NYS Court of Appeals Criminal Decisions: December 14, 2023

People v. Bay

Here the Court unanimously reversed a lower court's denial of a 30.30 motion to dismiss involving discovery violations and an invalid CPL 245.50 Certificate of Compliance ("CoC"). This is the first time the Court confronted the seminal 2020 discovery legislation that replaced Article 240 with 245 and changed New York criminal law. Judge Halligan authored the decision.

The new law imposed automatic CPL 245.20(1) disclosure requirements (for 21 categories of materials) and compliance mechanisms, linking for the first-time discovery and 30.30 readiness. *See*, CPL 245.50(3); 30.30(5). The People have 20 days to comply (by filing a CoC) for in-custody defendants and 35 days for defendants out of custody. The filing of a CoC requires prosecutors to have exercised due diligence and make reasonable inquiries to ascertain the existence of discovery material. There is a CPL 245.60 continuing duty to disclose, requiring the filing of a supplemental CoC if needed. But a supplemental CoC does not absolve an initially-filed illusory CoC. CPL 245.80 sanctions and remedies, short of dismissal, are appropriate where the DA acts in good faith and reasonably under the circumstances. Still the DA cannot correct an initial illusory CoC with a supplemental one.

Under a 2022 amendment to the statute, as long as the initial CoC is appropriate, dismissal should be ordered only where appropriate and proportionate to the prejudice caused. Trial courts must make inquiries on the record in order to analyze the DA's readiness, to ensure inquiries from defense counsel are meaningfully addressed and make sure that the People's efforts are recorded. Moreover, the defendant has an obligation to notify the People of a deficient CoC, all the more motivation for courts to make a proper record. Further, "[n]othing prevents the People from detailing their efforts to exercise due diligence within the [CoC] itself." Indeed, it is the People's burden to establish due diligence in response to a motion to dismiss under this statutory scheme. Prejudice is not required for a successful motion to dismiss under CPL 245.50(3) and 30.30(5). A good faith compliance with the CPL 245 disclosure mandates is a prerequisite for being 30.30 ready for trial. The consequence is dismissal.

The defendant at bar was charged with second-degree harassment in city court. The People turned over key pieces of required discovery under CPL 245.20 *(including the 911 call, the domestic incident report and a police report)* weeks after filing a CoC. The defense had made numerous requests on the record for particular discovery to be turned over. The prosecution, which made vague assurances of having checked for requested discovery items, was therefore not actually ready for trial under CPL 30.30. The CoC statement of readiness was illusory. Because the People failed to show they exercised due diligence and made reasonable efforts to identify mandatory discovery prior to filing the CoC, the CoC was improper and the prosecution's declaration of trial readiness was

therefore illusory. The trial court's sanction of precluding the admission of the 911 tape under CPL 245.80 was inadequate. The intermediate appellate court's affirmance based in part on the purported lack of prejudice to the defense was erroneous.

Analyzing the reasonableness of the DA's efforts is conducted on a case-by-case basis. The statute does not require a "perfect prosecutor." However, good faith is not a substitute for due diligence. CPL 245.20(2); 245.50(1), (3). Factors to consider in evaluating due diligence include the efforts made to comply with the statute, the volume of the discovery, the complexity of the case, how obvious the missing material would be to a prosecutor exercising due diligence, the prosecution's explanation for the discovery lapse and its response when apprised of the missing discovery. Due diligence is a mixed question of law and fact, requiring only the existence of some record support to affirm the lower court's decision.

It's important to note that prosecutors may seek more time to comply, seek an individualized finding of special circumstances or attempt to exclude periods of delay based on exceptional circumstances under CPL 30.30(4)(g). At bar, however, there were significant items not timely turned over which were easily noticed by the defense. The DA had two opportunities to establish due diligence but failed to do so.

Concluded the Court:

> Because the People did not establish that they exercised due diligence prior to filing the initial COC, the trial court should have determined that the COC was improper and accordingly stricken the statement of readiness as illusory. In the absence of a valid readiness statement tolling the speedy trial clock, the People do not dispute that they had exceeded the applicable 30-day period under CPL 30.30 (1) when Bay moved for dismissal. Thus, the defendant's motion should have been granted. Accordingly, the County Court order should be reversed, defendant's CPL 30.30 motion granted, and the accusatory instrument dismissed.

People v. Purdue

"Mrs. Victim, do you see the man who shot you in court today?" "Well, perhaps it's the guy at the defense table sitting next to the attorney."

This is a 6 to 1 decision, affirming the AD. Judge Singas authored the majority opinion. Judge Rivera wrote a lone dissent. At issue was the lack of formal notice for a first-time in-court identification. In other words, as there were no pre-trial law enforcement ID procedures conducted (through a photo-array, show up or lineup), no CPL 710.30 notice was required.

The defendant was accused of shooting the victim at a house party. The victim had an opportunity to view a dark-skinned six-foot Black male with a mustache and goatee, wearing gray jeans, white sneakers and a white cap. Law enforcement did not conduct a pre-trial identification procedure. The defense unsuccessfully moved to preclude the expected ID at trial, as the defendant sitting next to defense counsel was obviously unduly suggestive. No other alternative procedures were sought by the defense.

Where there is a first-time in-court ID, a defendant must be afforded, as soon as practical, an opportunity to request alternative ID procedures. The People have an obligation to ensure the defendant is made aware (as soon as practical) of the possibility of a first-time in-court ID. Trial courts have discretion to fashion protective measures necessary to reduce misidentification, subject to the traditional balancing of the probative value against the dangers of misidentification. Factors the trial court should consider: the opportunity the witness had to view the incident, the extent the witness previously viewed or knew the defendant, the witness's ability to provide an accurate description, corroborating evidence and the time between the crime and the trial. The defense must be given a meaningful opportunity to seek additional procedures to address the reliability of the identification and (or) reduce the suggestiveness of the identification.

While the majority recognized the "very real danger" of wrongful convictions based on witness misidentification, as well as the futility of cross-examining a witness that is convinced of his or her identification, no formal pretrial procedure was required here. The witness had the ability to observe the shooting, described the shooter in detail, was corroborated by the surveillance video, had met the defendant before the shooting, mirrored the description from the 911 call and made the ID at trial just 5 months after the crime. The discovery provided to the defendant here *(including body-camera footage, the 911 call and the witness list)* was sufficient to place him on notice of the situation. The lack of formal notice did not significantly prejudice the defendant.

In **dissent**, Judge Rivera reminds us of the dangers of misidentification leading to innocent people being convicted, particularly in single ID witness cases. DNA-related exonerations have borne this out. *See generally*, *People v. Boone*, 30 NY3d 521, 535 (2017) (addressing cross-racial ID issues). At bar, the witness had consumed alcohol the night of the party and only briefly saw the defendant. As there's often just a single person sitting at the defense table next to counsel, a first-time in-court identification is a high stress, inherently unduly suggestive, show up procedure. Even a rudimentary knowledge of courtrooms guarantees an ID. Moreover, juries tend to trust a confident witness's ID of a defendant.

Due process and the right to a fair trial require formal notice where ID is an issue, the witness was a stranger and memory is the only basis for the ID. It should be the prosecution's burden to establish the reliability of an ID to effectuate the truth-seeking function of a trial. To support her concerns, Judge Rivera notes 79 exonerations reported by 14 DA "conviction integrity units" across the state. The typical exonerated individual spends 14 years in custody before being freed. Aside from the individual harm to the

defendant, this obviously erodes confidence in our system. Cross-examination of a confident witness won't sufficiently mitigate this issue. It's like throwing a drowning person an anchor. Indeed, there are no "Perry Mason moments" in real life. Why have a rule where a defendant is only afforded *constructive* notice and must shoulder the burden to contest an inherently unfair situation? Why hide the ball? Why not require an express on-the-record notice (i.e., like under CPL 710.30(1)(b))?

NYS Court of Appeals Criminal-related Decisions: December 19, 2023

Matter of Appellate Advocates v. NYS DOCCS

This is a FOIL request made by the Appellate Advocates regarding 11 documents withheld by the NYS Department of Corrections and Community Supervision ("DOCCS"). The Third Department is unanimously affirmed in finding these documents exempt and privileged as attorney-client communications under Public Officers Law § 87(2)(a) and CPLR § 4503(a)(1). Judge Rivera authored this decision. This FOIL request involved the Board of Parole's decision-making process, resulting in DOCCS providing thousands of pages of materials. An Article 78 settlement resulted in the 11 pages in question being in dispute.

Under New York's FOIL, there is a presumption of disclosure unless the scenario falls within an enumerated statutory exemption. FOIL is to be liberally construed and its exemptions interpreted narrowly. The purpose of the law is to maximize transparency and the public's access to government records. Here, however, the documents reflected counsel's legal analysis of statutory, regulatory and decisional law and were prepared for the purpose of facilitating the rendition of legal advice or services.

The law promotes open dialogue (in both directions) between attorney and client, whether or not that advice was explicitly requested by the client. An attorney's professional judgment, experience, skill and knowledge of the law are critical to his or her client. Communication in this regard may be in anticipation of litigation *or* as way of avoiding it. The communications at bar were for training and advising parole commissioners, and were primarily of a legal character. They addressed interviews and discretionary determinations. Privileged communications may include memoranda or slide shows as part of a training project. The Court rejected the argument that this material was effectively the parole board's official policy.

People v. Butler

This is a unanimous remittal, authored by Judge Cannataro. The issue, one of first impression in our State, was whether a dog sniff of a human constitutes a search under the Fourth Amendment. The answer is yes. The matter was remanded to determine a proper standard.

A canine's heightened sense of smell has long been utilized by law enforcement to detect the presence of illegal drugs embedded in cars, suitcases and clothing. Here, law enforcement observed the defendant's vehicle leave the scene of an apparent drug deal and commit several VTL violations. The car was stopped and the defendant was questioned. When Mr. Jones denied a request to search his vehicle, a police canine was led towards the vehicle, but started pulling toward the defendant who was standing outside. The dog jumped into the front seat, indicating it caught the scent of narcotics. The officer then extended the leash to allow the dog to walk around the defendant. The dog put its nose in the defendant's groin area. When the officer indicated the dog was signaling the scent of narcotics, the defendant attempted to flee. Abandoned drugs were recovered from the surrounding area (which the defendant admitted were his). County Court denied the defendant's suppression motion, finding that *no search* occurred through the dog sniff. The Third Department affirmed on different grounds, finding that a search did occur, but that reasonable suspicion, purportedly present here, was sufficient.

The US Supreme Court has addressed dog sniffs of: **(1)** the exterior of an airplane passenger suitcase (*US v. Place*, 462 US 696, 707 (1983) *(not a search; not requiring the suitcase to be opened, no embarrassment or inconvenience caused)*), **(2)** the exterior of a lawfully seized motor vehicle (*Illinois v. Caballes*, 543 US 405, 409 (2005) *(also not a search; only reveals presence of narcotics)*) and **(3)** the porch of a residence (*Florida v. Jardines*, 569 US 1, 6, 8 (2013) *(qualifies as a search; the porch is encompassed within the 4th Amendment curtilage)*). For the *Jardines* homeowner, where one's privacy rights are most heightened, there was no implied invitation to have a trained police dog sniff the porch area for narcotics possessed inside the home.

There is also a heightened expectation of privacy, integrity and security in one's body and the space immediately surrounding it. The Fourth Amendment protects against unreasonable intrusions into our bodies by the government - - and is triggered when the government attempts to gather evidence of criminal activity from one's person (whether the method be compelled surgical intrusion or brief outer-clothing contact). Direct physical contact is not a prerequisite for triggering the Fourth Amendment. Sniffing an inanimate object like a suitcase does not create as great an intrusion as sniffing a human body. Most people attempt to hide bodily odors from the public, as they cause people embarrassment and anxiety. It is little consolation that the law enforcement canine is only obtaining *otherwise undetectable* info regarding the presence of illegal drugs. The dog sniff of a person may be undignified, alarming, intrusive, annoying, humiliating and demeaning. Moreover, many people are afraid of dogs. Many others, particularly people of color, don't trust law enforcement. One's personal space when confronted by a law enforcement canine may be precious. When one ventures into public, being subject to a

law enforcement canine sniff is not implied as a social convention. Law enforcement may not roam the streets of NYS with their drug dogs arbitrarily sniffing people for the detection of illegal drugs.

As the standard for conducting the search was not addressed by County Court and was thus beyond the jurisdiction of the AD to decide, *People v. LaFontaine*, 92 NY2d 470, 473-474 (1998), the AD is reversed and the matter is remitted to County Court.