NYS Court of Appeals Criminal Decisions for May 18, 2023

People v. Wheeler

This memorandum is a unanimous and successful People's appeal. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to establish the defendant's conviction for second-degree assault. "The victim testified that defendant delivered a very hard blow to his face, that he felt pain, and that he experienced bleeding and swelling. Hospital records describe the victim's pain as "aching" and indicate he was directed to take over-the-counter painkillers." "Physical injury" under PL § 120.05(3) was satisfied.

People v. Saenger

This is a 6 to 0 win for the defendant, authored by Judge Troutman. The indictment for committing an aggravating family offense pursuant to PL § 240.75 is dismissed, as the predicate misdemeanor offense (required as an element under the statute) was not specified in either the indictment or the bill of particulars. This was a jurisdictional error. Indictments: (1) provide notice, (2) assure that the defendant faces the charge the grand jury in fact voted on, and (3) protect against being accused again for the charged offense. The indictment here only parroted the statutory language. The bill of particulars merely provided factual allegations. That the People separately charged the defendant with second-degree criminal contempt is of no moment, as that was not a prerequisite for charging PL § 240.75. It was not the defendant's burden to figure out which of the potential 18 listed misdemeanors in the statute applied to his case.

Mr. Saenger was not, however, deprived of effective assistance of counsel by his attorney not moving for a trial order of dismissal regarding the legal sufficiency of the first-degree criminal contempt charge PL § 215.51(c), as there was no clear cut and dispositive legal authority in support at the time of trial.

People v. Johnson

Great decision. Chief Judge Wilson authored this reversal, based on a *De Bour* violation taking place on a Rochester street. Judge Rivera wrote a separate concurring opinion. No dissents. The Fourth Department is reversed and the indictment is dismissed.

It was an early evening in April 2015. The defendant was illegally stopped and frisked by two uniformed officers after exiting a *legally* parked car and then walking down a street.

Prior to exiting his car, the defendant switched from the driver's seat to the front passenger seat - - and then leaned towards the driver's seat as the police approached. He was the only occupant of the vehicle. As the defendant's pants were unbuttoned and his belt was undone, he was pulling his pants up as he walked. The encounter took place in a high crime area. The defendant appeared nervous when confronted by the police and denied possessing any weapons. There were no bulges observed in his clothing. In his possession, however, were marijuana and heroin. The police lacked reasonable suspicion to justify a level three intrusion under *People v. De Bour*, 40 NY2d 210, 216-219, 223 (1976). *See also*, *People v. Hollman*, 79 NY2d 181, 185, 194-195 (1992) (considering the first two levels of intrusion and reaffirming the vitality of *De Bour*).

With regards to the defendant's movements while still inside the vehicle, the purported "potential" for Mr. Johnson trying to stash or retrieve a weapon was speculative. So was the fact that weapons are commonly stored in the waistband and the defendant was seen pulling up his pants. To stop and search an individual, there had to be reasonable suspicion that the person committed or was about to commit a crime, or was armed and dangerous. *People v. Benjamin*, 51 NY2d 267, 270 (1980); *People v. Carney*, 58 NY2d 51, 52 (1982). The defendant's actions were nothing more than innocuous behavior, not indicative of criminality. The officers' actions were based on nothing more than whim or caprice.

In her **concurrence**, Judge Rivera proposed doing away with the four-tier *De Bour* regime, as police intrusions at the first two levels often escape judicial review, yet still form the basis for more expansive subsequent constitutional infringements. *See also*, *People v. Samuels*, 50 NY2d 1035, 1039-1040 (1980) (Fuchsberg, J., dissenting) (observing that "the mushrooming lexicographical distinctions into which the reasonableness of street stops and seizures are being categorized present a disturbing problem… Since the circumstances of no two stops are ever precisely the same… the semantics necessarily employed to effect such compartmentalization, however well intended, in the end make it all the easier to substitute labels for liberties").

Police conduct must be reasonable from its inception. All non-public safety intrusions short of an arrest, according to Judge Rivera, should require reasonable suspicion. This includes the present level one *(request for info)* and level two *(common law right of inquiry)* intrusions. In reality, it is very difficult, especially for the mentally ill and people of color in poor neighborhoods, to just walk away from a questioning officer. The four-level *De Bour* doctrine simply doesn't serve the goals it was intended for. Instead, it spurs more police intrusions, creating danger for both the citizenry and law enforcement. Moreover,

> [t]he *De Bour* Court aimed to shield "the right to be free from aggressive governmental interference" and "the right to be left alone" (40 NY2d at 216, 219), but experience has shown that the means it supplied for doing so—the regulation of sub-*Terry* encounters on less than reasonable suspicion—has not only proven inadequate, but, at times, undermined those very

> rights by promoting heightened forms of governmental intrusion triggered by non-criminal behavior. The resulting escalation of police-initiated encounters jeopardizes the safety of the public and police officers, and frustrates community policing efforts.

Johnson, 2023 NY Slip. Op. 02734, at p. 7 (Rivera, J., concurring). At bar, as the defendant had "the right to be left alone," *De Bour*, 40 NY2d at 219, every level of intrusion should have been deemed illegal. Indeed, all of Mr. Johnson's behavior was innocuous.

More commentary: The debate goes on. Take a look at *People v. Gates*, 31 NY3d 1028, 1029-1036 (2018) (Garcia, J., dissenting), where Judge Garcia also called for doing away with *De Bour*. However, his Honor recommended utilizing the federal totality of the circumstances standard, where anything less than a stop and frisk is *not* subject to judicial scrutiny. *Id*. at 1032 (observing that "[o]ur State's *De Bour* standard… imposes a rigid, complex, and graduated scale on encounters that are often fluid, dynamic, and developing"); *see also*, *Terry v. Ohio*, 392 US 1 (1968). Between 2004 and 2012, the NYPD conducted over 4.4 million co-called *Terry* stops. *See*, *Floyd v. New York*, 959 F. Supp. 2d 540, 558 (SDNY 2013). As 83 % of those stopped by the NYPD overall are either Black or Latino (who together account for only 52 % of NYC's population), *id*. at 560, the issue of street encounters with law enforcement is critical. To be continued.

NYS Court of Appeals Criminal Decisions for May 23, 2023

People v. Reid

This is a 6 to 0 reversal for the defense, authored by Judge Cannataro. A new trial is ordered, as the courtroom was improperly closed to the public for four hours during this 8-day jury trial. The closure kept the public from seeing several witnesses, the summations and the verdict. The defendant's Sixth Amendment right to a public trial was violated. No inquiry was conducted regarding the necessity and potential scope of the closure. There was no showing that the closure was justified under *Waller v. Georgia*, 467 US 39 (1984).

During this murder trial, the People moved for closure because photographs had been surreptitiously taken in the courtroom (via cell phone) and posted on Instagram. The court observed on the record that participants in court were intimidated by members of the audience, who made "extremely long hard stares" at them. This carried over to an incident where the court reporter was apparently "stared at" in a courthouse elevator.

A public trial is a fundamental and constitutional right. *People v. Martin*, 16 NY3d 607, 611 (2011). Accordingly, there is a presumption against closure. A trial court's inherent

discretion to exclude the public must be exercised only when unusual circumstances necessitate it. The *Waller* factors must also be considered: (1) there must be an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) reasonable alternatives must be considered; and (4) the trial court must make factual findings on the record sufficient for appellate review. *Waller*, 467 US at 48; *Presley v. Georgia*, 558 US 209, 214-215 (1984).

The court below never made a finding as to any specific spectator. The closure here was overly broad and not narrowly tailored to address the interest in question. Indeed, a less drastic alternative to closure, like prohibiting phones in court, was not considered. Moreover, no individual spectator or group was admonished for their demeanor or behavior. No witness or juror was alleged to have been photographed. This was a "sparse" record. While prevention of intimidation during a trial may be considered an "overriding interest" in support of courtroom closure, the purportedly cumulative atmosphere of intimidation at bar, vaguely described by the trial court, was insufficient to warrant the court's actions. The First Department is reversed.

People v. Muhammad

This is another reversal of a murder conviction for violation of the constitutional right to a public trial, this time out of Syracuse. Judge Rivera authored the majority opinion, with Judge Garcia writing a concurrence, joined by Judge Singas. The Fourth Department is reversed.

The defendant's Sixth Amendment right to a public trial was violated. *People v. Martin*, 16 NY3d 607, 611 (2011). This right benefits the defendant and the public. Through transparency, accusers are kept "keenly alive to a sense of their responsibility…" *Waller v. Georgia*, 467 US 39, 46 (1984). A public trial further encourages witnesses to come forward and discourages perjury. This is why trial courts must take every reasonable measure to accommodate public attendance at criminal trials. *Presley v. Georgia,* 558 US 209, 215 (2010). Accordingly, there is a presumption of openness. Only after considering the four *Waller* factors (noted in the *Reid* summary above) may a trial court exercise its discretion in closing its courtroom.

Here, the Onondaga County Court Judge had a policy of prohibiting the public from entering or exiting the courtroom while a trial witness is testifying. This policy was applied in every case before the court. The courtroom deputies were expected to implement this policy, which was well known to the local bar. The court believed that spectator traffic during testimony is distracting to everyone in the room. The defendant did not object to the policy. The spectators were also required to turn in their cell phones to the deputies prior to entering the courtroom.

On the morning of the third day of trial (and the second day of testimony), the potential spectators arrived on time and turned in their phones to the deputies outside the courtroom. Though testimony began and others entered (and exited) the courtroom, the potential spectators were never *affirmatively* asked to enter. According to court officers, the public was never explicitly prohibited from doing so. Obviously assuming they needed an affirmative invitation to enter, the spectators remained outside while over an hour of testimony was taken. An officer stationed inside the unlocked courtroom informed another in the hallway that the spectators were free to enter. A member of the DA's Office alerted the court to the people waiting outside. The court had them brought in; approximately two dozen people entered.

The following day, a fact-finding hearing was conducted. The judge, the prosecution and the defense all called witnesses. These included three court officers, a prosecutor, an intern, a police officer and four members of the public kept from entering the courtroom. Two of the victim's family members testified they were affirmatively told by a court officer not to enter. Hallway surveillance video was also considered. But the defendant's motion for a mistrial was denied, as, according to the lower court, no one was explicitly or implicitly excluded from the courtroom.

Contravening the AD, the Court of Appeals believed the trial court was responsible for *both* the announcement of its policy as well as its agents' conduct in implementing the policy. The deputies excluded potential spectators, including both the victim's family and the defendant's supporters, in violation of the court's exclusion policy. (In his concurrence, Judge Garcia believed the implementation of the court's exclusion policy, not its *failed* implementation, was unconstitutional.)

While they are obligated to control conduct and decorum in the courtroom, trial courts are also responsible for their delegation decisions to court personnel. Here, the public was excluded as a "direct consequence of the implementation of the judge's policy." Under the circumstances, particularly upon having already surrendered their phones, it should not have been the public's burden to ask courtroom deputies for "affirmative" permission to enter. The spectators were unjustifiably excluded. Finally, the Court of Appeals took no position regarding the trial court's underlying policy of excluding the public during the taking of testimony.