NYS Court of Appeals Criminal Decisions for October 19, 2023

People v. Justice A.

This memorandum is a unanimous reversal of the Appellate Term. The accusatory instrument is dismissed.

The defendant was charged with third-degree assault, requiring the People to proceed to trial within 90 days. *See*, CPL 30.30(1)(b). At issue was the CPL 30.30(4)(f) "without counsel" exclusion. A defendant is not "without counsel" under the statute where the defendant appears with "substitute" counsel. *See*, *People v. Rouse*, 12 NY3d 728 (2009). Here, the defendant was assigned an attorney from the Legal Aid Society, who appeared at arraignment but was subsequently replaced by another attorney from that office. The (4)(f) provision was inapplicable and the lower court erred in excluding this time from its speedy trial calculation.

The Court also commented that the defendant appearing in court later in the day after a bench warrant is issued does not trigger the bench warrant exclusion under CPL 30.30(4)(c)(ii).

People v. Cerda

This is a 5 to 2 decision, reversing the Second Department, which had affirmed the judgment. The trial court erred in applying the rape shield law (CPL 60.42) to exclude forensic evidence proffered by the defense to demonstrate a third party committed this sex crime.

Saliva from two unknown males was discovered in a stain in the complainant's underwear. The DA's expert testimony was ambiguous as to why the complainant had burst blood vessels in the hymen area of her vagina. The defense sought to present a plausible alternative theory of third-party contact in response to other scientific evidence introduced by the prosecution (including evidence of semen in the complainant's vaginal area). This forensic evidence would imply that the complainant had prior sexual contact with a third party.

CPL 60.42 presumably precludes evidence of a complainant's prior sexual conduct in PL article 130 prosecutions, unless a statutory exception applies. This type of evidence tends to harass the complainant and confuse jurors. While typically providing little relevance to the question at hand, it may seriously prejudice the prosecution of a sex crime. However, defendants are guaranteed a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 US 683, 690 (1986); *Chambers v. Mississippi*, 410 US 284, 294 (1973). Along these lines, CPL 60.42(5) carves out a broad exception to preclusion,

providing a low 'interest of justice' discretionary standard for relevance and admissibility. Here, the defendant was deprived of his constitutional right to due process and to present a defense. The forensic evidence in question was relevant to the defense, directly addressing the theory of the prosecution. Alternative (and innocent) explanations to the complainant's injuries would have been presented. The probative value of this evidence outweighed any potential for confusion or undue prejudice to the prosecution. Great language here from the majority, observing that the constitutional right to present a defense encompasses "the right to put before a jury evidence that *might* influence the determination of guilt." *See*, *Taylor v. Illinois*, 484 US 400, 408 (1988) (emphasis added). In other words, the evidence in question need not completely exonerate the defendant in order to be deemed admissible. The inconclusiveness of forensic reports goes to the weight, not admissibility of the documents. The majority recognizes these principles despite the defendant at bar having had an opportunity to address this issue in general; the forensic reports were more important. The DA's summation, touting the idea that no alternative theories existed, didn't help their cause here. In sum, the trial court's ruling was an abuse of discretion as a matter of law under CPL 60.42(5).

In **dissent**, Judge Cannataro, joined by Judge Garcia *(Judge Singas recused herself from this Nassau County based case)*, opined there was no abuse of discretion by the trial court precluding the defense from using this inconclusive, speculative and confusing evidence. No defense expert testimony was proffered to help explain the report. The dissent further thought (for some reason) it was important that the prosecution had not intended to introduce the report in question *(hardly surprising since it didn't help its case)*. The dissent opined that the jurors would be confused and led to speculate by the introduction of this evidence. The 60-year-old defendant purportedly committed these sex crimes against this minor whom he was babysitting. She immediately reported the incident to her mother. The rape shield law was meant to exclude this type of evidence. The right to a defense is not absolute. Now the child has to testify again. This, according to the dissent, is just more evidence of how difficult these cases are to prosecute. Future victims will be discouraged from coming forward.

NYS Court of Appeals Criminal Decisions for October 24, 2023

People v. Lovett

This memorandum is an unsuccessful People's appeal; an affirmance of the County Court order, which affirmed an erroneous Town Court dismissal of an accusatory instrument on CPL 30.30 grounds. The People agreed in Town Court that CPL 30.30 applies to stand-alone traffic infractions. However, CPL 30.30(1)(e), which became effective more than a year before the defendant was charged here, clarified that the provision applies to traffic infractions charged along with crimes - - but the *Galindo* decision says stand-alone traffic

infractions are *not* subject to CPL 30.30 regulation. *See*, *People v. Galindo*, 38 NY3d 199, 201, 206 (2022). The majority found it too late (now on appeal) for the People to complain about this ostensibly simple issue. It appears the Court was also concerned about bringing back to court a *pro se* traffic infraction litigant almost two years after his case was disposed. Judge Rivera was the sole dissenter, relying on *Galindo* as precedent.

People v. Douglas

This is a 6 to 1 opinion, affirming the First Department and approving of a so-called "inventory search" of the defendant's vehicle conducted by the NYPD. A firearm was recovered. Judge Singas authored the majority opinion and Judge Rivera was the lone dissenter.

The defendant was pulled over following the police observing him commit a number of VTL violations. He was arrested for illegally possessing a gravity knife, found in his pocket at the time of the vehicle stop. The vehicle was transported to the precinct and an inventory search (under the guise of NYPD Patrol Guide section 218-13) was conducted. The firearm was found in the trunk.

The NYPD protocol listed 10 areas of the vehicle which were to be searched, including the glove compartment and trunk. The trunk may, under the protocol, be forced open if only minimal damage will result. A specific invoice or "voucher" form is required to be completed for each item seized. All property must "within reason" be listed in the officer's activity log. Further, all items removed must be cross-referenced to the invoice number pertaining to those items.

Following a lawful arrest, a vehicle may be impounded and the police may conduct an inventory search. Such a search is designed to properly catalogue the contents at the time of the search. Because no warrant has been issued, an inventory search must be conducted according to a "familiar routine procedure." *People v. Padilla*, 21 NY3d 268, 272 (2013); *People v. Johnson*, 1 NY3d 252, 256 (2003); *Colorado v. Bertine*, 479 US 367, 375 (1987). The inventory search here, which limited the discretion of the officer in the field, *People v. Galak*, 80 NY2d 715, 719-721 (1993); *Johnson*, 1 NY3d at 256, and was administered in good faith, *Bertine*, 479 US at 374, was legal and complied with established procedures. The defendant's *facial* challenge to the constitutionality of the NYPD protocol was thus properly denied. The majority did not address the 11-hour delay between the discovery of the gun and completion of the vouchering process (*see*, majority decision, FN 1).

In **dissent**, Judge Rivera focused on the 11-hour delay between the finding of the knife and the completion of the paperwork. The NYPD's protocol was silent as to the timing issue, and how and where to safeguard a defendant's property. This means unfettered discretion for the police and a violation of both the state and federal constitutions. *See*,

US Const. Amend, IV; NY Const., art. I, § 12; *Johnson v. United States*, 333 US 10, 14 (1948). Judge Rivera also observed the purposes of having an inventory search protocol: protecting the property while in police custody, protecting the police against claims of stolen or lost property, and protecting the police and others from dangerous items. *Galek*, 80 NY2d at 718. A "meaningful inventory list" is the hallmark of an inventory search. *Johnson*, 1 NY3d at 256. The procedure must be rationally designed to meet these objectives and justify the search in the first place - - and must also limit the officer's discretion in the field. *Galek*, 80 NY2d at 719; *Bertine*, 479 US at 375. The procedure must assure searches are carried out consistently and reasonably, and do not become little more than general rummaging to discover incriminating evidence. *Galek*, supra. The NYPD's protocol being silent on timing, as well as how and when to safeguard the seized items, leaves too much discretion for the NYPD.