NYS Court of Appeals Criminal Decisions for April 21, 2022

People v. Carman

This is a 5 to 2 memorandum, affirming the AD. Without deciding whether the right to meaningful and effective assistance of counsel applies in SORA (Correction Law article 6-C) proceedings in general, the majority concluded the defendant failed to establish he was deprived of this right. *People v. Benevento*, 91 NY2d 708, 712 (1998). Judges Rivera and Wilson dissented for the reasons set out in the AD's dissent. *See*, *People v. Carman*, 194 AD3d 760, 763-767 (2d Dep't 2021) (Barros, J., dissenting) (describing how assigned counsel failed to even request a downward departure during the SORA proceedings).

NYS Court of Appeals Criminal Decisions for April 26, 2022

People v. Easley

This is a 4 to 3 memorandum, with Judge Rivera authoring the dissent, joined by Judges Wilson and Troutman. The AD is affirmed. The trial court abused its discretion by admitting Forensic Statistical Tool ("FST") low copy number ("LCN") DNA evidence without conducting a *Frye* hearing. *See*, *People v. Foster-Bey*, 35 NY3d 959 (2020); *People v. Williams*, 35 NY3d 24 (2020). FST is a DNA analysis method developed by the NYC Office of Chief Medical Examiner ("OCME"). The People's proof was overwhelming, however, making the error harmless. *People v. Crimmins*, 36 NY2d 230, 241-242 (1975).

In **dissent**, Judge Rivera opined the circumstantial evidence purportedly establishing the defendant's guilt was far from overwhelming. The defendant was convicted of CPW regarding a gun found between boxes on a deli store shelf during an attack on defendant by several unidentified individuals. But the prosecution carries a heavy burden in establishing constructive possession. Here, no one witnessed the defendant possess the gun. There were, however, three DNA contributors on the trigger of the gun, including the defendant. Still, there was no blood or fingerprint related testimony. Nor did the defendant make any admissions. The store surveillance video merely showed the defendant to be in the physical proximity of the gun, along with numerous other individuals in this chaotic and violent episode.

People v. Dawson

This is a brief 5 to 2 memorandum, affirming the AD. Judge Wilson authored an extensive dissent, joined by Judge Rivera. While a defendant in custody who unequivocally requests an attorney may only waive that right in the presence of counsel, the majority deemed the issue here a mixed question of law and fact. At bar, there was record support for the lower court's denial of defendant's suppression motion.

The **dissent**, however, saw it differently. As Judge Wilson observed, the 19-year-old defendant was brought to the police station in handcuffs and had his cell phone confiscated. His leg was shackled to a chair. He waited in isolation for two hours before a detective entered the small interrogation room to inform the defendant of why he was there.

A verbatim account from the video-taped interrogation was provided by the dissent, including the Mirandized defendant asking the police for his phone back so he could contact his attorney. As counsel's number was in his phone, the defendant specifically requested the opportunity to utilize the only mechanism he knew of to communicate with the attorney. The exchange confirmed law enforcement's understanding of the defendant's comments and requests to constitute a request for counsel. Said the detective: "It sounds like you understand your *Miranda* rights and you want your attorney." An officer's reaction to a request for counsel is relevant. *People v. Porter*, 9 NY3d 966, 967 (2007) (observing that the officer noted the defendant requested an attorney). The detective did in fact exit in order to retrieve the phone, but then returned *less than two minutes later* and continued to prod the defendant. He asked, among other things, "do you want your lawyer here or do you want to just figure this out?" The defendant was then Mirandized again and a written apology / confession for the alleged sex crime followed. The officer's conduct diluted the previous *Miranda* warnings. *See*, *People v. Dunbar*, 24 NY3d 304, 316 (2004) (where law enforcement's pre-arraignment preamble to *Miranda* warnings undermined the warnings, indicating that the defendants had the opportunity to "tell [their] story").

Indeed, the officer gave the defendant the false impression that this serious sex crime investigation could somehow be resolved quickly in the defendant's favor by him speaking to the police. For sure, there was no scrupulous adherence to the defendant's unequivocal invocation of counsel. The fact that the defendant wanted to know what charges were impending and how long he would be at the station did not diminish his interest in seeking counsel. The only uncertainty expressed by the defendant was the method to be used in communicating with counsel.

The state and federal constitutional rights to the privilege against self-incrimination, due process and the right to counsel were at stake in this matter. "The right to counsel in New York is robust and one [the Court] has vigilantly guarded." It is more expansive than its federal counterpart. *People v. Bing*, 76 NY2d 331, 338 (1990); *People v. Settles*, 46 NY2d

154, 161 (1978). As Judge Wilson observed, once the right is invoked, it was legally impossible for a defendant to change his or her mind and speak to the police outside the presence of counsel. *See*, *People v. Glover*, 87 NY2d 838, 839 (1995); *People v. Cunningham*, 49 NY2d 205, 207 (1980). This singular rule "breathes life" into the constitutional requirement that a waiver of the right to counsel be knowing, intelligent and voluntary. *People v. Hobson*, 39 NY2d 479, 484 (1976). A request for counsel is equivocal when it is "unambiguously negated" at the same time it is requested. *Glover*, 87 NY2d at 839. A defendant asking if he or she should speak to a lawyer is insufficient. *See*, *e.g.*, *People v. Hicks*, 62 NY2d 969, 970 (1987). However, the Court has found "I might" and "I think I need" a lawyer to be unequivocal requests which trigger the constitutional right to counsel. *See*, *People v. Esposito*, 68 NY2d 961, 962 (1986); *Porter*, 9 NY3d at 967.

Judge Wilson observed the apparent new standard of verbal precision that the Court applies to criminal defendants, including when defendants assert the right to represent themselves *pro se*:

> Mr. Dawson unequivocally requested counsel. The detective repeatedly stated that he understood Mr. Dawson to have requested counsel. Why doesn't the majority? … Today's holding is like several others in which our Court has imposed a high and unrealistic linguistic burden on criminal defendants — where the intent is clear, but some better choice of words can be imagined, often finding ambiguity in deferential language. For example, in *People v Silburn*, the Court upheld the Appellate Division's finding that a defendant's statement to the trial court "I would like to know if I could proceed as pro se" as equivocal because the defendant also requested a lawyer be available as an aide (31 NY3d 144, 162 [2018, Wilson, J, dissenting]). In *People v Duarte*, the Court again interpreted the defendant's statement "I would love to go pro se," despite abundant clarity, as insufficiently clear and unequivocal (37 NY3d 1218 [2022]. In *People v Brown*, the Court held the defendant's agreement to waive his right to appeal waived his right to speak at sentencing, despite his clear requests to do so — "Am I going to get a chance to talk?" (37 NY3d 940, 941, 943 [2021, Wilson, J., dissenting]). Despite our eschewing the need for "magic words" in theory, we seem to require them in practice.
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> The Court's failure construe defendants' speech in a commonplace, contextualized, or even reasonable manner misapprehends the animating concerns behind our state's expansive guarantees of the privilege against self-incrimination, right to counsel and due process. Our hallmark right to counsel cases show deep recognition of the fear and

> intimidation inherent in police interrogation and investigation. We have noted that the rights we have recognized in this state not only "preserve the civilized decencies, but protect the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State" (*Hobson*, 39 NY2d at 485 [emphasis added])…. [w]hen it is not fear that shapes a defendant's word choice, it is often the custom of using the conditional tense when speaking to those in power: adopting a more deferential tone with a trial court or the police officers in whose control a defendant's liberty and immediate safety rests may be advantageous.

People v. Dawson, __ NY3d __ , 2022 NY Slip. Op. 02772, 2022 NY Lexis 818, at *18-20, 2022 WL 1216195 (2022) (Wilson, J., dissenting) (emphasis added). As Judge Wilson further opined, "[p]enalizing criminal defendants for fearful or deferential speech that otherwise clearly articulates their desires is detrimental for those individuals, but also damages the integrity of the justice system as a whole."

Further commentary: As averred above, law enforcement's actions here violated both state *and* federal constitutional standards. *See*, *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981) (holding that "[w]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused… having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."); *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (expanding the *Edwards* protection of a suspect who invokes the right to counsel following *Miranda* warnings, requiring that at least 14 days pass before law enforcement may accept a post-invocation of counsel waiver under *Edwards*).

People v. Wakefield

The Chief Judge authored this decision. All members of the panel agreed with the result (affirming the Third Department), with Judge Rivera authoring a concurrence joined by Judges Wilson and Troutman. At issue was the admissibility of DNA mixture evidence generated by the TrueAllele Casework System. TrueAllele, created in 1999, is a probabilistic genotyping software for calculating a DNA likelihood ratio. The Supreme Court did not abuse its discretion in admitting, following a *Frey* hearing, this evidence as generally accepted in the relevant scientific community. *Frye v. United States*, 293 F. 1013 (DC Cir. 1923); *People v. Wesley*, 83 NY2d 417, 422 (1994) (recognizing the RFLP methodology of DNA to be generally accepted as reliable in the scientific community).

Indeed, the DNA Subcommittee of the NYS Forensic Science Commission ("DNA Subcommittee") recommended the NYS Police utilize TrueAllele. Virginia, Pennsylvania, California, Northern Ireland and Australia admit this type of evidence as well.

This was a burglary, robbery and ligature strangulation homicide. The victim was strangled with a guitar cord. A number of items were stolen or touched by the perpetrator, including shirt collars, an amplifier cord and the victim's forearm. The defendant made a number of confessions, was observed in the victim's company the weekend of the homicide and was seen in possession of the victim's orange duffel bag after the crime.

TrueAllele analyzes raw data and calculates a DNA likelihood ratio using fundamental mathematical models and algorithms, as well as artificial intelligence. The People, however, were not in possession of the TrueAllele source code, which was characterized as a trade secret. This was also never disclosed to the defense. The majority believed this disclosure was unnecessary for the trial court to properly conduct the *Frye* hearing. Moreover, the source code is not a declarant that may be cross-examined under the *Crawford* jurisprudence.

The **concurrence**, however, believed the defense should have had the opportunity to confront (pursuant to the Sixth Amendment) the TrueAllele source code, which utilized artificial intelligence in place of human judgment. The calculations in question were nearly impossible to conduct by hand, with no meaningful involvement by the human analyst who merely prepared the initial data. In other words, it comes close to "eliminating all but the most rudimentary of human participation." There was no opportunity for members of the relevant scientific community to review the source code. Internal validation studies and the "insular" endorsement of the DNA Subcommittee should not supplant the courts' obligation under *Frye*. Indeed, the Confrontation Clause and *Crawford* were violated as the source code was testimonial. *See generally*, *Crawford v. Washington*, 36 US 36, 42 (2004); *Bullcoming v. New Mexico*, 546 US 647, 657 (2001); *Hemphill v. New York*, 595 US __ , 142 S.Ct. 681, 692 (2022); *People v. John*, 27 NY3d 294, 303 (2016). There was no viable challenge to the conclusions based on the TrueAllele algorithm linking the defendant to the murder. But as the evidence of the defendant's guilt was overwhelming, these constitutional errors were harmless beyond a reasonable doubt. *People v. Crimmins*, 36 NY2d 230, 237 (1975).