NYS Court of Appeals Criminal Decisions: November 18, 2021

People v. Williams

This is a unanimous decision authored by Judge Garcia. The Fourth Department is affirmed. No consent is required for the court to display for a deliberating jury a requested copy of the statute at issue. Here, in response to a jury request, the trial court displayed on a "visualizer" *(in open court with both parties present)* the definitions and elements of the charged crimes. Because it was done in court, there was purportedly no risk of the jury placing undue weight on the displayed text as opposed to the rest of the instructions. The defense consented to the statute being provided and did not object to the manner in which it was displayed. CPL 310.30 permits this. The instruction must be given in the presence of the defendant in open court. The statute authorizes the court, with the parties' consent, to "give" "copies" of the statute to the jury. Dictionary definitions reveal that "giving" is synonymous with "furnishing." But "displaying" of the statute to the jury is not the same as "giving" or "furnishing." There was no abuse of discretion by the court. The issue further required preservation for appellate review.

People v. Powell

This is a lengthy 4 to 3 decision, authored by the Chief Judge. Judge Rivera wrote for the dissent, joined by Judges Wilson and Fahey. In *People v. Bedessie*, 19 NY3d 147, 149, 159, 161 (2012), the court recognized the potential relevance of expert testimony regarding dispositional and situational factors involving false confessions elicited during custodial interrogations. In this Queens robbery appeal, however, the trial court, after holding *Frye* and *Huntley* hearings, did not abuse its discretion in precluding the psychologically-related testimony of a defense expert on false confessions. *See generally*, *Frye v. United States*, 293 F 1013 (DC 1923); *People v. Lee*, 96 NY2d 157, 162 (2001) (addressing whether the jury would benefit by the specialized knowledge of an expert witness, which would be outside the ken of the typical juror); *People v. LaGrand*, 8 NY3d 449 (2007). The AD is affirmed.

A day after the officers claimed he was Mirandized, the defendant provided a generic handwritten confession, followed by a more detailed one after two witnesses identified him in a lineup. Law enforcement did not recall whether the visibly agitated defendant was provided the medication he requested. He ultimately confessed to multiple robberies. But the defendant testified to having been physically struck multiple times by an officer during the questioning. While he signed a *Miranda* waiver in order to secure food and medication, the defendant denied having been actually Mirandized.

The defendant filed a CPL 250.10 notice of intent to present psychological evidence relative to the voluntariness and reliability of his statements. Mr. Powell had an IQ of just

78. He also had a history of mental illness, including paranoid ideation, schizophrenia and depression, as well as substance abuse issues. He had ingested heroin and cocaine the day he was arrested and said to be Mirandized. The proposed defense expert, whose impressive credentials were not questioned, opined the defendant could be made vulnerable to suggestion in a custodial setting. The *Frye* hearing testimony addressed the defendant's characteristics, including his mental illness, intelligence and substance abuse, as well as his having been in custody more than 24 hours. The testimony also analyzed the common psychologically-based interrogation methodology of the 1962 *Reid Technique*. This included presenting false evidence, minimizing the suspect's responsibility, theme development, offering leniency, and isolating and confronting the suspect with the interrogator's knowledge of the case. While the expert testimony revealed only 10 to 15 % of wrongful convictions are because of false confessions, this is because most are DNA exonerations involving rape and murder.

The trial court believed the defense failed to establish its expert testimony was based on principles and methodologies generally accepted in the relevant scientific community. The lower court opined the expert did not have sufficient knowledge of the defendant's medical history and circumstances. Of course, no expert is permitted to opine on the particular facts of the case without improperly bolstering the credibility of other witnesses. Defendant testified at trial regarding the involuntary nature of his interrogation. The jury was instructed as to the voluntariness requirement of all statements made to the police, as well as to eyewitness ID, including the cross-race effect. *See*, CPL 60.45; *People v. Boone*, 30 NY2d 521, 527 (2017).

The defendant purportedly only claimed his first statement was coerced and, according to the majority, denied making the second set of admissions attributed to him. The circumstances addressed by the expert were thus not relevant to this case. The proposed testimony may have been informative but would have been misleading, confusing and irrelevant for the jury, and was insufficiently connected to the facts of the case. The trial court must make a determination of the proposed expert testimony's relevance. The majority further made quick work of the trial court's denial of cross-racial eyewitness ID expert testimony, which would have addressed the issues of stress and memory in the context of potential *Boone*-related racial misidentification results.

In her 49-page **dissent**, Judge Rivera opined the majority made factual findings involving weight and credibility issues that are meant for the jury to decide. The majority's view resembled the more case-specific federal *Daubert*, 509 US 579 (1993)) standard *(see also FRE 702)* more than the *Frye* standard which has been historically followed in our state. The majority believed that general acceptance of a scientific theory is not enough; the court still has a gate keeping function. Indeed, *Daubert* focused more on reliability and relevance. The NYS-*Frye* approach places more trust with the jury. The defendant's right to present a defense here was denied. The expert testimony would have properly aided the jury in assessing the voluntariness of defendant's statements - - not by claiming all of the factors apply, but rather by providing a scientific background on the topic. *LaGrand* did not give trial courts a license to make factual findings prior to the facts being tested through the adversarial process. The majority's opinion that the defendant flatly

denied making the second confession was overstated. The court's denial of proposed cross-racial ID expert testimony was also critical to presenting a defense, as the surveillance video at bar was not conclusive. The answer is to permit more cross-examination for the prosecution, not preclusion of helpful and relevant expert testimony for the defense.

People v. Romualdo

This prosecution appeal is a unanimous reversal of the Second Department. There was legally sufficient evidence to support the defendant's homicide conviction. The AD's conclusion that there was no evidence placing the defendant at or near the crime scene was erroneous as a matter of law. DNA established the defendant's semen was found on the sexually assaulted (and strangled) victim's body. The AD ignored reasonable inferences when viewing the evidence in a light most favorable to the People. *See*, *People v. Carrel*, 99 NY2d 546, 547 (2002); *People v. Danielson*, 9 NY3d 342, 349 (2007). The Court of Appeals even reversed the AD's weight of the evidence determination, as the AD "manifestly" failed either to consider the issue or did so using an incorrect legal principle. This was an error as a matter of law.

People v. Mendoza

This is a brief Rule 500.11 decision. With the People's consent, the Second Department is unanimously reversed. The appeal waiver is invalid pursuant to *People v. Bisono*, 36 NY3d 1013, 1017-1018 (2020).

People v. Jennings

This is another brief Rule 500.11 decision. The Fourth Department is unanimously reversed. Counsel's failure to challenge the verdict as repugnant did not render the representation ineffective as the issue was not clear cut and dispositive.

People v. Hargrove

This is a brief and unanimous memorandum, reversing the AD. The matter is remitted to Supreme Court, Kings County, as the lower court failed to determine on the record whether the defendant is an eligible youth for *youthful offender* status by considering factors under CPL 710.20(3). *See*, *People v. Middlebrooks*, 25 NY3d 516, 527-528 (2015).

NYS Court of Appeals Criminal Decisions: November 23, 2021

People v. Wortham

This is a 5 to 2 decision, with Judge Fahey authoring the majority opinion. Judges Rivera and Wilson authored two separate opinions, both dissenting in part. In this weapon and drug possession case originating out of Brooklyn, the Court of Appeals affirmed the First Department's conclusion that the defendant's pedigree statements did not trigger *Miranda* protections. However, the AD was reversed and the matter remanded for a *Frye* hearing regarding the admissibility of the forensic statistical tool ("FST") created by the NYC Office of the Chief Medical Examiner ("OCME") in determining multi-source DNA results.

To begin with, the entire Court agrees that the trial court erroneously admitted the FST evidence without conducting a *Frye* hearing to determine whether FST is generally accepted in the relevant scientific community. *Frye v. United States*, 293 F. 1013 (DC Cir. 1923). Unlike in *People v. Williams*, 35 NY3d 24 (2020) and *People v. Foster-Bey*, 35 NY3d 959 (2020), this error was not harmless. The OCME is simply too secretive about its methods. Just having the okay from the DNA Subcommittee of the NYS Commission on Forensic Science is insufficient. A *Frye* hearing must now be conducted by the court below.

Second, the interrogation issue: *Miranda* warnings are not triggered by routine booking (or "pedigree") questioning, such as asking one's name, date of birth and address. *See*, *Miranda v. Arizona*, 384 US 436 (1966); *Rhode Island v. Innis*, 446 US 291, 297-302 (1980); *People v. Ferro*, 63 NY2d 316, 322 (1984); *People v. Rodney*, 85 NY2d 289, 292 (1995). Pedigree questioning is not deemed part of the investigation of a crime, and is thus not interrogation. However, before the present case, even facially appropriate administrative questions could be deemed interrogation where, under the circumstances, they were reasonably likely to elicit an incriminating response. *Rodney*, 85 NY2d at 292-294. Effectively dropping that protection, now if the questioning reasonably relates to non-investigative and administrative concerns, they are to be deemed pedigree questions unless the trial court determines *(as a non-dispositive factor)* that those particular "rare" circumstances show law enforcement subjectively intended to disguise interrogation as

pedigree questions. This is overall an objective analysis. At bar, these were just pedigree questions. Though the majority opines it is merely clarifying *Rodney*, the dissent believes it does much more.

Judge Rivera in her **dissent** opined that only where administrative issues are the *sole* reason for the questioning it should be deemed pedigree in nature. The majority has made it much more difficult to establish ostensibly pedigree questioning as interrogation. The *Rodney* rule primarily focused on the incriminating nature of the defendant's answer, not the intent of the police. Here, the defendant was asked *(while handcuffed and sitting in an apartment surrounded by 12 members of law enforcement)* if he lived there. In his **dissent**, Judge Wilson believed that, consistent with sister states and federal jurisprudence, a new trial was the appropriate remedy for the *Frye* issue, not a second *pre*-trial bite at the apple to allow the prosecution to fix its error. The remedy afforded here was incompatible with the presumption of innocence.

People v. Buyund

This is a successful prosecution appeal, a 5 to 2 decision authored by Judge Cannataro. Judge Wilson wrote the dissent, joined by Judge Rivera. The Second Department is reversed, with the majority holding that an intermediate appellate level challenge to the legality of sex offender certification must be preserved and is not subject to the narrow illegal sentence exception. *See*, *People v. Fuller*, 57 NY2d 152, 156 (1982); *People v. Samms*, 95 NY2d 52, 56 (2000) (recognizing the essential nature of the right to be sentenced as provided by law); *People v. Nieves*, 2 NY3d 310, 315 (2004).

Mr. Buyund did not object under CPL 470.05(2) to his SORA certification at sentencing, following his entry of a guilty plea. On appeal, he successfully argued his crime of conviction, 1st degree burglary as a sexually motivated felony, was not an enumerated registerable offense under Corr. Law § 168-a(2)(a), which was amended in 2007 as part of the Sex Offender Management and Treatment Act ("SOMPTA"). The defendant opined the statute required that an enumerated felony be both defined under PL § 130.91 and cited in Corr. Law § 168-a(2)(a). The majority observed, however, that the defendant's interpretation would exclude some 20 sexually motivated felonies.

Regarding preservation, *People v. Hernandez*, 93 NY2d 261, 267 (1999) held a SORA certification was an integral part of the conviction and sentencing, and was appealable as part of the judgment of conviction. However, *Hernandez* did not address whether the SORA certification was part of the sentence itself. In *People v. Smith*, 15 NY3d 669, 674 (2010), the court held notice and registration requirements under NYC's Gun Offender Registration Act ("GORA") was not part of the judgment of conviction. PL § 1.20(15). In dicta, the *Smith* court observed SORA certification to be a part of a sentence. *Id*. at 674, n 2. In today's case, the majority retreats from this "overly expansive interpretation" of *Hernandez*. In *Nieves*, the court concluded that an order of protection, which is non-punitive in nature, is part of the judgment but not part of the sentence itself. 2 NY3d at

315. Such an order is not under the illegal sentence exception to the preservation rule. SORA certification, which is remedial, part of a civil statute and non-punitive in nature, is not addressed in the CPL or the PL. *See also*, *People v. Gravino*, 14 NY3d 546, 559 (2010) (finding SORA certification to be a collateral consequence of a guilty plea; it's a result of actions taken by independent agencies not controlled by the court). SORA certification at sentencing is the beginning of a statutory process, culminating with a SORA risk determination hearing and potentially a civil appeal.

In **dissent**, Judge Wilson pondered: what if *larceny* was illegally certified as a sex offense? The defendant's substantive argument, while perhaps not reflecting a sound policy result, is a legislative prerogative not subject to judicial re-drafting. The conviction at bar is not an enumerated offense under the unambiguous definitions of "sex offense" or "sexually violent offense" (Corr. Law § 168-a(2)(a)). There were other avenues available to the prosecution to address the crimes in question through a plea offer. The proper remedy here is to vacate the defendant's plea. Pursuant to *Hernandez*, 93 NY2d at 268, and *Smith*, 15 NY3d at 674, n 2, an illegal SORA certification makes the sentence illegal and appealable even without a timely objection below. The majority fails to properly distinguish between SORA certification and risk level determination, the latter of which is not part of a criminal sentence. *See*, *Hernandez*, 93 NY2d at 270; *Smith*, supra at 674.

People v. Dukes

This is a brief Rule 500.11 decision affirming the Fourth Department's 3 to 2 decision. The defendant's argument that portions of the presentence report were inadmissible and should not have been considered by the SORA risk level determination court was unpreserved for appellate review. Judges Rivera and Wilson dissent for the reasons given by the AD dissenters. *See*, *People v. Dukes*, 186 AD3d 1073, 1074-1076 (4th Dep't 2020) (Peradotto, J.P. and Lindley, J, dissenting) (discussing the defendant's two prior Family Court juvenile adjudications).