NYS Court of Appeals Criminal Decisions for January 6, 2022

People v. Sposito

This is a 5 to 1 memorandum, affirming the AD. Judge Wilson authored the dissent. Judge Troutman did not participate. The defendant was not deprived of ineffective assistance of counsel under either the state or federal constitutions, *People v. Baldi*, 54 NY2d 137, 147 (1981); *Strickland v. Washington*, 466 US 668, 690-691 (1984), by waiving a *Huntley* hearing. Rather, it was a reasonable trial strategy to take the sting out of defendant's statements and fend off their use in impeachment of the defendant. Not using expert testimony also did not reach the level of ineffective assistance, as counsel was able to obtain key concessions from the People's experts during cross-examination.

NYS Court of Appeals Criminal Decisions for January 11, 2022

People v. Ortiz

This is a unanimous memorandum, affirming the AD. The *Miranda*-related issue of post-warning statements being admissible is unpreserved. The admission of defendant's initial unwarned statements was harmless error. *People v. Crimmins*, 36 NY2d 230, 237 (1975). There was no ineffective assistance of counsel and the trial court did not abuse its discretion in summarily denying the defendant's CPL 440.10 motion.

NYS Court of Appeals Criminal Decisions for February 10, 2022

People v. Johnson

This is a unanimous and brief memorandum reversing the AD. The waiver of appeal, which included a suppression issue, was invalid, as it conflated the rights the defendant was giving up in pleading guilty, as opposed to those surrendered by waiving the right to appeal. See, *People v. Moyett*, 7 NY3d 892, 892-893 (2006); *see also generally*, *People v. Holz*, 35 NY3d 55 (2020) (terrific decision on CPL 710.70(2) suppression issues surviving the entry of a guilty plea).

NYS Court of Appeals Criminal-Related Decisions for February 15, 2022

People v. Duarte

This is a 4 to 2 memorandum, affirming the Appellate Term. Judge Rivera authored the dissent, joined by Judge Wilson. Judge Troutman did not participate. The Court held that the defendant's statement to the trial court, "I would love to go *pro se*" (mixed within his complaints about defense counsel), did not reflect a definitive commitment to self-representation that would trigger a searching inquiry by the trial court. *See*, *People v. LaValle*, 3 NY3d 88, 106 (2004); *People v. McIntyre*, 36 NY2d 10, 17 (1974); *see also*, *People v. Crespo*, 32 NY3d 176, 178 (2018); *People v. Silburn*, 31 NY3d 144, 150 (2018).

In **dissent**, Judge Rivera opined the defendant's request was clear and unequivocal, as evidenced by his reference to purported ineffective assistance of counsel and suppression issues. The clarity of the defendant's words, coming on the heels of the court's rejection of his complaints about counsel, foreclosed any suggestion of hesitance or uncertainty. No request for a new assigned attorney was made. Though the trial court ignored the defendant, a simple inquiry would have clarified any potential questions as to what Mr. Duarte meant. Moreover, comments made *after* the defendant's request for counsel were irrelevant. "The reasoning of *McIntyre* has stood the test of time. The majority's memorandum cannot."

Matter of Endara-Caicedo v. NYS Dep't of Motor Vehicles

This is 5 to 1 decision, affirming the First Department. The Chief Judge authored the majority opinion, with Judge Rivera being the lone dissenter. Judge Troutman did not participate. At bar, the defendant was warned of the revocation consequences of refusing to take the chemical test *three* hours after his DWI arrest. He refused. The Court held that the horribly drafted VTL § 1194(2)(a) two-hour chemical test "deemed consent" rule was inapplicable to administrative DMV revocation hearings.

The Court observes that VTL § 1194(2)(c) limits the scope of administrative DMV revocation hearings to determining whether: *(1)* there are reasonable grounds to believe the motorist operated a motor vehicle in violation of VTL § 1192; *(2)* the arrest was lawful; *(3)* the motorist was sufficiently warned of the consequences of refusing to take the chemical test; and *(4)* the motorist refused to take the test.

The majority observed the legislature's wishes to facilitate the taking of chemical tests and remove "the scourge" of drunk drivers from the road. The Court distinguishes between the 2-hour evidentiary rule *(which is rooted in how fast alcohol is metabolized in the bloodstream)* regarding VTL § 1192 prosecutions in criminal court and administrative

hearings which determine whether a license is to be revoked. Administrative DMV revocation hearings have been with us since 1954, refusal warnings since 1968. In 1971, criminal and administrative DWI-related issues were delineated into separate subdivisions under § 1194(2). In 1973, a defendant's refusal became statutorily admissible in criminal trials under VTL § 1194(2)(f). In 1980, the legislature added an immediate suspension of the license by the criminal court if refusal is sufficiently alleged, pending the DMV administrative adjudication.

The Court distinguished *People v. Odum*, 31 NY3d 344, 346 (2018), which addressed the admissibility of "such chemical test" (under VTL § 1194(2)(f)) in a criminal proceeding taken more than two hours after the arrest. The matter at bar, however, addressed only the scope of a DMV hearing. In **dissent**, Judge Rivera opined that *Odum* controlled, as there was no textual basis for concluding the same language found in subsections (2)(a) and (2)(f) mean something different. The majority is making a policy-based statutory revision by judicial fiat, an action only a legislature may perform.