NYS Court of Appeals Criminal Decisions: January 11, 2024

People v. Greene

The AD is unanimously reversed in this memorandum decision, with Chief Judge Wilson filing an important concurrence. Count 3 of the indictment, charging perjury, is dismissed as multiplicitous. Multiplicitous counts create the risk that a defendant will be punished for, or stigmatized with, a conviction of more crimes than he or she actually committed. The judgment is otherwise affirmed.

In his **concurrence**, the Chief returns to a theme he has visited before: the excessive resources expended on unnecessary prosecutions. These types of cases often result, as this one did, in a disproportionate result for minor antisocial behavior. Here, the defendant rode his bike the wrong way on a street and almost hit two people. Harsh words were exchanged. One of the complainants tried to take the defendant's photo, so he grabbed her phone and took off. In essence, "two New Yorkers got into a protracted argument about whether a jaywalker or a wrong-way cyclist was in the wrong." The complainant was uninjured and got her phone back soon after the event. The defendant was charged with 4th degree grand larceny and two counts of perjury regarding his grand jury testimony. He ultimately represented himself *pro se* until sentencing, where his history of mental illness came to light. He received 4 to 8 years in prison. The complainant did not even want law enforcement involved in the situation.

The Chief, as he observed in his dissent in *People v. Britt*, 34 NY3d 607, 628-630 (2019) (J. Wilson, dissenting), warned against the use of law enforcement to prosecute minor offenses that often result in disproportionate punishment. Incarceration should not be the default response to those convicted of low-level offenses. Restorative justice, allowing the parties the opportunity to communicate without placing the defendant in custody, was the path that would best serve society.

People v. Messano

This 4 to 3 decision was authored by Judge Rivera. Judge Garcia wrote for the dissent, joined by Judges Singas and Cannataro. The prosecution failed to establish reasonable suspicion to detain the defendant and the evidence seized from the vehicle (a rolled-up dollar bill and apparent powder cocaine) was not taken under the plain view exception to the warrant rule, justifying a search of the car. A loaded firearm was found in the backseat. The Fourth Department, which affirmed with two dissents, is reversed.

A car was observed speeding that stopped in a Syracuse parking lot for its driver to conduct what appeared to be a drug deal. The driver exited and stuck his head into another parked car to have a conversation. The defendant also looked around and texted

on his phone. The officers did not actually observe drugs and money exchanged. A third party, who had previously been arrested for drug possession, approached the two parties in the parking lot. The police approached the defendant who was now sitting in his driver's seat in a non-threatening manner. The defendant exited as the officer approached and was frisked for weapons. At this point, the defendant was cuffed and not free to leave. Apparent cocaine was observed on the defendant's driver's seat. A baggy containing apparent narcotics was retrieved from the front console, in addition to a handgun secured from the center armrest in the backseat. Defendant also had $1,200 on his person.

Warrantless searches are presumed unreasonable. One of the narrow and delineated exceptions to the warrant requirement is when incriminating evidence in plain view is observed from a lawful vantage point. *People v. Diaz*, 81 NY2d 106, 111 (1993); *People v. Brown*, 96 NY2d 80, 89 (2001). It is the DA's burden to establish the legality of a search. Here, the defendant was not lawfully detained, as there was no reasonable suspicion supporting the purported drug transaction. *Terry v. Ohio*, 392 US 1, 20-22 (1968); CPL 140.50. The dollar bill and the white powder on the driver's seat were not in plain view. No drug transaction was actually observed. The arrival of a third party with a prior drug arrest did not change this conclusion.

At the time the defendant was detained, the police did not have evidence that he had committed a violation or a crime. There is no record evidence that the police could see the car seat (where the incriminating evidence was viewed) as the defendant approached or during the frisk. After the defendant was detained at the back of the car, the officer looked through the window and observed the driver's seat. Indeed, there was no evidence or reasonable inference that the police were in a position to see the money and drugs absent the unlawful detention. In sum, the People failed to rebut the presumption of unreasonableness regarding this warrantless search.

In **dissent**, Judge Garcia pointed out this determination was a mixed question of law and fact. The Court of Appeals does not have jurisdiction to find suppression-related facts. With any record support, viewing the evidence in favor of the court's ruling below, the Court of Appeals should go no further. The People were entitled to the benefit of every reasonable inference. The majority, ignoring this standard, reweighed the hearing testimony, effectively acting like a suppression court. The officer pointed to specific and articulable facts. Based on the totality of the circumstances, there was reasonable suspicion to detain and ample support in the record for the lower courts' determinations.

More commentary: This appears to be an aggressive and defense-friendly view of the mixed question of law and fact ("MQLF") doctrine, which leads to two conclusions: First, consider using this decision to help fend off prosecutors' leave application responses on MQLF suppression arguments. Second, while it's still early, this expansive MQLF interpretation may be an indication of how strong the new four-judge pro-criminal defense bloc on the Court may be. Always the optimist.

NYS Court of Appeals Criminal Decisions: January 16, 2024

People v. Appiah

The AD is unanimously reversed in this memorandum decision. The defendant's waiver of appeal was invalid and unenforceable pursuant to *People v. Thomas*, 34 NY3d 545 (2019) and *People v. Bisano*, 36 NY3d 1013 (2016). The matter is remitted to the AD to address the defendant's excessive sentence argument.