circus, with the defendant stating during jury selection that he didn't know what he was doling - - and the trial court then slamming him with "curative" instructions. Not surprisingly, Mr. Shanks was convicted as charged.

After denying a second recusal motion, the trial court offered to give the defendant 'time served' in exchange for his withdrawal of previous motions and waiving his right to appeal. The waiver was both oral and written - - and coercive. Indeed, it mischaracterized the scope of appellate rights and was insufficient to establish a knowing and voluntary waiver. *See*, *People v. Thomas*, 34 NY3d 545, 559, n 2 (2019) (recognizing jurisdictional and constitutional rights going to the very heart of the process as not waivable); *People v. Bisono*, 36 NY3d 1013 (2020); *People v. Callahan*, 80 NY2d 273, 280 (1992); *Garza v. Idaho*, __ US __ , 139 S.Ct. 738, 744-745 (2019). There was no clarification of the oral waiver allocution in the written appeal waiver, particularly regarding poor person relief and the rights that would survive the waiver. Under the circumstances, it was not certain the defendant understood the nature of the appeal waiver.

While persistent egregious behavior *(such as threatening, assaultive and physically abusive conduct)* may forfeit the right to counsel, this case fell short of that. As Judge Fahey observed:

> mere raised voices, vociferous disagreement with an attorney over strategy, or accusations of incompetence do not rise to the level of egregious conduct constituting forfeiture of the right to counsel, especially when the defendant himself does not seek to dismiss the attorney. A defendant does not forfeit the right to counsel simply by being argumentative or uncooperative with counsel or by moving to reassign counsel "as a mere dilatory tactic". <u>The right to counsel would be almost meaningless if every defendant who quarreled with their attorney about their defense or attempted to delay the proceedings forfeited the right to counsel</u>. There may be circumstances where a defendant who refuses to cooperate with successive assigned attorneys is ultimately deemed to have forfeited the right to assigned counsel, although such an individual must be afforded the opportunity to retain counsel.

Shanks, 2021 NY Lexis 2171, at *15-16 (emphasis added and internal citations omitted). There was no abusive or threatening conduct by the defendant at bar. A new trial was ordered.

NYS Court of Appeals Criminal Decisions; October 14, 2021

People v. Ibarguen

This is a brief 5 to 2 memorandum affirming the Second Department. The suppression court did not abuse its discretion in denying the defendant's motion without conducting an evidentiary hearing. The motion papers failed to comply with CPL 710.60(1) and (3), which require that suppression motions state the legal grounds for relief and contain sworn allegations of fact. *See also*, *People v. Mendoza*, 82 NY2d 415, 422 (1993); *People v. Burton*, 6 NY3d 584, 588 (2006) (observing the defendant may also rely on the People's allegations). Standing was not properly alleged for this social guest. There was also no *People v. LaFontaine*, 92 NY2d 470 (1998); *People v. Nicholson*, 26 NY3d 813 (2016), issue regarding the Court of Appeals deciding an issue not addressed by the courts below. *See also*, CPL 470.15(1).

In **dissent**, Judge Wilson opined the defendant provided sufficient sworn allegations in support of his suppression motion; he was an invited dinner guest, a lawful invitee who received his mail at this Queens residence. The police, investigating illegal drug distribution, first burst into the residence without a warrant, consent or exigent circumstances. A search warrant was subsequently executed. A pre-marked $20 bill from an undercover operation was recovered in the bathroom. The defendant was ultimately identified following a show up ID procedure. Sufficient allegations to challenge the legality of the search were provided.

To assert one's Fourth Amendment interests, a legitimate privacy interest in the place searched must be shown; this is an interest that society is prepared to recognize as reasonable. *Katz v. United States*, 389 US 347, 361 (1967) (Harlan, J, concurring); *Rakas v. Illinois*, 439 US 128, 148 (1978) (rejecting automatic standing for house guests); *Minnesota v. Olson*, 495 US 91, 98 (1990) (finding no standing where overnight guest was there to complete a drug operation). Of course, there is a difference in the expectation of privacy between an overnight guest, who has a reasonable expectation of privacy, and a momentary invitee. *See*, *Minnesota v. Carter*, 525 US 83, 91 (1998) (finding short term commercial guests lack the same expectation of privacy as social guests). The person who attends a dinner at a friend's home (where he or she receives mail) has as much expectation of privacy as Mr. Katz did (389 US at 361) standing in a phone booth. After all, some say all great change in our country begins at the dinner table. The home is ordinarily afforded the most stringent Fourth Amendment protection. *United States v. Martinez-Fuerte*, 428 US 543 (1973); *Payton v. New York*, 445 US 573, 603 (1980). Privacy in the home is critical for our democracy; it's the place of important conversations, private political gatherings and relationships. Freedom of association often stems from these events, which in turn result in private membership groups pursuing political activism. The harder it is for invitees to a home to challenge a warrantless intrusion, the

less the police will be deterred from doing so. Judge Wilson says the majority's decision enacts a dangerous obstacle for social or dinner guests to secure an evidentiary suppression hearing in the future.

Finally, Judge Wilson opined that the defendant preserved (pursuant to CPL 470.05(2)) his argument regarding the right to privacy as a social guest in the Fourth Amendment context by citing to controlling US Supreme Court case law (i.e., *Olsen* and *Carter*). In a signal to future litigants and his colleagues, moreover, Judge Wilson also opined the majority should articulate the scope of such privacy.

People v. Blandford

This is a 4 to 3 memorandum, affirming the Third Department. Judge Wilson authored the dissent, with Judges Rivera and Fahey joining. The lower court's denial of defendant's suppression motion, addressing the legality of a canine sniff of a vehicle's exterior, was a mixed question of law and fact. Here there was record support for the lower court's determinations.

As Judge Wilson observes **in dissent**, a canine sniff of a vehicle's exterior is on par with the second level of *De Bour*, that is, whether the police possessed a founded suspicion that criminal activity was afoot. *See*, *People v. Devone*, 15 NY3d 106, 110 (2010); *People v. De Bour*, 40 NY2d 210, 223 (1976). Here, the defendant was observed driving without a seat belt and pulling into a convenience store parking lot. The defendant and another individual greeted each other outside the store and, according to law enforcement, appeared to conduct a drug sale, or what the officer described as "a handshake, type hug thing." *(This was also an area where drug sales ordinarily occur. Further, the defendant was suspected to have sold drugs before.)* The defendant then entered his vehicle. Another individual exited the store and got into the front passenger seat. The car then drove away with two rear license plate lamps out. The officer's emergency lights were activated and the defendant's car did a "slow roll" before stopping, during which time the defendant made "furtive movements" inside the vehicle (including reaching over the passenger's seat). The officers' suspicion of the defendant was based in part on his behavior outside the store and his purportedly "kind of talk[ing] in a circle" in response to the officer's inquiry. He gave "mixed consent" to search the area the police were most concerned about, i.e., the front passenger compartment. Though nothing incriminating was recovered there, a canine sniff of the exterior of the vehicle led to discovery of marijuana in the trunk.

The police acknowledged at the suppression hearing this was a "pretext stop," which is unfortunately lawful. Law enforcement believed, without a founded suspicion, that the defendant was selling drugs, so they watched him. But the first VTL violation for the seatbelt, according to the dissent, was effectively superseded by an intervening event,

that is, the defendant's visit to the convenience store. Furthermore, shaking hands is a common gesture between people on the street. As observed by Judge Wilson:

> First, Mr. Blandford's handshake or hug to at least one person outside the convenience store does not support any suspicion of criminality. Notably, neither officer observed Mr. Blandford deliver or receive any contraband when they saw him greet at least one person outside the store; instead, each acknowledged that his conduct could have been completely innocent. Unless we are prepared to say that the police may detain anyone who hugs or shakes hands outside of a store known to the police to have been the site of drug transactions, those facts cannot be a basis for stopping Mr. Blandford. We should also keep in mind that such a rule would fall more harshly on communities of color and low-income communities: shaking hands as you enter Saks will likely not result in your detention. Because neither Trooper Shive nor Investigator Backer observed any exchange of contraband, it was improper for County Court to consider Mr. Blandford's handshake or hug as a factor supporting its finding that there was a founded suspicion of criminality afoot justifying Trooper Shive's canine sniff.

People v. Blandford, 2021 NY Lexis 2209, at *15 (Wilson, J., dissenting) (emphasis added).

Judge Wilson also opined that the more protective federal ("reasonable suspicion") standard for a canine sniff of the exterior of a vehicle, *Rodriguez v. United States*, 575 US 348, 355 (2015), controls as the less protective 2010 New York rule had been superseded and is now unconstitutional. *Devone*, 15 NY3d at 110. In other words, federal standards may provide more, not less, constitutional rights. The federal rule is analogous to the third *De Bour* prong. Moreover, as defense counsel argued below the more protective federal canine sniff standard, the less protective state standard was also necessarily preserved as well. Finally, from by Judge Wilson:

> Mr. Blandford's letter brief raises several policy considerations about police practices in communities of color, arguing that "[t]his case is about . . . how we as a society want to treat persons of color in their neighborhoods and when they step into cars." … An objective reader of the facts would have to conclude that the officers here were not concerned that Mr. Blandford would be injured because he was not wearing a seatbelt, or that his license plate could not be read with only

> one working lightbulb. Rather, they suspected—for reasons we don't know—that he was dealing drugs. It is not reasonable to believe their suspicion was based on his hugs, his fruitless shopping at a convenience store or his giving a friend a ride. After searching his car and speaking with him, it could not have been based on a slow roll or furtive movements. It must have been based on something else—something they suspected well before that November afternoon. Because that "something else" is not in the record, we are left to wonder how benign or pernicious that suspicion may have been.

Blandford, 2021 NY Lexis 2209, at *24-25 (Wilson, J., dissenting).

More commentary: The *Ilbarguen* and *Blandford* appeals (both decided on 10/14/21) are the first split criminal decisions under the new (and still evolving) lineup encompassing Judges Singas and Cannataro, both of whom landed in the pro-prosecution bloc of the Court. We'll stay tuned to see how future Fourth Amendment cases play out.