NYS Court of Appeals Criminal Decisions for June 13, 2023

People v. Holmes

This memorandum is a unanimous reversal. Here is the entire decision:

"The order of the Appellate Division should be reversed, and a new trial ordered. In contrast to *People v Duarte* (37 NY3d 1218 [2022]), the trial court here recognized defendant as having unequivocally requested to proceed *pro se*. However, the court failed to conduct the required "'searching inquiry' to ensure that the defendant's waiver [of the right to counsel] is knowing, intelligent, and voluntary" (*People v Silburn*, 31 NY3d 144, 150 [2018] [internal quotation omitted])."

People v. Bradford

This is a 4 to 2 reversal of the Fourth Department (204 AD3d 1483), with Judge Rivera authoring a dissent (joined by Judge Wilson). Judge Troutman did not participate.

The defendant was required to wear a stun belt throughout his 2011 homicide trial. This was ordered by the sheriff's department. The trial court was never informed. It was error for the court not to have articulated a particularized need for requiring the defendant to wear the belt. *People v. Buchanan*, 13 NY3d 1, 4 (2009). But this was not, according to the majority, a mode of proceedings error. County Court did not abuse its discretion in summarily denying the defendant's CPL 440.10 motion (filed in 2020) based on this issue. It was error, however, to summarily deny the portion of defendant's 440 motion regarding his ineffective assistance of counsel ("IAC") claim for his not objecting to the stun belt requirement. Factual issues exist in this regard; i.e., whether the defendant voiced his concerns to defense counsel. The IAC standard from *People v. Benevento*, 91 NY2d 708, 712-713 (1998), should be applied following a hearing.

In **dissent**, Judge Rivera opines this was indeed a mode of proceedings error, as a judicial determination was improperly delegated to a non-judicial officer. *People v. Ahmed*, 66 NY2d 307, 312-313 (1985). This issue "strikes at the heart of the integrity of the judicial process." A stun belt is capable of delivering 50 to 70 thousand bolts of electricity into the defendant's body, causing immediate loss of muscular control, incapacitation, extreme pain and humiliation. The sheriff's department, which prior to trial required the defendant to sign a form explaining what the stun belt did, usurped the court's exclusive authority to determine the necessity of imposing the belt upon the defendant. Law enforcement's conduct prevented the court from exercising full and proper control over application of the device. This is distinguishable from *People v. Cooke*, 24 NY3d 1196, 1197 (2015), where the trial court ultimately learned of the stun belt being imposed

and addressed the issue with defense counsel on the record. Defense counsel never objected to this imposition on his client; instead he informed Mr. Bradford this was the sheriff department's standing policy and there was nothing he could do about it. The dissent naturally questions whether the failure to object under the circumstances could *ever* serve as a legitimate defense strategy.

More commentary: Judge Rivera reminds us that the decision whether to object to physical restraints, i.e., handcuffs, shackles or stun belts, implicates both the defendant's bodily integrity and the constitutional right to a fair trial. One has to wonder how any defendant, already subject to the pressures of standing trial, can realistically focus on constructively participating in his or her own defense under the threat of having thousands of bolts of electricity shot into his or her body. Accordingly, defense counsel *must* be vigilant in litigating this issue.

NYS Court of Appeals Criminal-related Decisions for June 15, 2023

Matter of E.S. v. Livingston Correctional Facility, et al.

This is a unanimous reversal of the AD, which reversed the judgment (but with 2 dissenters). *See*, 193 AD3d 57 (4th Dep't 2021). Judge Halligan authored the court's opinion. This is another Sexual Assault Reform Act ("SARA") habeas case. The headline here is that individuals having been adjudicated as youthful offenders ("YO") are subject to SARA while under parole supervision.

Petitioner had pleaded guilty to attempted rape of a 13-year-old and was adjudicated as a YO. Had he been timely released to parole, he would have been an indigent and homeless level 3 sex offender under SORA. Like many others in his situation, he challenged the legality of the NYS Department of Corrections and Community Supervision ("DOCCS") "temporarily" confining him as he sought shelter in NYC under its Department of Homeless Services system -- despite receiving his earliest release date from parole. As SARA, codified in Exec. Law § 259-c (14) *(as amended in 2005)*, prohibits level 3 offenders from residing within 1000 feet of a school, *see also*, Penal Law § 220.00 (14)(b) (defining "school grounds"), the petitioner could not just reside anywhere he wanted. The DOCCS waiting list for this type of housing is 2 to 3 years.

Hold on tight here. A defendant who receives a YO adjudication is no longer "convicted" of a crime; rather the individual has had his or her conviction "replaced" by a YO finding. CPL 720.20 (3); 720.35 (1). The YO defendant is then somehow "sentenced" pursuant to PL § 60.02. But a defendant may only be "sentence[d]" under the CPL "upon a conviction." CPL 1.20 (14). Yet those adjudicated as a YO have indeed been "sentenced." *See*, *e.g.*, CPL 720.10 (5), 720.20 (3). SARA merely requires that the person is "serving a sentence" for an enumerated offense, including those requiring a "convict[ion]" under

Corr. Law § 168-a (l). *See again*, Exec. Law § 259-c (14). Accordingly, the entire Court of Appeals concluded that YO parolees must comply with SARA.

The complicated web continues. The Court observed that if a YO defendant was not being "sentenced," the person would have no right to parole and would be deprived of the "fresh start" meant for YO litigants. *See*, *People v. Randolph*, 21 NY3d 497, 501 (2013). YO probationers, for example, are not subject to SARA. But here's how you know a statutory scheme is badly written. The legislature in CPL 1.20(14) was apparently just trying to distinguish "conviction" from "sentence" for purposes of appellate and postconviction review. Judge Halligan concluded that importing the CPL definition of "sentence" into Exec. Law § 259-c (14) would render the latter statute incoherent. So much for placing future litigants on notice.

Matter of Rivera v. Woodbourne Correctional Facility, et al.

This is a 57-page 4-3 affirmance of the AD, with Judge Singas authoring the majority. Judge Rivera wrote one dissent, joined by the Chief. Judge Halligan wrote a separate dissent. This is another brutal Sexual Assault Reform Act ("SARA") habeas case. The bottom line: applying SARA to the then 17-year-old petitioner's 1986 convictions and sentences (occurring years before SARA was amended [in 2005] to include his particular offense) did not violate the constitution's prohibition against *Ex Post Facto* laws. Like many others, because the petitioner could not secure SARA-compliant housing, he was held in custody 21 months past his "open parole date."

While SARA was enacted in 2000, Exec. Law § 259-c (14) was significantly expanded in 2005 to include a broader definition of "school grounds" and a longer list of offenses subject to the law's reach.

The federal *Ex Post Facto* clause (U.S. Const., art. I, sect. 10, cl. 1) prohibits states from retroactively altering the definition of crimes or increasing their punishment. This provision is concerned with the "after the fact" enactment of arbitrary and potentially vindictive legislation. But these principles only apply to penal laws, not where a challenged statute does not seek to impose punishment. *See*, *Collins v. Youngblood*, 497 US 37, 43 (1990); *Kellogg v. Travis*, 100 NY2d 407, 410 (2003). Whether the condition constitutes an affirmative restraint, resembles historically criminal punishment, promotes traditional aims of punishment *(i.e., deterrence)*, is rationally connected to a nonpunitive purpose and is excessive in relation to that purpose, are all factors to be considered. *Kennedy v. Mendoza-Martinez*, 372 US 144, 168-169 (1963).

This was not an "as applied" challenge, and thus required sufficient data to support the claim that the entire class of SARA defendants were subject to an "affirmative restraint." Moreover, the parole department requiring additional requirements prior to release does not equate to increased punishment. And while the SARA requirements impact

employment and housing opportunities, these individuals are still otherwise free to travel "throughout the state." The majority also afforded great weight to the "rationally connected to nonpunitive purpose" factor and attacked the legitimacy of the data showing the lack of effectiveness of the 1000-foot rule -- a point hotly contested In Judge Rivera's dissent (*see*, *e.g.*, fn 8). The legislature is presumed to have sufficiently investigated the issue and acted reasonably in imposing these temporary requirements, which terminate when the sentence ends.

In **dissent**, Judge Rivera observes that the 1000-foot rule *("a modern-day form of banishment" meant to inflict public disgrace)* is not rationally related to the purposes of the law, that is, protecting children and deterring recidivism. Social data has long recognized that most sex crime victims personally know their assailants. There is no evidence establishing that this residential restriction actually protects children and furthers the defendant's reintegration into society. Rather, the stress caused to an individual who can't find housing and, by extension, employment, only magnifies the defendant's problems which led to the underlying criminal behavior in the first place. As Justice Sotomayor has observed:

> Despite the empirical evidence, legislatures and agencies are often not receptive to the plight of people convicted of sex offenses and their struggles in returning to their communities. Nevertheless, the Constitution protects all people, and it prohibits the deprivation of liberty based solely on speculation and fear. When the political branches fall short in protecting these guarantees, the courts must step in.

Ortiz v. Breslin, 142 S Ct 914, 915-916 (2022) (Sotomayor, J., statement regarding denial of certiorari]). To show that his extended imprisonment was punishment, the petitioner had the burden of showing "the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Kansas v Hendricks*, 521 US 346, 361 (1997). He met his burden here. It wasn't necessary to show a particular number of impacted individuals within the subject class to qualify as an *Ex Post Facto* issue. In her **dissent**, Judge Halligan agreed that SARA-type restrictions have no beneficial impact on public safety, but instead have brought unintended negative consequences. Unlike Judge Rivera, however, Judge Halligan believes that the Court's rejection of a substantive due process violation in the SARA context in *Matter of Johnson v. Adirondak CF*, 36 NY3d 187 (2020), resolves the rational connection issue.

More commentary: The majority very casually observes that "[b]ecause the defendant did not satisfy the mandatory parole condition, he remained in custody until he could locate suitable housing." Moreover, observed the majority, "[i]n the event these offenders are unable to find compliant housing prior to their expected release date, DOCCS will not release them." In contrast to the parsimony clause under 18 USC § 3553(a), which compels proportionality in *federal* sentencing, the majority observes the imposition of the SARA 1000-foot rule may cast a "wider" net than necessary to accomplish its important

goals. Finally, Judge Rivera's dissent provides a nice source of research into *Ex Post Facto* jurisprudence.

People v. Weber

This is a 5 to 1 affirmance of the Fourth Department. Judge Halligan authored the majority decision, with the Chief writing a dissent. After County Court erroneously calculated points for a risk assessment instrument ("RAI"), the AD reversed and remitted to afford the DA a second opportunity to address an upward SORA departure that had *not* been argued in the first instance. The defendant argued that the AD remittal was too broad. The Court of Appeals disagreed with the defense.

Mr. Weber pleaded guilty to sexual assault in the first degree in 2014 regarding a ten-year-old victim. He ended up with a three-year term of imprisonment. His RAI indicated a presumptive risk level of 3, with 110 points. The AD reversed, finding that 10 points for forcible compulsion were unwarranted (which would land the defendant in level 2). As County Court did not have the opportunity during the initial proceedings to consider whether clear and convincing evidence supported an upward departure to level 3, the matter was properly remitted to address that issue. *See*, CPLR 5522 (authorizing AD to remit for further proceedings). The prosecution is not, according to the majority, being afforded more relief, only the opportunity to maintain the level 3 designation they had originally sought. Unlike in *People v. Gillotti*, 23 NY3d 841, 860-861 (2014), the DA was successful below. The Second, Third and Fourth Departments are in line with this procedural posture in the SORA context. The paramount concern for SORA litigation is achieving an accurate risk level determination.

In **dissent**, Chief Judge Wilson complained, as he recently had in his dissent in *People v. Kaval*, 39 NY3d 1081, 1084-1090 (2022), that the prosecution should not have been afforded a second bite at the apple. This was a *de facto* "do-over." The issue was not preserved below and the AD's remittal plainly benefits the prosecution. If the shoe was on the other foot, the defendant would not have been given a second opportunity to litigate the issue. The majority speaks of achieving accuracy in SORA litigation, but isn't that concern *(as well as weighty due process and public safety issues)* heightened in criminal matters, which still require preservation of issues? *See, e.g.*, *People v. Tiger*, 32 NY3d 91, 101 (2018). Moreover, modern civil litigation places greater emphasis on efficiency, finality and judicial economy - - to the extent that litigants are expected to plead inconsistent theories or risk forfeiture of their claims. Indeed, prosecutors often seek upward SORA departures in the alternative. The DA could have easily done so at bar.

People v. Worley

The entire court here agrees to reverse the AD. Judge Rivera authored the majority opinion. Judge Garcia, joined by Judges Singas and Cannataro, authored a concurrence. The defendant's due process right to have the opportunity to litigate the lower court's decision to upwardly depart to a level 3 SORA risk level was violated.

The defendant was required upon being released to reside in restrictive housing and was thus precluded from participating in sex offender treatment because of his disciplinary record while in custody. As a result, he should not have been given 15 risk assessment instrument ("RAI") points for failing to do so. In other words, it was unfair to characterize him as failing to participate in this regard. The DA agreed with the defense in the court below, but the court decided to upwardly depart to level 3 anyway, as the defendant had a bad disciplinary record. The defense, while being steamrolled by the court, was able to articulate they were not put on notice of this departure. *See*, Corr. Law § 168-l (6) (requiring 60 days notice). Notice and opportunity to be heard are fundamental in SORA litigation. *Doe v. Pataki*, 3 F. Supp. 2d 456, 471-472 (SDNY 1998); *see also*, fn 2 of *Worley* decision (further analyzing what due process means under *Doe*); *People v. David W.*, 95 NY2d 130, 138 (1995); *People v. Baxin*, 26 NY3d 6, 10 (2015). The AD is reversed. Finally, the **concurring** judges sought to limit the scope of the majority's holding, emphasizing the "unique record" at bar.

People v. Anthony

This is a 5 to 2 affirmance of the Second Department regarding a SORA adjudication, with Judge Rivera authoring a dissent (joined by the Chief).

The defendant was convicted of committing multiple residential burglary/rapes at knifepoint in 1988. In anticipation of his 2020 release, the defendant received a risk assessment instrument ("RAI") score of 155, landing him in a presumptive risk level of three. But the defendant did attempt to present a number of mitigating circumstances including: *(1)* his obtaining a GED and college credits, *(2)* his age (fifty one) at the time of release, *(3)* familial support, *(4)* his participation in sex offender treatment, *(5)* various studies supporting his theory about sex offender recidivism, *(6)* his limited disciplinary history while in custody and *(7)* the difficulty he would have in obtaining housing consistent with the Sexual Assault Reform Act ("SARA"). Supreme Court concluded that the defense failed to show by *clear and convincing evidence* ("CCE") that a downward departure was warranted.

A SORA court must determine whether mitigating circumstances are of a kind and to a degree not adequately accounted for in the risk assessment guidelines. Contrary to the lower court's assertion, the standard for downward departures is a preponderance of the

evidence, *not* CCE (which is the prosecution's burden for establishing an upward departure). This issue was unobjected to by defense counsel below.

The AD concluded the defendant proved the existence of some mitigating factors not adequately taken into account by the Guidelines, but the totality of circumstances did not show the presumptive risk level overassessed the defendant's risk and danger of reoffending. These circumstances included the number and severity of the defendant's prior violent sex crimes, one of which occurred in the presence of a victim's child. There was a high risk of reoffending here. In sum, the SORA court did not abuse its discretion.

Judge Rivera in **dissent** observed that the three-step framework for determining whether to depart from the Board of Examiners of Sex Offenders' presumptive risk level determination (*People v. Gillotti*, 22 NY3d 841, 861 (2014)) does not categorically disqualify certain subject matter (that the Guidelines consider in calculating the presumptive risk level) from consideration as a mitigating circumstance in support of a downward departure. The AD thus erroneously failed to consider all of the defendant's proposed factors.

The RAI establishes a starting point based on aggravating factors pointing towards the defendant's risk of recidivism and threat to the public. Unlike the federal sentencing guidelines, which reward certain mitigating circumstances with the *affirmative reduction* of points, the SORA guidelines only "work in one direction," merely awarding zero points when an aggravating factor is absent. But this does not equate to an affirmative prohibition on the consideration of the important mitigating factors presented by the defendant at bar. A totality of the record should be considered. A proper and accurate assessment of a defendant's risk to offend requires an "evenhanded consideration" of both aggravating and mitigating evidence. Among other things, the vague and conclusory-termed guidelines were insufficient in evaluating the defendant's actual supervision environment.