NYS Court of Appeals Criminal Decisions for March 17, 2022

People v. Burgos

This is a unanimous affirmance of the defendant's consolidated direct and CPL 440 denial appeals, authored by Judge Troutman. Defense counsel, who had a history of ethical violations, had been suspended from practicing law for 18 months (for neglecting clients) by the U.S. Court of Appeals for the Second Circuit. There were pending reciprocal disciplinary proceedings in the First Department at the time of counsel's representation of Mr. Burgos. The Second Circuit had required counsel to instruct other tribunals that he was appearing before of the Second Circuit's suspension. But his client was not informed. This did not deprive the defendant of meaningful and effective assistance of counsel, or of the constitutional right to the counsel of his choice. The attorney was not constructively unlicensed in NYS at the time of the representation in question. Indeed, the First Department only reciprocally suspended defense counsel from practicing law after the defendant had been sentenced in this matter.

The defendant argued that had he known of the Second Circuit suspension, he would not have let counsel continue representing him. But attorneys are entitled to due process (i.e., notice and an opportunity to be heard) in disciplinary proceedings. Accordingly, the imposition of reciprocal discipline is not a foregone conclusion. Defense counsel violated no ethical rule, according to the Court, by not informing his client of this foreign jurisdiction's disciplinary ruling. Finally, while the Court in footnote 6, affirms once again that the state constitution "offers greater protection than the federal test…" for ineffective assistance of counsel, *People v. Caban*, 5 NY3d 143, 156 (2005), the Second Circuit's suspension had no impact on the representation provided at bar.

NYS Court of Appeals Criminal-Related Decisions for March 22, 2022

Matter of Alvarez v. Annucci

This is a 5 to 2 memorandum regarding an Article 78 petition. Judge Wilson authored the dissent, with Judge Rivera joining. The Second Department is affirmed. The Court held that the residency restriction of the 2000 Sexual Assault Reform Act ("SARA") applies equally to eligible offenders released on parole, conditional release or subject to post-release supervision ("PRS"). Mr. Alvarez was on PRS and argued the law did not apply to him.

As SARA, codified in Executive Law § 259-c(14) *(as amended in 2005)*, prohibits certain enumerated level 3 sex offenders from residing within 1000 feet of a school, *see also*,

Penal Law § 220.00(14)(b) (defining "school grounds"), released offenders are not free to reside anywhere they want. Finding a homeless shelter as a sex offender, particularly in NYC, is a daunting task, as the DOCCS waiting list for this type of housing is 2 to 3 years. *See also generally*, *McCurdy v. Warden, Westchester Co. Corr. Facility*, 36 NY3d 251 (2020); *Negron v. Superintendent, Woodbourne Corr. Facility*, 36 NY3d 32 (2020); *Johnson v. Superintendent, Adirondack Corr. Facility*, 36 NY3d 187 (2020).

The question here was whether SARA applies to a scenario not contemplated explicitly in Exec. Law § 259-c(14), which only refers to parolees and those conditionally released. *But see*, *Johnson*, 36 NY3d at 200 (finding the SARA residency requirement indeed applies to PRS).

The Court concluded that the 1998 Sentencing Reform Act, which brought us PRS under PL § 70.45(3), needs to be considered in this context as part of a "comprehensive reading of the statutory scheme." *See also*, Exec. Law § 259-c(2) (referencing PRS, along with parole and conditional release as being under the authority of the Parole Board). Resembling its recent DWI decision in February, the majority described SARA as part of a "comprehensive and multiyear legislative effort to place more stringent restrictions on certain sex offenders living in the community." *See again*, *Matter of Endara-Caicedo v. DMV*, 2022 NY Lexis 164, at *11-13; 2022 NY Slip. Op 00959; 2022 WL 451453 (Feb. 15, 2022) (recognizing the various legislative attempts in ridding society of the *scourge* of drunk drivers in concluding the 2-hour rule applied to DMV administrative hearings). It does appear that policy issues are again the loadstar in this Court's analysis. *But see again*, *Negron*, 36 NY3d at 37-40 (where the Court conducted a *strict* interpretation of SARA, finding only specifically enumerated offenses qualify under the law).

In **dissent**, Judge Wilson opines the majority interpreted SARA well beyond its text. The legislature explicitly omitted PRS from Exec. Law § 259-c(14). The canon *expression unis est exclusion alterius* directs that the exclusion of one term while utilizing others is presumed to be intentional. The legislature knew how to draft the provision differently but chose not to. To hold otherwise would make the specific references to parole and conditional release superfluous. Moreover, Exec. Law § 259-c(14) indicates its words stand "[n]otwithstanding any other provisions of law to the contrary," which was meant to preempt potentially conflicting statutes. Further, the law's legislative history does not clarify the issue at bar. *See*, fn 7 (discussing same).

Judge Wilson further reminds us: (1) that Mr. Alvarez was effectively held in custody a year and a half too long, and (2) of the "near impossibility of finding affordable SARA-compliant housing in urban areas like New York City, in which virtually no residences are located more than two blocks from a school…" Still, Judge Wilson observes, the Court's 2020 decisions in *Johnson* and *McCurdy* concluded it did not unconstitutionally infringe on the liberty of litigants to be effectively subjected to indefinite DOCCS confinement. There's also some interesting footnotes here: number 3 is a veiled criticism by Judge Wilson of the Court's decision to designate this fully preserved case of first impression under its fast-tracked Rule 500.11 procedure. Footnote 9 describes the prison

programming a former inmate has received after serving a full term, perhaps making an individual on PRS less likely to commit crimes than those on parole (who haven't yet served a full prison term). Food for thought.

People v. Bush

This is a 4 to 3 decision affirming the AD, authored by the Chief Judge. Judge Rivera wrote for the dissent, joined by Judges Wilson and Troutman.

The defendant entered a guilty plea to the misdemeanor, CPCS in the 7th degree, wherein he agreed to 20 days of community service ("CS"). Trial courts have the constitutional duty to ensure that defendants, before pleading guilty, have a "full understanding" of what the plea connotes and its consequences. *People v. Ford*, 86 NY2d 397, 402-403 (1995); *People v. Catu*, 4 NY3d 242, 244-245 (2005); *People v. Louree*, 8 NY3d 541, 544 (2007). Here, the plea allocution was described as "thorough." The CS was completed prior to sentencing and the defendant did nothing to otherwise breach the plea agreement. At sentencing, however, after purportedly being given the opportunity to lodge an objection, the lower court imposed a one-year conditional discharge, PL § 65.10(3)(b), which was not specifically referenced as part of the plea agreement. But the agreed-to CS was part of a revocable sentence imposed under the court's statutory authority to impose a conditional discharge. Along these lines, the defendant agreed at the time of the plea that he could face a year in custody for not complying with the CS requirement.

As no objection or motion to withdraw the plea, CPL 220.60(3), was lodged, any argument that the plea was involuntary was unpreserved. *See*, *People v. Williams*, 27 NY3d 212, 221-222 (2016). Not properly preserving issues breeds speculation at the appellate level. *See*, fn 4 (discussing same). The illegal sentence exception to the preservation rule, *People v. Samms*, 95 NY2d 52, 56 (2000), was inapplicable. If there are other issues outside of the record… you guessed it… the defendant needs to file a CPL 440 motion.

In **dissent**, Judge Rivera opined dismissal was the proper remedy, as the defendant did all that was asked of him to secure this bargained-for-sentence. No penological purpose is served by merely remitting the matter. Indeed, Mr. Bush had no practical opportunity to object, as he was only informed within minutes of the lower court imposing a harsher term, i.e., a one-year conditional discharge. At sentencing, the court stated, "I'm glad you did the [CS], and I'm glad the case is over." The error was not clear from the record and did not constitute sufficient notice. The court must advise defendants of direct consequences of the plea, including the sentence. *See generally*, *People v. Harnett*, 167 NY3d 200, 205 (2011). The defendant's due process rights were violated, as he was unaware at the time of his plea of the additional conditional discharge term to be imposed at sentencing. *See generally*, *Catu*, 4 NY3d at 245 (addressing PRS requirement). The integrity of the system is threatened when the government reneges on a plea bargain,

which is essentially a contract. Our system relies on what the parties and the court "understand and state" on the record.