NEW YORK CIVIL LIBERTIES UNION REPORT ON JUDICIAL DECISIONS INVOLVING NEW YORK COURT OF APPEALS NOMINEE HECTOR D. LaSALLE

January 17, 2023

The New York Civil Liberties Union is the New York affiliate of the ACLU and since 1951 has worked to defend and promote civil rights and civil liberties in New York. In addition to its extensive litigation in federal court, the NYCLU for decades has brought civil-rights cases in New York's state courts. Two prominent examples are the case in which the New York Court of Appeals held that the United States Constitution entitles poor New Yorkers to free and adequate legal representation when charged with a crime[1] and the case in which the Court of Appeals held that Section 50-a of the Civil Rights Law allowed police departments to withhold in their entirety records bearing on police misconduct (a decision subsequently negated through legislation).[2]

The NYCLU does not endorse or oppose judicial nominees. It does, however, provide analyses of nominees' legal decisions, and this report analyzes judicial decisions involving Justice Hector D. LaSalle, whom the governor has nominated to fill the Court of Appeals vacancy created by the resignation of former Chief Judge Janet DiFiore. Given its focus on civil rights and civil liberties, the NYCLU in this report focuses on civil-rights and civil-liberties decisions involving Justice LaSalle.[3]

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[1] *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2010).

[2] *New York Civil Liberties Union v. New York City Police Department*, 32 N.Y.3d 556 (2018).

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OVERVIEW

Justice LaSalle has served as a judge in New York since 2009 and has been an appellate judge since 2012. His judicial biography includes the following positions:

- 2021-present: Presiding Justice of the Appellate Division, Second Department
- 2014-2021: Associate Justice of the Appellate Division, Second Department
- 2012-2014: Associate Justice of the Appellate Term,[4] Ninth and Tenth Judicial Districts
- 2009-present: Justice of the New York State Supreme Court, Tenth Judicial District[5]

Identifying all cases in which Justice LaSalle authored a decision or joined other judges when he was not the identified author is difficult. However, based on a search of legal databases, the NYCLU believes he has been involved in (either as author or as someone signing on with others) as many as 5852 opinions—including 2 in the Court of Appeals,[6] 5510 in the Appellate

[4]The Appellate Terms in the Second Department are comprised of two separate courts, authorized by Art. 6, § 8 of the New York State Constitution and established by the Appellate Division. One court serves the 2nd, 11th, and 13th Judicial Districts (Kings, Queens and Richmond Counties), and the other the 9th and 10th Judicial Districts (Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess Counties). Each of the two Appellate Term benches consists of five Supreme Court justices serving pursuant to the appointment of the Chief Administrative Judge of the State of New York with the approval of the Presiding Justice of the Appellate Division, Second Department.

[5] Prior to his judicial positions, Justice LaSalle served in the following positions:

- 2002-2008: Deputy Bureau Chief of Special Investigations Bureau and Head of Anti-Gang Unit at the Suffolk County District Attorney's Office
- 1999-2002: Assistant Attorney General at the New York Attorney General's Office Claims Bureau
- 1998-1999: Associate at Ruskin, Moscou & Faltischek PC
- 1993-1998: Assistant District Attorney for the Suffolk County District Attorney's Office

[6] In the Court of Appeals Justice LaSalle participated in *White v. Cuomo*, 38 N.Y.3d 209, 192 N.E.3d 300 (2022), and *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, 38 N.Y.3d 169, 191 N.E.3d 355 (2022). Neither case presented civil-rights or civil liberties issues.

Division, 235 in the Appellate Term, and 100 when he was a trial judge.[7] In the more than 5700 appellate decisions -- which involve panels with multiple judges -- the NYCLU has identified six opinions authored by Justice LaSalle, of which three were dissents. As for the thousands of appellate opinions Justice LaSalle joined but did not author, the NYCLU has identified 92 cases that presented a significant civil-rights issue, of which 59 were criminal cases and 33 were civil cases.

Opinions Written by Justice LaSalle- Of the six opinions Justice LaSalle apparently wrote, four came in cases involving civil-rights issues, all of which involved criminal defendants. In two cases he authored a dissent rejecting the defendant's claims (*People v. Derival* and *People v. Sanchez*); in one case, he authored an opinion concurring in the majority's decision to uphold one of the defendant's claims but dissenting from the majority's acceptance of a second claim (*People v Delvillartron*); and in a third case he authored a unanimous decision upholding a claim by a man convicted of a sex offense (*People v. Buyund*), a decision the Court of Appeals reversed. It's not possible to draw meaningful conclusions from such a small number of cases. What is significant is that such a veteran jurist would have authored so few appellate opinions, including so few opinions that focus on a civil-rights issue.

Decisions in Criminal Cases Justice LaSalle Joined- A majority of cases the NYCLU reviewed involved appeals from criminal convictions or judicial risk-level designations pursuant

[7] The NYCLU identified these opinions using the "Profiles of Attorneys and Judges" database on Westlaw. As of January 13, 2023, this database lists a total of 5852 opinions for Justice LaSalle. Of these opinions, the NYCLU reviewed 92 from the Appellate Division—31 opinions the database categorized as pertaining to "Civil Rights" and 61 opinions it categorized as pertaining to "Constitutional Rights." Upon review, several opinions the database flagged did not present a civil-rights issue and are not included in this report. This report also includes several additional opinions that have been identified in public reporting and discussion as pertaining to civil rights or civil liberties.

to the Sex Offender Risk Assessment Act (SORA). Unfortunately, most of the decisions from these cases are conclusory and lack complete reasoning and/or a fulsome recitation of the facts, making it nearly impossible to assess if the panels correctly applied the law to the circumstances of the cases.

Aggregate analysis of these criminal cases reveals that in 49 of the 59 cases reviewed (83%) Justice LaSalle sided with the prosecution and voted either to affirm the defendant's conviction or risk-level determination. In five of these cases, Justice LaSalle was on panels that found that constitutional violations or other errors of law occurred but nonetheless ruled these violations/errors were "harmless" and did not warrant a reversal of the conviction. For example, *People v. Rodriguez*, 17 N.Y.S.3d 753 (2d Dept. 2015), *People v. Jones*, 60 N.Y.S.3d 445 (N.Y. App. Div. 2d Dept. 2017), and *People v. Barnes*, 120 A.D.3d 1355, 92 N.Y.S.2d 150 (2d Dept. 2014), were cases in which police officers violated the *Miranda* rights of criminal defendants, but Justice LaSalle's panels held that those violations did not warrant reversal. Similarly, in *People v. Tsintzelis*, 153 A.D.3d 558, 59 N.Y.S.3d 741 (2d Dept. 2017), Justice LaSalle joined a decision holding it was "harmless" for the trial court to have violated the defendant's right to confront witnesses against him, a ruling the Court of Appeals unanimously reversed. Of the five cases where Justice LaSalle ruled on claims that prosecutors violated their obligation under the Supreme Court's decision in *Brady v. Maryland* to turn over to the defense exculpatory information, he never found that a violation occurred.

Additionally, 51 of the 59 cases involving criminal appeals or appeals from SORA designations were unanimously decided, and 8 cases involved either one- or two-justice dissents. In all 8 of these cases involving a dissent, Justice LaSalle voted to affirm the conviction or risk-level assessment of the defendant.

Decisions in Civil Cases Justice LaSalle Joined- Justice LaSalle joined appellate decisions in 33 civil cases presenting civil-rights claims, 24 of which involved a civil-rights claim asserted against the government. In 18 of those cases (75%), Justice LaSalle ruled against the party presenting the civil-rights claim and for the government. (In addition to the 24 cases, six concerned discrimination complaints filed with the New York State Division of Human Rights, and three concerned civil-rights claims in which the government was not a party.)

Decisions Justice LaSalle Joined that the Court of Appeals Reviewed- Of the civil-rights cases reviewed by the NYCLU in which Justice LaSalle participated, the Court of Appeals reviewed nine. Of those nine, the majority of the Court of Appeals sided with Justice LaSalle's position five times, each time ruling against the criminal defendant or civil party asserting a civil-rights claim.

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The compilation of cases below includes all 92 civil-rights cases the NYCLU identified in which Justice LaSalle participated, including the four cases in which he authored an opinion. Decisions the NYCLU believes to be particularly significant are marked with an asterisk and are in red, and cases where he wrote an opinion are marked with a double asterisk.

A separate section after the compilation summarizes two cases where he authored an opinion in a case that did not present a civil-rights issue. Finally, the NYCLU has prepared an appendix with all 94 decisions.

SUMMARIES OF JUSTICE LaSALLE CASES
PRESENTING CIVIL RIGHTS ISSUES

*Notable decision
**Opinion authored by Justice LaSalle

1160 Mamaroneck Ave. Corp. v. City of White Plains, 2022 WL 17480752 (2d Dept. 2022)

Issues: environmental review, due process; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case is an appeal from a hybrid Article 78 declaratory action challenging certain amendments to the zoning ordinance of the City of White Plains. The petitioner/plaintiff operated a nursery in a residential district. The nursery's operations included the processing, grinding, and composting of raw materials such as topsoil, wood chips, and mulch. The City's Common Council determined that processing activities engaged in by petitioner/plaintiff had various harmful effects that were incompatible within residential districts and adopted amendments to the City's zoning ordinance which banned those activities by nurseries located in residential districts. In addition to a claim under the State Environmental Quality Review Act, the nursery claimed that the City's actions were arbitrary and unconstitutional.
- The Second Department (Justices Lasalle, Connolly, Genovesi, and Ford) held that the City only had to show that its regulations were "rationally related to a legitimate governmental objective" to satisfy equal protection and that there is a "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" to satisfy substantive due process. The court held that the City met this bar and demonstrated that "that the zoning amendments are in accordance with a well-considered comprehensive plan and fall within the bounds of the zoning power delegated to the City by statute."

Point of Concern

- While the rational basis standard is undoubtedly low, there is no substantive analysis of the evidence presented by the City to show that the zoning amendments were related to its goals.

Advanced Recovery, Inc. v. Fuller, 162 A.D.3d 659, 77 N.Y.S.3d 151 (2d Dept. 2018)

Issue: workplace sex and disability discrimination; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a complaint filed with the New York State Division of Human Rights (DHR) by a woman against her former employer for discrimination on the basis of sex and disability. An ALJ found in favor of the woman and the Commissioner of the DHR

adopted the ALJ's findings. The former employer commenced this proceeding for review of the SDHR's determination, and the DHR cross-petitioned for enforcement of its determination.

- The issue before the Second Department was whether the DHR's determination was supported by substantial evidence.
- In an unsigned opinion, the Second Department (Justices Dillon, Balkin, Miller, and LaSalle) held that the DHR's determination that the woman established a prima facie case of discrimination was supported by substantial evidence. The Court granted the SDHR's cross petition, denied the former employer's petition, and dismissed the proceeding on the merits.

Alvarez v. Annucci, 186 A.D.3d 704, 127 N.Y.S.3d 303 (2d Dept. 2020), *aff'd*, 38 N.Y.3d 974, 187 N.E.3d 1032 (2022)

Issues: confinement beyond determinate prison sentence and interpretation of sex-offender statute; not authored by Justice LaSalle; panel vote: 4-0; affirmed 5-2 by the Court of Appeals.

Summary

- This case concerns an Article 78 mandamus action filed by the petitioner against Anthony Annucci in his capacity as Acting Commissioner of DOCCS. The petitioner brought his petition after being transferred to Fishkill Correctional Facility and then Queensboro Correctional Facility after having completed his determinate three-year prison sentence, which was to be followed by seven years of post-release supervision. Annucci moved to dismiss the petition and the Supreme Court granted that motion and dismissed the proceeding.
- The issue on appeal was whether the Supreme Court erred in granting Annucci's motion to dismiss. To make this determination, the Second Department considered whether the petitioner's case was moot since DOCCS transferred him to community housing while his petition was pending.
- The Second Department (Justices Rivera, LaSalle, Barros, and Iannacci) held that the Supreme Court erred in determining that Mr. Alvarez's case was moot but affirmed the Supreme Court's dismissal of the proceeding because "the petitioner has failed to demonstrate that Queensboro is not a legitimate residential treatment facility for sex offenders, or that DOCCS's determination to place him there was irrational."

Other Notes

- The petitioner, who served a sentence for sexual abuse in the first degree, argued that Annucci failed to comply with his statutory obligations to assist him with finding housing located more than 1,000 feet from school grounds and to release him from Queensboro to either a residential treatment facility or to approved housing in the community that was in compliance with the residency restrictions of the Sexual Assault Reform Act (SARA).
- The Second Department determined that three exceptions to the mootness requirement were present in this case: the legal issue of whether a particular DOCCS facility is a

legitimate residential treatment facility recurs, is a significant issue, and is the type of issue that typically evades review given the time frame in which individuals like the petitioner who are subject to post-release supervision obtain complaint housing.

- At the Court of Appeals, Justice Wilson authored a dissent (joined by Justice Rivera) that criticized the majority's interpretation of SARA. Judge Wilson argued that "This Court has interpreted SARA far beyond its original purpose" and that the "plain text" of that statute provides that the residency restrictions for people convicted of certain sex offenses apples only to those "on parole or conditionally released." Because Mr. Alvarez was neither conditionally released nor on parole, Justice Wilson argued that he and others like him are not included under SARA.

Argudo v. New York State Dept. of Motor Vehicles, 51 N.Y.S.3d 589 (2d Dept. 2017)

Issue: administrative challenge to agency regulations; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns an article 78 challenge to DMV emergency regulations restricting the issuance of drivers licenses to recidivist drunk drivers on the grounds that the regulations usurped legislative authority, violated the separation of powers, violated the Ex Post Facto Clause of the Constitution, and were applied to petitioner in an arbitrary and capricious manner. The Nassau County Court denied the petition and dismissed the action.
- The Second Department (Justices Balkin, Hall, Lasalle, and Barros) affirmed the Supreme Court's decision, with modifications, and rejected each of petitioner's contentions.
- After restating the four *Boreali v. Axelrod* factors, the panel held that the DMV did not usurp legislative authority because it "did not act on its own ideas of public policy, but rather implemented the Legislature's policies of promoting highways safety and reducing instances of impaired and intoxicated driving."
- It cited several statutory provisions to support the finding that the legislature intended to grant the DMV regulatory authority over the relicensing of people with alcohol or drug-related driving offenses; therefore, the regulations did not violate separation of powers.
- The opinion briefly notes, with no factual analysis, that because the regulations were enacted for nonpunitive purposes and were not so punitive in effect as to negate that intent, the regulations did not constitute a violation of the Ex Post Facto Clause.
- Lastly, it determined that the DMV's decision to deny petitioner's application for a driver's license was not arbitrary and capricious, as it was amply supported by the evidence. Here, the opinion re-states petitioner's driving record and concludes that he failed to establish that the DMV failed to follow its own precedent or treated similarly situated individuals differently.

Banks v. Rhea, 133 A.D.3d 745, 19 N.Y.S.3d 337 (2d Dept. 2015)

Issue: unreasonable application of public housing rules regarding family members succeeding to the lease of a deceased resident; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case challenged the New York City Housing Authority's (NYCHA) denial of the petitioner's request to succeed to the lease of his late mother's apartment. The petitioner moved into the apartment with his mother to help care for her towards the end of her life as she was homebound with an array of severe medical conditions. During this time, the petitioner made three requests to NYCHA to be added to the household as an official tenant, the first two of which the agency failed to process without explanation. Upon the third request, NYCHA staff, despite knowing the petitioner's mother was severely ill and unable to leave home, insisted that she go to the office in person to file the request. Ultimately, NYCHA denied the petitioner's fourth request based on a minor conviction he received 24 years prior for which he served a one-day sentence.
- When the petitioner's mother died, the petitioner applied to succeed to her lease as a "remaining family member" pursuant to NYCHA rules. The agency denied his application on the grounds that he had not been an authorized occupant of the apartment for one year. The petitioner sought review of NYCHA's determination.
- The Second Department (Justices LaSalle, Dillon, Miller, and Duffy) denied the petition in a short, unsigned opinion. The court ruled that substantial evidence supported NYCHA's finding that the petitioner had not been an authorized occupant for the requisite year. But the court made no mention of the evidence that the petitioner had in fact been living in the apartment for more than a year with his mother's consent. Nor did the court mention that the reason the petitioner had not been authorized was due to NYCHA ignoring several of his requests for authorization, requiring his mother to file the request in person despite her severe disabilities, and denied his final application on questionable grounds.

Points of Concern

- The court's cursory decision denying the petition wholly failed to engage with—or even mention—the compelling facts of the case and overlooked NYCHA's unreasonable treatment of the petitioner and his mother, all of which were thoroughly set forth in his briefing.
- As the petitioner pointed out, the agency without explanation ignored his first two requests to be authorized as an occupant of the apartment, and then denied his application to succeed to the lease for his failure to obtain authorization earlier.
- Moreover, as the petitioner persuasively argued, the NYCHA staff's insistence that the petitioner's mother file the authorization request in person at the NYCHA office—despite being aware of her severe medical conditions and inability to leave her home—constituted a refusal to reasonably accommodate her disability.
- Given that the purpose of NYCHA is to provide safe and decent housing for low-income families, the court's total failure to hold the agency to account for its treatment of the petitioner and his mother is concerning.

Barry v. Cadman Towers, Inc., 136 A.D.3d 951, 25 N.Y.S.3d 342 (2d Dept. 2016)

Issue: application of statute of limitations to housing discrimination and due process claims; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case was brought in 2012 by several plaintiffs who were evicted in 2005 from their public housing unit based on the city's determination that they had violated a "primary residence rule." The plaintiffs contended that their eviction violated their rights under the Fair Housing Act and due process. The decisions available on Westlaw do not describe the factual allegations underlying the plaintiffs' claims.
- The trial court granted the city's motion to dismiss the claim as time-barred under the relevant statutes of limitations—two years for the Fair Housing Act claim and three years for the due process claim.
- The Second Department (Justices LaSalle, Mastro, Leventhal, and Cohen) affirmed in an unsigned decision. The court noted that the alleged discrimination occurred in 2005 and the plaintiffs did not sue until 2012, well past the statutes of limitations.

Campbell v. Stanford, 173 A.D.3d 1012, 105 N.Y.S.3d 461 (2d Dept. 2019)

Issue: application for release on parole; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns an incarcerated person's challenge to a decision by the New York State Board of Parole denying his application for parole. After the Parole Board denied his application, the petitioner filed an administrative appeal and the Parole Board affirmed its determination. The petitioner filed suit, and the Supreme Court, Dutchess County denied the petition and dismissed the proceeding "based solely upon the nature of the underlying offenses." The petitioner appealed, arguing the Parole Board's determination was arbitrary and capricious and failed to provide a sufficient explanation for the denial.
- In an unsigned opinion, the Second Department (Justices Rivera, Cohen, LaSalle, and Connolly) affirmed, holding that the Parole Board's denial was supported by substantial evidence.

Point of Concern

- The petitioner was convicted of two counts of murder in the second degree and sentenced to consecutive indeterminate terms of imprisonment of nine years to life on each conviction for an incident that occurred when he was 14 years old. Though the Second Department noted that "a juvenile homicide offender has a substantive constitutional right not to be punished with life imprisonment for a crime reflecting transient immaturity," the Court held that the Parole Board considered the requisite statutory factors in reaching its determination.

Other Note

- The petitioner submitted numerous parole applications since becoming eligible for parole release in 2008. In the application in question, which was 24 pages long, the petitioner expressed remorse; included numerous letters advocating for his release; provided details on his educational achievements, which included obtaining his GED and being accepted to Bard College; provided an institutional record reflecting only two infractions; and showed evidence of having completed multiple programs, including a Sex Offender program and Aggression Replacement Training.

Davila v. City of New York, 39 A.D.3d 890, 33 N.Y.S.3d 306 (2d Dept. 2016)

Issues: policing and municipal liability; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a claim under federal law for damages against NYPD officers and the City of New York for personal injuries stemming from police officers' negligence and excessive force. NYPD officers responded to 911 calls at an apartment where plaintiff, who had a long history of mental illness, and his parents resided. At the apartment, both the plaintiff and officers fell down a flight of stairs.
- At trial, a jury found in favor of the plaintiff on his negligence and excessive-force causes of action. The defendants then moved for judgment as a matter of law, and the Supreme Court denied their motion.
- The Second Department (Justices Mastro, LaSalle, Rivera, and Austin) reversed, holding that the officers' actions were entitled to qualified immunity and governmental-function immunity and therefore the Supreme Court should have granted the defendants' motion for judgment of law dismissing the negligence and excessive force causes of action.

Point of Concern

- The Court stated that "it cannot be said" that officers employed excessive force "beyond what was objectively reasonable to contain the plaintiff, an emotionally disturbed person whom they viewed as posing a danger to himself and others." This raises concerns regarding police presence and the resulting escalation of incidents with people with mental illness, and perceptions of people with mental illness as dangerous.

Other Notes

- The Second Department held that the police officers were entitled to qualified immunity because "it is clear that officers of reasonable competence could disagree" as to whether the NYPD officers should have waited for the Emergency Services Unit to arrive before they approached the plaintiff. The Second Department also held that because the "allegedly negligent acts of the police officers were discretionary, and not ministerial . . . the doctrine of governmental function immunity precluded liability for the allegedly negligent conduct of the officers."
- Finally, the Second Department briefly discussed and disposed of plaintiff's arguments that the Supreme Court gave faulty instructions to the jury, holding that that argument

was not properly before the Second Department\since the plaintiff failed to brief this issue in his main brief.

Devine v. Annucci, 56 N.Y.S.3d 149 (2d Dept. 2017)

Issue: retroactive application of sex offender law; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns whether the retroactive application of the Sexual Assault Reform Act (SARA), which became effective after petitioner had committed the underlying sex offense, would violate the Ex Post Facto Clause. Plaintiff committed a sex offense in 2000 and SARA became effective in 2001. While on parole in 2014, SARA's restrictions on sex offender proximity to schools required petitioner to move out of his home and made movement within Brooklyn and NYC virtually impossible. He brought an article 78 challenge to prohibit DOCCS from enforcing SARA against him on the grounds that it was unconstitutional as applied. The Kings County Court found for petitioner and DOCCS appealed.
- The Second Department (Justices Leventhal, Roman, Sgroi, and LaSalle) reversed the lower court judgment, finding that SARA was part of a civil, nonpunitive regulatory scheme and therefore its retroactive application was not prohibited under the Ex Post Facto Clause. The panel explained that the constitutional prohibition on ex post facto laws applies to "penal statutes which disadvantage the offender affected by them," but that statutes enacted for nonpunitive purposes, and whose effects are not so punitive as to negate that nonpunitive intent, may be applied retroactively. The panel held that SARA's legislative history made clear that it was intended to provide protection for children as part of a regulatory scheme, and not to punish offenders for a past crime. It also concluded that petitioner did not show by the "clearest proof" that SARA's residency restrictions, as applied to him, were so effectively punitive as to transform the restrictions into punishment.
    - This is despite the fact that the residency restrictions forced petitioner to move out of his apartment, where he lived with his girlfriend, and into a three-quarter house.

Point of Concern

- The panel fails to meaningfully engage with the second prong of the ex post facto inquiry, which requires a court to determine "whether the statute is so punitive, in purpose or effect, as to negate the legislature's intention to deem it civil." Although the opinion begins with a recitation of facts about the petitioner's case and circumstances, it does not articulate how it weighs those facts as they pertain to the law. The court merely concludes that petitioner has not clearly proven that SARA's effects are so punitive as to constitute punishment. This lack of attention to the serious impact of SARA's residency restrictions is particularly troubling as there are likely many others similarly situated to

the petitioner, who live in dense areas like New York City and struggle to avoid being within 1,000 feet of a school.

Other Note

- In its opinion, the panel notes that there is a circuit split with respect to retroactive application of statutes similar to SARA. The Court of Appeals of the Sixth Circuit held that retroactive application of portions of Michigan's Sex Offender Registration Act amounted to ex post facto punishment prohibited by the constitution; whereas the Eighth Circuit held that an Arkansas sex offender registration statute is not an unconstitutional ex post facto law.

Eltingville Lutheran Church v. Rimbo, 174 A.D.3d 856, 857, 108 N.Y.S.3d 39, 41 (2d Dept. 2019)

Issues: judicial involvement in religious disputes; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case involves a church suing the network of churches that it was within for taking administrative control of it and taking control of its property. Eltingville Lutheran Church, the plaintiff, was a member of the Evangelical Lutheran Church in America and the Metropolitan New York Synod of the Evangelical Lutheran Church in America. The defendants imposed synodical administration on the plaintiff and appointed trustees to take control of the church's property. The plaintiff sued and defendants moved to "dismiss the complaint, arguing that the Supreme Court lacked subject matter jurisdiction over the internal church dispute since the determination to impose synodical administration was a nonjusticiable religious determination."
- The Second Department (Justices Chambers, Miller, Lasalle, and Christopher) held that "[t]he First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs." The court held the decision to apply synodical administration to the church was a nonjusticiable religious determination. The court also held that the property dispute could not be settled by neutral principles of law, because the constitutions of the religious organizations "provide that, upon imposing synodical administration, a Synod may take charge and control of the local congregation's property."

Point of Concern

- This panel decision was very respective of the separation of church and state and lean on the side of not getting involved in the affairs of the church. Such deference may put many decisions made by religious organization outside of the reach of the law.

Evergreen Association v. Schneiderman, 153 A.D.3d 87, 54 N.Y.S.3d 135 (2d Dept. 2017)

Issue: investigative subpoena to entity misleadingly claiming to provide abortion services; not authored by Justice LaSalle; panel decision: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns an investigatory subpoena duces tecum the AG served on Evergreen, the operator of 12 crisis pregnancy centers in NYC, as part of an investigation into whether the centers were engaging in the unauthorized practice of medicine. The subpoena sought documents relating to Evergreen's corporate structure and facilities; the credentials and responsibilities of all Evergreen's staff members; details regarding Evergreen's facilities; the services and materials Evergreen gives to clients; Evergreen's medical services, equipment, and supplies; entities to whom Evergreen refers clients; and the sources of Evergreen's funding.
- Evergreen filed suit to quash or narrow the subpoena on several grounds, including that it infringed the First Amendment rights of Evergreen and its staff members. The Supreme Court denied Evergreen's petition in its entirety.
- The issues on appeal were: (1) whether the AG had statutory authority to issue the subpoena; (2) whether the AG had sufficient factual basis to issue the subpoena; and (3) whether the subpoena comported with the First Amendment.
- The Second Department (Judge Cohen authoring, Judges LaSalle, Leventhal, and Duffy joining) unanimously ruled for the State on issues (1) and (2) but held on (3) that "the subpoena infringes on the First Amendment right of the petitioner and the petitioner's staff members to freedom of association." Accordingly, the court substantially narrowed the subpoena to "documents that are substantially related to the Attorney General's legitimate need to gather evidence to determine whether Evergreen has engaged in the unauthorized practice of medicine."
    - Most notably, the court entirely blocked the AG from obtaining Evergreen's promotional materials and advertising, as well as documents about the sources of Evergreen's funding.
    - The court further ordered that documents produced pursuant to the subpoena had to first be reviewed in camera by the Supreme Court before they could be released to the AG.

Points of Concern

- Although the decision is generally careful in noting when the court is relying on Evergreen's own characterization of its services ("Evergreen states…"; "According to Evergreen…"), the decision in places uncritically adopts Evergreen's framing of the function of its crisis pregnancy centers. The very first sentence of the introduction uncritically describes Evergreen as "a not-for-profit corporation committed to providing women experiencing unplanned pregnancies with alternatives to abortion." In a similar vein, the next sentence states that Evergreen's "largely volunteer staff gives pregnant women advice and emotional support aimed at encouraging them not to terminate their pregnancies and to keep their babies." In its recitation of the facts, the decision says

"[t]he centers also provide a variety of pregnancy-related services, including pregnancy testing, ultrasounds, and sonograms," without providing more context.

- In discussing the state interest, the court acknowledged that "[t]here is no question that the Attorney General's investigation is of the utmost importance to protecting the health and safety of women." But the court made no reference to the interest the State specifically asserted in protecting "a woman's freedom to seek lawful medical services in connection with her pregnancy."
- The court's First Amendment analysis was flawed in several respects:
    - The court does not explain why the subpoena was not within the AG's prerogative to investigate possible fraud not protected by the First Amendment.
    - The Appellate Division's opinion concluded that the subpoenas at issue impaired Evergreen's First Amendment rights of ideological association without identifying any specific intrusion into associational activities protected by the First Amendment. The lower court had found that "Evergreen had not demonstrated any way in which the First Amendment rights of its staff would be threatened." The Appellate Division did not contest this finding. Nor did it expressly reverse this conclusion. Instead, it looked elsewhere to discover a First Amendment injury. It found that injury in the decision of the Bronx Lebanon Hospital to withdraw from its transactional relationship with Evergreen. But whatever that relationship may have been (it seems that Evergreen was using Bronx Lebanon facilities for some medical tests) there was no basis to believe that it involved First Amendment associational activities. Accordingly, the Appellate Division opinion invented a non-existent First Amendment injury and used that fictive injury to invoke First Amendment scrutiny and curtail the AG's investigation into Evergreen's activities.
    - The Appellate Division opinion also erred in its application of First Amendment standards. It insisted that the subpoenas must be "narrowly tailored" to the pursuit of the State's interests. But then the only interest that it considered was the interest in investigating the alleged "unauthorized practice of medicine." It never posited the State's interest in investigating Evergreen's allegedly fraudulent practices. And in blocking disclosure of Evergreen's promotional materials and advertising, it ignored the investigation into fraudulent practices.
- Presentation of the facts—although the court did not blatantly misrepresent the facts, there were a few ways in which its framing of the controversy seemed unnecessarily solicitous to Evergreen.
    - Most fundamentally, the court makes only passing allusions to the core concern driving the investigation into Evergreen—that, in the AG's words, "[a]s part of its mission, EMC seeks to dissuade pregnant women from having an abortion" through misleading practices. The court goes only as far as acknowledging that the AG was looking into "whether Evergreen may be . . . misleading women into believing that they are being seen by a medical doctor," and that "[t]here is no question that the Attorney General's investigation is of the utmost importance to protecting the health and safety of women." By contrast, the court describes the

interests of Evergreen's staff as the "lawful First Amendment right to persuade women to give birth."

- The AG explained—and the Supreme Court noted—that its investigation into whether Evergreen was engaged in fraudulent or illegal acts included but was not limited to whether Evergreen was practicing medicine without authorization. The Second Department mentioned this fact but appeared to disregard the breadth of the investigation in the First Amendment analysis, leading to its holding that the AG could obtain "only those documents directly related to Evergreen's alleged unauthorized practice of medicine."
- The Supreme Court noted that the AG's investigation also concerned whether Evergreen was violating a consent judgment between Evergreen and the State "in part to prevent the unauthorized practice of medicine by [Evergreen]"—with the caveat that "the purpose of the subpoena [at issue] was not to enforce the Consent Judgment." The Second Department made no mention of the consent judgment.

Other Notes

- Evergreen argued that the AG had no authority to issue a subpoena under the relevant statute to investigate Evergreen's "conducting or transaction of business" because Evergreen was a non-profit. The court rejected this argument (although in doing so it appeared to follow established law).
- The court also rejected Evergreen's argument that the AG lacked sufficient factual basis to support the issuance of the subpoena. In doing so, the court credited the AG's affirmation that preliminary investigations had uncovered evidence that Evergreen was engaging in the unauthorized practice of medicine, including "that Evergreen's centers were set up to look like medical offices, staff members were dressed in scrubs or lab coats, a medical history was taken from clients, diagnoses of pregnancies, ectopic pregnancies, and gestational age were made, and medical advice was given, including false advice."
- The court further rejected Evergreen's argument that the documents sought were not reasonably related to the subject of the AG's investigation "into whether Evergreen may be practicing medicine without a license and misleading women into believing that they are being seen by a medical doctor."

Haberman v. Zoning Board of Appeals of City of Long Beach, 152 A.D.3d 685, 59 N.Y.S.3d 402 (2d Dept. 2017)

Issue: zoning permits and qualified immunity; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a challenge to a city zoning board's revocation of a building permit previously issued to the petitioners. The individual defendants filed motions to dismiss one of the petitioner's causes of actions as asserted against them. The Supreme Court, Nassau County granted these motions, and the petitioners appealed.
- In an unsigned opinion, the Second Department (Justices Balkin, Roman, Hinds-Radix, and LaSalle) reversed, denying the individual defendants' motions to dismiss.

Other Notes

- Regarding this case's confusing procedural history: The petitioners sought to recover damages against all of the defendants under federal law. The Supreme Court denied this petition, holding that the petitioners "did not allege sufficient facts to support their claim that the defendants' alleged actions effected a deprivation of their constitutional rights" and that the individual defendants—members of the municipal Zoning Board of Appeals—"were immune from suit for monetary damages." The plaintiffs appealed and the Second Department reversed. The Supreme Court subsequently expressed uncertainty as to whether the Second Department reversal impacted whether the individual defendants had qualified immunity for the petitioner's claims brought pursuant under federal law. The Second Department clarified in this instant case that its prior reversal "clearly reversed" the Supreme Court's grant of the defendants' motion to dismiss and "necessarily rejected the individual defendants' claims of qualified immunity."

Hanson v. Hicksville Union Free Sch. Dist., 209 A.D.3d 629, 175 N.Y.S.3d 327 (2d Dept. 2022)

Issue: recovery of damages by former student for school's failure to report sexual abuse committed by its guidance counselor; not authored by LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case was brought by a plaintiff who was allegedly sexually abused by her guidance counselor for years when she was in junior high and high school. The plaintiff sought to recover damages for the school district's failure to report the abuse as required by state law. The school district moved to dismiss one claim on the basis that an "abused child" under the law must be one harmed by a "parent or other person legally responsible for [their] care," and that a school guidance counselor does not fall within that definition. The Supreme Court denied the motion to dismiss.
- The Second Department (Justices LaSalle, Miller, Genovesi, and Wan) in an unsigned decision reversed and ordered the claim dismissed, agreeing with the school district that a guidance counselor is not a "parent or other person legally responsible for [the child's] care" within the meaning of the law.

Point of Concern

- The decision provides minimal analysis of its holding, which consisted of one sentence and two citations to precedent. The cited precedent contains reasoning that suggests a guidance counselor or teacher is not a "parent or other person legally responsible for [the child's] care" within the meaning of the statute, but does not expressly so hold. The court's decision supplied no additional reasoning.

Howell v. City of New York, 142 N.Y.S.3d 81 (2d Dept. 2021), *aff'd*, 2022 WL 17096862 (2022)

Issues: policing, domestic violence, and municipal liability; not authored by Justice LaSalle; panel vote: 4-0; affirmed 4-2 by Court of Appeals.

Summary

- This case concerns an action filed by a woman to recover damages against NYC and two NYPD officers after her former boyfriend threw her out of the window of a third-floor apartment. The woman sought damages against the City for negligent hiring, retention, training, and supervision; and damages against two police officers for negligent failure to protect her from her former boyfriend, against whom she had an order of protection.
- The defendants moved to dismiss the complaint as asserted against them or, in the alternative, for summary judgment. The Supreme Court denied the defendants' motion to dismiss and denied their motion for summary judgment as premature. The defendants then brought this appeal.
- The issue on appeal was whether the Supreme Court should have granted the defendants' motion to dismiss or their motion for summary judgment. To answer this question, the Second Department considered the question of whether NYC and the NYPD could be held liable for the injuries that the plaintiff suffered.
- The Second Department (Justice Chambers authoring, Justices LaSalle, Iannacci, and Christopher joining) unanimously reversed the Supreme Court's holding and ruled for the defendants, holding that the Supreme Court should have granted the defendants' motion for summary judgment. The Second Department determined that there was no special relationship between the municipality and the woman and therefore the City and its officers could not be held liable for negligence.

Points of Concern

- The Second Department determined that there was no municipal liability because no special relationship existed between the defendants and the woman. In making this determination, the Second Department stated that the defendants established that "the officers made no promise to arrest [the ex-boyfriend], and the plaintiff could not justifiably rely on vague assurances by the officers that she would 'be okay' and that [the ex-boyfriend] would not be returning to the building where both he and the plaintiff lived." At 84.
- The Second Department did not discuss the merits of plaintiff's arguments in opposition to defendants' claims beyond stating that "the plaintiff failed to raise a triable issue of fact, demonstrate how additional discovery may lead to relevant evidence, [] establish that facts essential to opposing the motion were exclusively within the defendants' knowledge or control" or "that the defendants violated a statutory duty owed to her." Id.
- The Second Department noted that the woman had a protection order against her ex-boyfriend, and prior to the incident where he threw her out of the third-story window, the woman had called the defendant police officers on multiple occasions because her ex-boyfriend was violating the protection order. On these occasions, the police officer told the woman that the ex-boyfriend "won't be returning," that "he would not be coming back," and that she would "be okay." After an incident where the ex-boyfriend banged on the plaintiff’s door with a pipe and broke off a lock, police officers asked the plaintiff why she continued to reside at her residence and threatened to arrest her if she called them again. Yet despite these repeated violations, the protection order, and the woman's multiple pleas for assistance, the Court limited it's reasoning for denying liability to facts

"established" by the defendant, without mentioning the merits of the plaintiff's arguments.

HP Ronkonkoma, Inc. v. Kirkland, 122 A.D.3d 737, 996 N.Y.S.2d 343 (2d Dept. 2014)

Issue: review of finding of employment discrimination made by New York State Division of Human Rights; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerned the New York State Division of Human Rights' (DHR) determination that an employer discriminated against its employee on the basis of sex by subjecting her to a hostile work environment and retaliating against her. DHR awarded the employee compensatory damages. The employer appealed.
- The Second Department (Justices LaSalle, Skelos, Austin, and Sgroi) affirmed in an unsigned decision. The court, applying a deferential standard of review, held that the DHR's finding of discrimination was supported by substantial evidence.

I.T.K. v. Nassau Boces Educ. Found., Inc., 177 A.D.3d 962, 113 N.Y.S.3d 726 (2019)

Issue: sexual assault; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns an action for personal injury damages brought by a special-education student against North Shore Central School District (NSCS) and Nassau BOCES Educational Foundation, Inc. for negligent supervision after she was allegedly assaulted by another student in the bathroom at school. The plaintiff enrolled in the school through defendant Nassau BOCES Educational Foundation, Inc. NSCS moved for summary judgment.
- The Supreme Court, Nassau County denied NSCS's motion for summary judgment. NSCS appealed.
- In an unsigned opinion, the Second Department (Justices Chambers, Maltese, LaSalle, and Christopher) reversed and granted NSCS's motion for summary judgment, finding NSCS established that it was not affiliated with the school where the incident occurred and that the plaintiff was not in NSCS's custody when she was sexually assaulted.

Other Note

- The Second Department rejected the plaintiff's argument that she was within NCSC's "orbit of authority" because NSCS was responsible for formulating and implementing her Individualized Education Program. The Court stated that because the plaintiff did not include this argument in her notice of claim the argument was an "impermissible substantive change to the theory of liability."

Iacone v. Passanisi, 133 A.D.3d 717, 19 N.Y.S.3d 583 (2d Dept. 2015)

Issue: qualified immunity for city alleged to be responsible for unsafe street conditions; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case was brought by a plaintiff who was injured in a car accident at an intersection. The plaintiff sued the city, alleging that the view of oncoming traffic at that intersection was obstructed. The city moved for summary judgment on qualified grounds. The Supreme Court denied the city's motion.
- The Second Department (Justices LaSalle, Dillon, Sgroi, and Cohen) affirmed in an unsigned opinion. The court noted that although the government is entitled to qualified immunity from liability arising out of street safety planning decisions, the government must demonstrate that its decision "was the result of a deliberative decision-making process." The court determined that the city in this case had failed to demonstrate that the obstructions at the intersection resulted from a deliberative decision-making process.

J. B. v. State Univ. of New York, 175 A.D.3d 493, 494, 109 N.Y.S.3d 51, 52–53 (2d Dept. 2019)

Issues: Due process, campus sexual assault, education; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals

Summary

- The case concerns a student at Purchase College, State University of New York Purchase charged with committing four violations of the student code of conduct. Following an administrative hearing, a college Administrative Hearing Board found he committed the charged violations and recommended that he be expelled from the college. After an internal appeal upheld the decision, the student was expelled.
- The Second Department (Justices Leventhal, Lasalle, Barros, and Brathwaite Nelson) held that the student was not deprived of due process because he was provided the hearing board's decision, which included a concise statement of both the evidence relied upon and the specific conduct of the petitioner that constituted the violations. The court also found that there was sufficient evidence to support the decision and that expulsion was not disproportionate to the conduct.

Point of Concern

- The panel opinion does not provide any indication of the evidence that the school had that the student committed the violations. Further, it does not articulate the substantive content of the board's written decision.

Johnson v. Palumbo, 154 A.D.3d 231, 60 N.Y.S.3d 472 (2d Dept. 2017)

Issue: housing protections; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a petition by a woman whose Section 8 housing benefits were terminated for failing to request permission to add an additional person as an occupant of her apartment. After her housing benefits were terminated, the petitioner participated in an informal hearing with respondent City of Poughkeepsie Office of Section 8 Housing (the "Agency"), and the hearing officer confirmed the termination of petitioner's Section 8 benefits. The petitioner then commenced this Article 78 proceeding, arguing that the hearing officer erred in concluding that the Violence Against Women Act (VAWA) did not prevent her tenancy from being terminated. Because the petitioner raised a substantial evidence question, the Supreme Court transferred the proceeding to the Second Department.
- The issue before the Second Department is whether the petitioner was entitled to the housing protections of the VAWA based upon evidence that the additional occupant had a history of abusive and violent conduct towards her, which included his unwanted presence in the petitioner's apartment and an incident that led to his arrest.
- The Second Department (Justice Brathwaite Nelson authoring, Justices Leventhal, Maltese, and LaSalle joining) held that the petitioner was entitled to the VAWA's housing protections.

Other Notes

- The Second Department briefly discussed the history of the VAWA. The court noted that "the VAWA specifically provides that an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking, shall not be construed as a serious or repeated lease violation, or good cause for terminating assistance to the victim."
- The Second Department also described the petitioner's history of interactions with the additional occupant, including his history of stalking, intimidation, harassment, and physical assault. "This unrefuted testimony established incidents of domestic violence and a course of conduct by McGill directed at the petitioner that would cause a reasonable person to fear for her safety or suffer substantial emotional distress." The Second Department held that the petitioner's testimony was "sufficient to establish that she was entitled to the protections of the VAWA."
- Noting that there was no evidence presented during the hearing from which the hearing officer could conclude that the petitioner voluntarily permitted the additional occupant to reside at her home, the Second Department held that "it would be unreasonable and inconsistent with the purpose of the statute to require the petitioner to seek permission to add McGill as an occupant of the unit."

Julian v. Fire Dept. of City of New York, 191 A.D.3d 676, 137 N.Y.S.3d 716 (2d Dept. 2021)

Issue: workplace age and disability discrimination; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a challenge by a retired firefighter alleging to the denial of a promotion on the basis of age and disability. The petitioner challenged a determination by the NYC Fire Department denying the promotion. The petitioner also challenged a determination by the New York State Division of Human Rights (DHR) dismissing the

petitioner's discrimination complaint for untimeliness since it was not filed within the time period required by law. The petitioner then commenced this action.
- The Supreme Court, Kings County denied the petition and the petitioner appealed.
- In an unsigned opinion, the Second Department (Justices Dillon, Chambers, LaSalle, and Iannacci) affirmed, holding that "the Supreme Court properly determined that the DHR's determination to dismiss the complaint was not arbitrary and capricious and had a rational basis" and that the action against the FDNY was also untimely.

Lewis v. New York State Division of Human Rights, 163 A.D.3d 818, 81 N.Y.S.3d 485 (2d Dept. 2018)

Issue: workplace discrimination and retaliation; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a challenge to a determination by the New York State Division of Human Rights (DHR) dismissing petitioner's complaints of unlawful discrimination and retaliation by her former employer. The petitioner commenced this proceeding for review of that determination.
- The Supreme Court, Queens County denied the petition and dismissed the proceeding on the merits. The petitioner appealed.
- The Second Department (Justices Mastro, Rivera, Austin, and LaSalle) affirmed, holding in a brief decision that "DHR conducted an adequate investigation" and "the record demonstrates that DHR's determination was neither arbitrary and capricious nor lacked a rational basis."

Martucci v. Nerone, 198 A.D.3d 654, 156 N.Y.S.3d 52 (2d Dept. 2021)

Issue: incarceration during COVID pandemic; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns an appeal by a father who was incarcerated for two months in late 2020 during the COVID-19 pandemic. The father was incarcerated after his child's mother commenced an action against him for violation of a child support order. The Family Court, Richmond County held that the father was in willful contempt of the order and held that he be sent to jail for two months unless he paid $12,000 within just over three months of the court's order. The father appealed.
- In an unsigned opinion, the Second Department (Justices LaSalle, Rivera, Duffy, and Ford) affirmed, holding that the Family Court did not improvidently exercise its discretion.

Point of Concern

- The father was jailed for violating his child support order during the COVID-19 pandemic. The Second Department referenced the father's health issues in the final sentence of its opinion, stating that "nor [do the father's] alleged health issues warrant reversal of the orders of commitment." The Second Department failed to elaborate on

these health issues or discuss the incredibly high COVID-19 transmission rates in prisons and jails.

Matter of Keanu S., 167 A.D.3d 27, 86 N.Y.S.3d 522 (2d Dept. 2018)

Issues: whether a child placed in Children's Services custody due to his adjudication as a juvenile delinquent is eligible to petition for Special Immigrant Juvenile Status to avoid deportation; not authored by Justice LaSalle; panel vote: 3-1; not reviewed by the Court of Appeals.

Summary

- This case concerns a 16-year-old noncitizen child's efforts to apply for Special Immigrant Juvenile Status ("SIJS") to pursue a path to lawful status and avoid deportation. The child, Keanu, came to the U.S. from Jamaica after he was abandoned by his mother and his father was murdered. Keanu was adjudicated a juvenile delinquent in Family Court for his role in two fights that resulted in injuries to others. He was then placed in the custody of the Children's Services agency. Keanu argued that because he was in Family Court custody, he was eligible to petition for SIJS as an "abused, neglected, or abandoned" child "dependent on a juvenile court."
- The Family Court denied Keanu's motion for an order that would allow him to petition for SIJS.
- The Second Department affirmed the Family Court in a divided opinion. The majority (Justice Rivera authoring, Justices LaSalle and Roman joining) held that allowing a child to apply for SIJS on the basis of a juvenile delinquency adjudication would conflict with Congress's intent in creating the SIJS program. The majority opined, "We cannot fathom that Congress envisioned, intended, or proposed that a child could satisfy this requirement by committing acts which, if committed by adults, would constitute crimes."
- The dissent (Justice Barros) comprehensively addresses each point made by the majority and explains why they are inconsistent with established law. The dissent points out that pursuant to the plain language of the statute, Keanu is dependent on a juvenile court, and that the majority's speculation about Congress's intent is unsupported by legislative history and belied by USCIS practice.

Points of Concern

- The majority disregards cardinal principles of statutory interpretation and relies on unsupported speculation about legislative intent to reach its decision, which imposes harsh consequences on child who has experienced significant trauma.
- Under both federal and New York law, when interpreting a statute, courts must look first to the statutory text, which is the clearest indicator of legislative intent. The SIJS statute is clear: It provides that a child is dependent on a juvenile court when the court has placed the child "under the custody of[] an agency or department of a State," as Keanu was. And the statute contains no exception for custodial placements resulting from a juvenile delinquency adjudication.
- Instead of following the statutory text, the majority invokes Congressional intent. But the majority does not support with any evidence its claim that Congress would not have

wanted children deemed juvenile delinquents to benefit from SIJS. To the contrary, as the dissent points out, SIJS was designed to protect children who have suffered parental abuse, neglect, or abandonment—like Keanu. And the USCIS policy manual specifically provides that with respect to SIJS, juvenile delinquency findings are not considered criminal convictions and that delinquency courts can be qualifying juvenile courts.

- Moreover, the majority's equating juvenile offenses with adult criminal convictions ignores the many reasons why children are justifiably treated less harshly than adults in the legal system. Indeed, Keanu's acts of aggression, when understood in the context of his traumatic childhood, could be considered evidence that he needs more protection from the State, not less. As the dissents states, "The majority has, in effect, created an immigration consequence to the juvenile delinquency adjudications of abused, neglected, or abandoned children"—a consequence that could apply to children who have committed such minor offenses as spraying graffiti.
- The majority's decision was at odds with other decisions in New York Supreme Court and Family Court as well as decisions from several other state courts.

Matter of Tyler L., 197 A.D.3d 645, 150 N.Y.S.3d 747 (2d Dept. 2021)

Issue: waiver of *Miranda* rights by a juvenile; not authored by Justice LaSalle; panel vote: 3-2; not reviewed by the Court of Appeals.

Summary

- This case is an appeal brought by Tyler L. challenging the Family Court's denial of his suppression motion and his adjudication as a juvenile delinquent.
- After being arrested, Tyler was interviewed by law enforcement officials. During this interview, which was videotaped, he made incriminating statements. Tyler moved to suppress these statements.
- The Family Court, Kings County denied the appellant's suppression motion, adjudicated him a juvenile delinquent, and placed him on probation for 12 months.
- The issue on appeal is whether the lower court erred in denying Tyler's motion to suppress his statements to law enforcement officials and in adjudicating him a juvenile delinquent.
- The Second Department (Justices LaSalle, Dillon, and Austin) affirmed, holding that Tyler's *Miranda* rights had been waived by him and his grandfather, who was present for Tyler's interrogation, and dismissed the probation order as academic. Justices Barros (joined by Justice Wooten) concurred in part and dissented in part.

Points of Concern

- The Second Department noted that an expert in juvenile forensic psychology stated that Tyler had an IQ of 74; was in the "borderline range of certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests;" and that he "could not have made an intelligent, knowing, and voluntary waiver of his *Miranda* rights during police questioning." Despite this evidence, the Second Department still determined that the Family Court's holding was "supported by the evidence," citing evidence that Tyler was able to complete "a test that required answers to 189 written questions in 20 minutes," was a "strong reader," and that he "had a basic comprehension

and understanding of *Miranda* rights at the time of his testing consistent with other 15-year-old adolescents of comparable abilities."

- Justices Barros wrote a concurrence/dissent that Justice Wooten joined. They argued the prosecutors failed to meet their burden to establish beyond a reasonable doubt "that the appellant, who was 15 years old with documented subnormal intelligence, voluntarily, knowingly, and intelligently waived his *Miranda* rights before giving statements to law enforcement officials during a custodial interrogation." The dissenters discussed numerous facts that were excluded from the majority opinion and that they argue weigh in favor of suppressing Tyler's statements to law enforcement. Among these facts were: the appellant, who was 15 years old and in the ninth grade, had reading comprehension at a fifth-grade level and listening comprehension at a fourth-grade level; had "overall intellectual abilities in the fourth percentile;" had "fundamental problems" with understanding *Miranda* rights and demonstrated a lack of understanding about "what it meant for a statement to be 'used against him;'" was listed as reading at a fourth-grade level in the same report cited by the majority to describe him as a "strong reader;" and was unable to consult with his grandfather prior to the interrogation. They also note that the grandfather had a conflict of interest since he was also the guardian of the alleged victim, and that the law enforcement officials verbally recited the *Miranda* rights "in a pro forma manner."

Monroe Equities, LLC v. State of New York, 145 A.D.3d 680, 43 N.Y.S.3d 103 (2d Dept. 2016)

Issue: unconstitutional taking of property; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This action is an appeal from a determination by the Court of Claims, where the court granted summary judgment to the State in an action brought by a landowner alleging that the application of the State's watershed regulations constituted a per se taking requiring compensation under the Takings Clause.
- The Second Department (Justices Leventhal, Miller, LaSalle and Nelson) affirmed, finding that the landowner had failed to establish a prima facie case that the property had suffered a complete elimination of value as the result of the regulations and that the challenged regulations were part of the background principles of the State's property laws "long before the claimant acquired title."

New York State Div. of Human Rights v. Town of Oyster Bay, 177 A.D.3d 893, 113 N.Y.S.3d 153 (2d Dept. 2019)

Issue: racial segregation in housing; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns an action brought by the Division of Human Rights against the Town of Oyster Bay and Long Island Housing Partnership, Inc. (together "the town and housing

partnership") for perpetuating racial segregation by restricting housing sales to existing relatives and their residents.
- The defendants separately filed motions to dismiss. The Supreme Court, Nassau County denied the motions, and the defendants appealed.
- In an unsigned opinion, the Second Department (Justices Chambers, Maltese, LaSalle, and Christopher) affirmed, agreeing with most of the Supreme Court's holding.

Point of Concern

- The Division of Human Rights asserted six causes of actions against the defendants. The Second Department disagreed with the Supreme Court's denial of the motion to dismiss with regards to three of these causes of action: discrimination in sale, rental, or lease of a housing accommodation; discrimination in the terms and conditions of the sale of a housing accommodation; and, printing and circulating statements, advertisements, or publications expressing discrimination. The Second Department held that the Supreme Court should have granted the parts of the motions to dismiss related to these causes of action because the defendants were not the type of actors that could be held liable for engaging in the discriminatory practices described in the relevant portions of the statute.

Noghrey v. Town of Brookhaven, N.Y.S.3d 341 (N.Y. App. Div. 2d Dept. 2019)

Issue: unconstitutional government taking of private property; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- Plaintiff purchased two parcels of property (Liberty Plaza and Diamond Plaza) that were zoned for business, with the intention of building shopping plazas. Four years later, Town zoning changes rendered the parcels residential. Plaintiff alleged that the rezoning effectuated a partial regulatory taking without just compensation.
- After a jury trial and appeal, two causes of action related to one of the parcels were severed and remitted to the Supreme Court for a new trial. Following the retrial, the jury found in favor of the defendants and a judgment was entered. Plaintiff appealed.
- The Second Department (Justices Roman, Hinds-Radix, Maltese, and LaSalle) affirmed.
    - Although the Second Department upheld a jury verdict finding a taking in relation to Diamond Plaza, collateral estoppel did not apply to establish any of the factors for Liberty Plaza, as the circumstances involving the two parcels were factually distinct.
    - Supreme Court was correct to deny plaintiff's motion to preclude or strike expert testimony as unreliable or consisting of inadmissible hearsay – these deficiencies spoke to the weight afforded to the testimony, not its admissibility.
    - Supreme Court correctly denied plaintiff's motion to set aside the jury verdict and for judgment as a matter of law, or to set aside the verdict as contrary to the weight of the evidence or for a new trial, as there was a valid line of reasoning and permissible inferences from which the jury could rationally conclude that the rezoning did not effectuate a partial regulatory taking.

Nour v. City of New York, 122 A.D.3d 596, 995 N.Y.S.2d 602 (2d Dept. 2014)

Issue: jury instructions on charge of malicious prosecution; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerned a lawsuit by a plaintiff to recover damages for malicious prosecution. The plaintiff was arrested and charged by NYPD officers, but both charges were dismissed. The plaintiff then sued the City for malicious prosecution. After a trial, the jury returned a verdict for the City. The plaintiff moved for a new trial, arguing the court improperly instructed the jury on what was required to establish malicious prosecution.
- The trial court denied the plaintiff's motion for a new trial.
- The Second Department (Justices LaSalle, Dickerson, Leventhal, and Sgroi) affirmed in a short, unsigned decision. The court held that the trial court correctly instructed the jury.

People v. Alas**,** 35 N.Y.S.3d 112 (N.Y. App. Div. 2d Dept. 2016)

Issue: risk assessment under sex-offender statute; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Queens County Court designated the defendant a level two registrant on the sex offender registry.
- In a short two-paragraph order, the panel (Justices Randall, Mastro, Maltese, and LaSalle) affirmed, rejecting the government's argument that the appeal was moot on the grounds the defendant had been deported but finding the Supreme Court properly assessed the risk points supported by clear and convincing evidence in the record.

Points of Concern

- The panel provides very short treatment of the appeal and dedicates a single sentence to analysis of the facts of the case.
- The panel opinion engages in no analysis, making it impossible to determine the propriety of its conclusions.

People v. Alexander, 41 N.Y.S.3d 746 (N.Y. App. Div. 2d Dept. 2016)

Issue: risk level assessment of person convicted of sex-offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the discretionary upward departure from the presumptive risk level assignment for a person convicted of a sex offense. Upon the recommendation of the Board of Examiners of Sex Offenders (the Board) the Kings County Court designated

defendant as a level three registrant on the sex offender registry, an upward departure from his presumptive risk level one designation. Defendant appealed.

- The Second Department (Justices Leventhal, Miller, LaSalle, and Braithwaite Nelson) affirmed the lower court's designation. It held that the state demonstrated by clear and convincing evidence that there were aggravating factors not adequately taken into account by the Risk Assessment Instrument (RAI). The opinion specifically identifies incidents where defendant committed forcible sexual acts and attempted rape, which were not accounted for in the RAI and supported the court's determination that an upward departure was warranted. The panel also rejected defendant's contention that the Supreme Court failed to sufficiently consider mitigating factors, such as his satisfactory conduct during his lengthy incarceration and the fact that he completed sex offender treatment, as these were already accounted for under risk factors 12 and 13.

People v. Anderson, 56 N.Y.S.3d 240 (N.Y. App. Div. 2d Dept. 2017)

Issue: risk level assessment of person convicted of sex-offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. Kings County Court designated defendant as a level three registrant on the sex offender registry, assessing him a total of 120 points and denying his request for a downward departure. On appeal, defendant challenged the assessment of points under risk factors 12 and 13, as well as the court's denial of his request for a downward departure.
- The Second Department (Justices Hall, Sgroi, Maltese, and LaSalle) held that the risk assessment was correct for risk factor 13, but incorrect for risk factor 12. Although it held that the lower court was correct to deny defendant's request for a downward departure from the presumptive risk level, it reversed the level three designation, calculating defendant at level two when correcting the assessment under risk factor 12.
    - For risk factor 13, the panel held that the Supreme Court correctly assessed defendant 20 points, rather than the 10 points assessed by the Board of Examiners of Sex Offenders, finding that the state demonstrated by clear and convincing evidence that the defendant engaged in unsatisfactory conduct during his confinement/supervision involving sexual misconduct.
    - For risk factor 12, the panel found that the state failed to prove by clear and convincing evidence that defendant had refused or been expelled from sex offender treatment to support its 15 point risk assessment. Although defendant had been discharged from two "residential treatment facilities," the state failed to show that he was receiving sex offender treatment at those facilities or that he was expelled from or explicitly refused to participate in sex offender treatment during his time at those facilities. The opinion notes that "conduct that places a defendant in a position where he or she could not receive treatment is not equal to refusal to

participate in treatment," and that "inferring refusal from a defendant's disciplinary record is not supported by the Guidelines."

- After subtracting the 15 points improperly assessed under risk factor 12, the panel found that defendant's point total put him in the range of a level two sex offender.

People v. Barnes, 120 A.D.3d 1355, 92 N.Y.S.2d 150 (2d Dept. 2014)

Issue: suppression of incriminating statement to law enforcement; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a motion by a criminal defendant charged with rape to suppress incriminating statements he made to law-enforcement officials. The defendant argued he had not been given proper *Miranda* warnings. The trial court denied the motion, and the defendant was convicted. He appealed, challenging the suppression ruling, certain jury instructions, and the effectiveness of his appointed counsel.
- In a five-paragraph unsigned opinion, the Second Department (Justices Skelos, Austin, Sgroi, and LaSalle) affirmed the conviction.
- On the suppression motion, the panel held the trial court erred in denying it, finding (without elaboration) "the evidence at the suppression hearing was insufficient to establish the defendant's statements to law enforcement were made after he knowingly, voluntarily, and intelligently waived his *Miranda* rights."
- The panel nonetheless held this error was harmless, stating (without specifics) that "the evidence of the defendant's guilt, without reference to the error, was overwhelming, and there was no reasonable possibility that the error might have contributed to the defendant's conviction."
- The panel rejected the appeal about juror instructions as being unpreserved.
- The panel rejected without discussion the ineffective-assistance-of-counsel claim.

Point of Concern

- Incriminating statements made by a defendant can have a significant impact on a jury. In the absence of any discussion of the other evidence, the panel opinion does not allow one to assess the extent to which the improper use of the statements at trial may have prejudiced the defendant.

People v. Benloss, 117 A.D.3d 1071, 986 N.Y.S.2d 625 (2d Dept. 2014)

Issues: ineffective assistance and *Brady* violation in criminal case; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- The case concerns a post-conviction challenge (under section 440 of the New York Criminal Procedure Law) in which a man convicted of second-degree murder argued he had been denied effective assistance at trial and that the prosecution had violated *Brady* by failing to disclose to the defense that one of its witnesses had a criminal charge pending against him. The trial judge denied his post-conviction challenge without conducting a hearing, and the man appealed.

- In a four-paragraph unsigned opinion, the Second Department (Justices Mastro, Skelos, Cohen, and LaSalle) affirmed denial of the post-conviction challenge.
- On the claim to ineffective assistance of counsel, the panel, without discussion of any facts, concluded, "The parties' submissions in support of an in opposition to the defendant's motion established that the defendant received meaningful representation at trial."
- On the *Brady* violation, the panel, without discussion of any facts, concluded, "Based upon the parties' submissions in support of an in opposition to the defendant's motion, there was no possibility that [nondisclosure of the pending criminal charge] affected the outcome of the trial."

Point of Concern

- The panel opinion engages in no analysis, making it impossible to determine the propriety of its conclusions.

People v. Bernard, 195 A.D.3d 740, 742, 145 N.Y.S.3d 402, 404 (2d Dept. 2021)

Issues: ineffective Assistance of Counsel, immigration; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case here involved a conviction that was a result of a guilty plea where the defendant alleged that he was not advised by his attorney of the immigration consequences of a plea. The defendant, a citizen of Trinidad and Tobago and lawful permanent resident of the United States, pleaded guilty to two felonies and was sentenced to time served. Years later the United States Department of Homeland Security initiated a removal proceeding against the defendant because one of the felonies was a deportable offense. The defendant moved pursuant to CPL 440.10 to vacate the judgments of conviction, contending that he was denied the effective assistance of counsel by his attorneys alleged failure to advise him of the clear immigration consequences of his pleas. The Supreme Court denied the motion without conducting a hearing.
- The Second Department (Justices Lasalle, Chambers, Barros, and Iannacci) reversed this denial and found that the transcript of the plea proceeding contained no evidence that defense counsel advised the defendant of such consequences of deportation and that because of his long-term relationship with the US, it was reasonable to believe that he might have rejected the plea if warned of the immigration consequences. The court remanded the case for a hearing.

Point of Concern

- This is a pretty straightforward application of the US Supreme Court's decision in *Padilla v. Kentucky*.

People v. Bisnauth, 51 N.Y.S.3d 599 (2d Dept. 2017)

Issue: evidence in criminal trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns an appeal of a criminal conviction on several grounds, including the introduction into evidence of prior statements to as impeachment material, the prosecutor's reference to those prior statements during summation, the trial court's failure to give limiting instructions when the impeachment material was introduced, ineffective assistance of counsel, denial of defendant's request for a missing witness charge, and denial of defendant's motion to vacate the judgment on the grounds of a *Brady* violation.
- The Second Department (Justices Balkin, Austin, Sgroi, and LaSalle) rejected each of defendant's contentions and upheld the conviction.
    - It held that defendant's contentions with respect to the impeachment material were unpreserved for appeal, and even if they were, that any error was harmless as the evidence of defendant's guilt was overwhelming.
    - The panel concluded that defendant as not deprived of the effective assistance of counsel by his attorney's failure to preserve some of these claims.
    - It held that the trial court was correct to deny the defendant's request for a missing witness charge because his codefendant was not called to testify, as the testimony of a codefendant who has pleaded guilty is "presumptively suspect" and a prosecutor would not normally be expected to call such a witness at trial.
    - Lastly, the opinion summarily dismisses defendant's plea to vacate the judgment on the ground that the prosecution committed a *Brady* violation by failing to disclose that a witness had been a police informant, finding that "there was no reasonable possibility that such nondisclosure affected the outcome of the trial."

Point of Concern

- The opinion does not engage in meaningful factual analysis to support its conclusions. The panel seemed quick to conclude that any error by the lower court would have been harmless—relying on this rationale to support rejecting three of the issues raised—but does not provide any detail to explain why the error could not have plausibly impacted the outcome.

People v. Boyd, 121 A.D.3d 658, 993 N.Y.S. 184 (2d. Dept. 2014)

Issue: departure from guidelines to raise risk level of person convicted of sex-offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a dispute over the risk level assigned a person convicted of a sex offense. Following a hearing, the County Court departed from standard risk-assessment assignment to raise the level from two to three in light of the state's claim he had failed to properly register as a sex-offender in New Jersey.
- In a four-paragraph unsigned opinion, the Second Department (Justice Skelos, Roman, Hinds-Radix, and LaSalle) rejected the appeal.
- The panel opinion stated the record clearly established "an aggravating factor" justifying departure from the risk-assessment instrument: "The proof presented at the hearing established, inter alia, that the defendant was convicted in New Jersey of failing to

register as a sex offender, which justified the court's determination to grant the People's request for an upward departure."

People v. Breland, 178 A.D.3d 716, 115 N.Y.S.3d 427 (2d Dept. 2019)

Issues: *Brady* violation, fair trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This is the appeal of a criminal conviction where the defendant alleged that the prosecution violated *Brady v. Maryland* by failing to turn over evidence that a witness had collected a $2,000 reward from Crime Stoppers.
- The Second Department (Justices Balkin, Cohen, Miller, and Lasalle) held that while the prosecution has the duty to disclose evidence affecting the credibility of a witness under *Brady* and *Giglio v. United States*, "there was no evidence that the prosecution was aware of the $2,000 reward at the time of the defendant's trial, as the identity of individuals providing information to, and collecting rewards from, Crime Stoppers is kept confidential." Further, the court held that because the prosecution had disclosed that the witness received $12,000 in exchange for his cooperation in the case, and the defense extensively cross examined him on this and other inconsistent statements, there was "no reasonable probability that additional cross-examination of that witness concerning the $2,000 reward would have yielded a different result."

Point of Concern

- The panel decision does not state that prosecutors have any affirmative duty to get evidence that is exculpatory or favorable to the defendant. The decision could be read to say that because the prosecution did not know of the $2,000 reward, even if they reasonably should have known or easily could have acquired that information, a *Brady* violation did not occur.

People v. Bridgeforth, 119 A.D.3d 600, 987 N.Y.S.2d 869 (2d Dept. 2014), *rev'd,* 28 N.Y.3d 567 (2016)

Issue: discrimination on the basis of skin color in striking prospective jurors; not authored by Justice LaSalle; panel vote: 4-0; reversed unanimously (6-0) by the Court of Appeals.

Summary

- This case concerns a criminal defendant's claim under *Batson v. Kentucky* that the prosecution discriminatorily used peremptory strikes to exclude five dark-skinned people from the jury in his trial. The defendant argued that such discrimination violated the equal protection guarantees of the U.S. and New York Constitutions and that he should be given a new trial. Confronted with this *Batson* challenge, the prosecution failed to offer a non-discriminatory reason for excluding the juror at issue—"a dark-complexioned Indian-American woman" whom the prosecution believed to be African-American or Guyanese.

- The trial court rejected the defendant's *Batson* challenge, and the defendant was convicted.
- The Second Department (Justices Skelos, Lott, Roman, and LaSalle) affirmed the conviction in an unsigned opinion. The court rejected the *Batson* claim in a two-sentence paragraph, ruling without analysis that "dark-colored" people were not "a constitutionally cognizable class protected under the Equal Protection Clause of the United States and New York Constitutions." The court therefore concluded that the defendant had failed to establish even a prima facie case of discrimination under the first step of the *Batson* analysis.
- The Court of Appeals unanimously reversed, holding that "[o]ur State Constitution and Civil Rights Law plainly acknowledge that color is a 'status that implicates equal protection' concerns and therefore a *Batson* challenge may be based on color." Accordingly, the Court of Appeals ordered a new trial
- Judge Garcia concurred in the decision and wrote separately to argue that a new trial was clearly warranted because the prosecution failed to articulate any non-discriminatory reason for the peremptory strike at issue and therefore that the court did not need to reach the question of whether skin color is a cognizable basis for a *Batson* challenge.

Points of Concern

- The Second Department's decision would have opened the door to widespread racial discrimination in jury selection. As the Court of Appeals pointed out, "the established protections of *Batson*" would "be eviscerated by allowing challenges based on skin color to serve as a proxy for those based on race."
- The Court of Appeals also pointed out that "[d]iscrimination on the basis of one's skin color"—distinct from discrimination on the basis of race—"has been well researched and analyzed." The Second Department's decision appeared oblivious to the reality of discrimination on the basis of skin color.
- The Second Department summarily rejected the defendant's claim without engaging with the egregious facts of the case or the well-established law holding that color is a protected class under New York law. The Court of Appeals noted that it was "clear from the record that the prosecutor failed to provide a reason for why he excluded the juror" at issue beyond the juror's skin color. The Court further observed that the Equal Protection Clause of the New York Constitution explicitly prohibits discrimination on the basis of both "race" and "color." Thus, even though there had been no Court of Appeals precedent prior to this case expressly prohibiting striking prospective jurors based on their skin color, the Second Department's failure to even reference New York law's recognition of skin color as a protected classification was glaring.

Other Notes

- The Court of Appeals acknowledged it had previously held in *People v. Smith*, 81 N.Y.2d 875 (1993), that a *Batson* challenge may not be based on "the exclusion of 'minorities' in general." But as the Court of Appeals explained, "Using peremptory strikes to exclude 'minorities'—a category that includes a vast and varied group of individuals that is subject to change based on census and other demographic data based on population—is quite different from excluding potential jurors because they share a similar skin color." In

any event, the Second Department's decision did not cite *Smith* and therefore cannot claim to have relied on that holding in rejecting the defendant's *Batson* claim.

People v. Brown, 61 N.Y.S.3d 101 (2d Dept. 2017)

Issue: discriminatory jury selection and admissibility of evidence; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals

Summary

- This case concerns a prosecutor's racially discriminatory peremptory challenges to two prospective Black jurors. During jury selection, defendant raised a Batson challenge, arguing that the prosecution was exercising its peremptory challenges in a discriminatory manner.
    - The prosecutor's explanation for the challenges cited one juror's facial expressions, which indicated that the juror would be inclined to disbelieve police officers, and unsatisfactory responses to questions posed during voir dire.
    - Defense counsel argued that other prospective jurors who were not Black had answered in the same way and had not been challenged.
    - The Queens County Court held that the prosecutor's explanation for challenging one of the prospective jurors was pretextual, and seated her as a juror; however, it held that the explanations for two of the other challenges were not pretextual and denied the defendant's application with respect to those two prospective jurors.
- The Second Department (Justices Dillon, Roman, Miller, and LaSalle) held that the prosecutor's nonracial explanations for challenging the two jurors were pretextual and that defendant was entitled to a new trial. The panel outlined the three-step Batson test to determine whether a party has used peremptory challenges for an impermissible discriminatory reason. It then noted that the prosecution's race-neutral reasons for challenging the prospective jurors were not applied equally to exclude people who were not Black. It explained that "although the uneven application of race-neutral factors does not always indicate pretext where the prosecution can articulate other legitimate reasons to justify the uneven use of its challenges, the prosecution here failed to do so."
- The panel additionally ruled on defendant's contention that the trial court erred in admitting evidence that the police found cash in his possession when he was arrested. The panel concluded that the evidence was properly admitted because it was relevant to the drug offense charged, which required intent to sell.
- Lastly, in dicta, the panel agreed with the defendant that he was incorrectly sentenced as a second felony offender based on an out-of-state conviction, but it did not need to decide on this matter because a new trial was required.

Point of Concern

- The panel provides very short treatment of why the evidence that defendant possessed cash when he was arrested was relevant and admissible. It seems to indicate that possession of cash is always admissible when intent to sell is an element of a criminal charge.

/*People v. Buyund*, 179 A.D.3d 161, 112 N.Y.S.3d 179 (2d Dept. 2019), *rev'd*, 37 N.Y.3d 532 (2021)

Issues: (1) whether defendant's challenge to sex offender certification was preserved for appeal; (2) whether defendant was correctly certified as a sex offender based on his conviction; authored by Justice LaSalle; panel vote: 4-0; reversed 4-2 by the Court of Appeals.

Summary

- This case concerns a criminal defendant's challenge to the legality of his certification as a sex offender. The defendant pleaded guilty to burglary in the first degree as a sexually motivated felony and, consistent with the plea agreement, was certified as a sex offender during sentencing. He did not object to the certification during the plea or at sentencing. On appeal, he argued that his offense of conviction was not enumerated in the relevant statute as an offense for which certification as a sex offender was required.
- In a unanimous decision authored by Justice LaSalle (joined by Justices Scheinkman, Dillon, and Maltese), the Second Department agreed with the defendant and vacated the part of his sentence requiring him to register as a sex offender. In doing so, the court agreed with the defendant that he did not need to preserve the challenge to his certification because it fell within an exception to the preservation requirement for certain challenges to unlawful sentences.
- In a 5-2 decision, the Court of Appeals reversed. The majority decision, authored by Judge Cannataro, held that sex-offender certification is not a part of a defendant's sentence and therefore a challenge to certification is not exempt from the preservation requirement. The court recognized, however, that on remand the Second Department could still consider the defendant's unpreserved challenge in the "interest of justice." The majority decision did not reach the merits of the defendant's challenge to his certification.
- The dissenting decision, authored by Judge Wilson and joined by Judge Rivera, agreed with the Second Department on both preservation and the merits. The dissent contended that the majority's holding on preservation ran counter to Court of Appeals precedent holding that a challenge to sex offender certification is a sentencing challenge. The dissent also argued that the Second Department correctly concluded the defendant's offense did not require him to certify as a sex offender.
- On remand, the Second Department—this time in a unanimous unsigned decision joined by Justice LaSalle—reaffirmed its earlier ruling on different grounds. This time, the court reached the defendant's unpreserved challenge to his certification "as a matter of discretion in the interest of justice" and again concluded that he was not required to certify as a sex offender.

Points of Concern

- Justice LaSalle's decision in this case evinced a principled adherence to the law. On preservation, although the decision was later reversed, the Second Department's holding was consistent with what Judge Rowan's dissent at the Court of Appeals described as "precedent mak[ing] clear that certification as a sex offender . . . is part of a defendant's sentence" and therefore not subject to the preservation requirement. This could mean that Justice LaSalle believed he was bound by precedent in reaching the defendant's claim, rather than interpreting ambiguous case law with attentiveness to the defendant's rights.

But the fact that the Second Department on remand exercised its discretion to look past the preservation issue in the interests of justice suggests that the court may not have issued its original decision merely because it felt constrained to do so.

- On the merits, Justice LaSalle's decision rigorously applied principles of statutory construction to hold that the defendant's offense of conviction—which undisputedly involved sexual conduct—did not constitute a crime for which certification was required. The decision acknowledged that "it may have been the intent of the Legislature" to require certification for a broad range of offenses, but the statutory language as drafted was unambiguous and did not include the defendant's offense as one warranting certification. Thus, in ruling for the defendants, Justice LaSalle wrote that the court was "constrained to give effect to the plain meaning of the statute as written." Judge Wilson's dissent at the Court of Appeals agreed that while this result may have been a "deliberate choice [by the Legislature] or inadvertence or careless drafting," "the statutory language is quite clear that the crime of sexually motivated burglary is not statutorily specified as a crime" requiring certification.

Other Note

- The Second Department held that the defendant's other claim—that his sentence of imprisonment was excessive—was precluded by his valid waiver of the right to appeal.

People v. Caballero, 27 N.Y.S.3d 84 (2d Dept. 2016)

Issue: rights of criminal defendant at trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns a post-conviction challenge in which a defendant convicted of second-degree murder appealed from a judgment of the Queens County Supreme Court.
- In a short decision, the panel (Justices Leventhal, Dickerson, Duffy, and LaSalle) summarily rejected the defendant's arguments that his conviction was not supported by legally sufficient evidence and that his Sixth Amendment rights had been violated. The court next rejected an argument that the trial court had admitted hearsay evidence finding the evidence fell within the exception for excited utterances. Finally, the court rejected the defendant's argument that the prosecution had failed to disclose statements of a prosecution witness because the prosecution had represented there were no such statements.
- The defendant sought leave to appeal two years later on the grounds that he had been provided with ineffective assistance of counsel but the same panel denied leave to appeal.

Points of concern

- The opinion engages in no analysis, making it impossible to determine the propriety of its conclusions.

People v. Carman, 194 A.D.3d 760, 147 N.Y.S.3d 119 (2d Dept. 2021), *aff'd*, 38 N.Y.3d 972, 187 N.E.3d 452 (2022)

Issues: risk assignment to sex-offender, ineffective assistance of counsel; not authored by Justice Lasalle; panel vote: 3-1; affirmed 5-2 by the Court of Appeals.

Summary

- This case concerns a defendant convicted of child pornography. In its risk assessment instrument, the Board of Examiners of Sex Offenders assessed a total of 60 points against the defendant, resulting in a presumptive level one classification. The District Attorney argued the defendant should be assessed 120 points, making him a presumptive level three. The County Court assessed the defendant 110 points, making him a presumptive Level Three. The defendant appealed.
- In an unsigned opinion, the Second Department (Justices Dillon, LaSalle, and Connolly) affirmed the lower court's assessment of points to the defendant. Justice Barros dissented.
- On appeal, in a pro se supplemental brief the defendant argued he was denied effective assistance of counsel because "his attorney did not permit him to speak to the court, failed to advise him prior to the SORA hearing that the People intended to argue for the assessment of points in addition to those assessed by the Board, and failed to preserve an objection about the timeliness of the People's intention to deviate from the Board's RAI." The panel opinion asserted that these actions did not meet the standard for ineffective assistance of counsel.
- There was also a dispute between the majority and the dissent over whether defense counsel's not requesting a downward departure constituted ineffective assistance of counsel.
- The majority held that because the pro se defendant did not specifically allege that his counsel was ineffective for not requesting a downward departure, the issue was unpreserved for review by the court. However, it held that if it was properly before the court, "the omission was not so egregious or prejudicial as to deprive the defendant of the effective assistance of counsel" and the nature of the offense made it such that a downward departure was not appropriate.
- The dissent (Justice Barros) countered that the issue was properly before the court. The dissent also would have held defense counsel was ineffective for not requesting a downward departure since the case involved child pornography and given the Court of Appeals ruling in *People v. Gillotti*. In *Gillotti*, the Court of Appeals recognized that, because of the nature of child pornography, defendants tend to be scored excessively and courts assigning risk levels should exercise their discretion to issue downward departures. The dissent continued, "[G]ven that the defendant never requested a downward departure, it is improper for my colleagues in the majority to presuppose that any such request, based upon mitigating circumstances that were never presented, would have had little or no chance of success in lowering the defendant's level three classification."
- The Court of Appeals reviewed and affirmed by a vote of 5-2. Judges Wilson and Rivera dissented "for reasons stated in the dissenting opinion by Justice Betsy Barros at the Appellate Division."

Point of Concern

- The Panel Decision did not substantively engage with *People v. Gillotti*'s recognition that people convicted of child pornography offenses can be scored excessively in a way that the risk assessment instrument is not equipped to handle.

***People v. Corbin*,** 121 A.D.3d 803, 993 N.Y.S.2d 746 (2d Dept. 2014)

Issue: waiver of right to appeal during guilty plea; not authored by Justice LaSalle; panel vote: 3-1; not reviewed by the Court of Appeals.

Summary

- This case is an appeal brought by a man who was convicted of criminal possession of a weapon after having entered a guilty plea. He appealed, seeking to suppress some physical evidence that was used against him.
- The issue before the Court is whether the defendant validly waived his right to appeal, which was a condition of his plea agreement. Before the defendant entered his guilty plea, the Supreme Court questioned the defendant with regards to a waiver form that the defendant signed, and advised him that some constitutional issues would survive the waiver. The defendant argued that his waiver of his right to appeal was invalid because he had not been told which constitutional issues he could and could not appeal as a result of the waiver.
- The Second Department (Justices Mastro, Sgroi, and LaSalle) affirmed the judgment of the lower court, holding that the defendant validly waived his right to appeal. The Second Department noted that the Supreme Court was not required to list "each and every potential appellate argument" that the defendant could raise, and that the waiver established "that the defendant appreciated" the consequences of the waiver.

Points of Concern

- Justice Balkin filed a dissenting opinion. Justice Balkin argued that the waiver was invalid because the hearing court's oral statement that "certain constitutional issues" were appealable contradicted the written form's statement that the "sentence and conviction will be final" and thereby created significant and unresolved ambiguity.
- Justice Balkin also considered the merits of the defendant's constitutional claim, which concerned the suppression of a handgun seized by an officer after the officer performed an inventory search of the defendant's car. Because none of the evidence satisfied the prosecution's burden of establishing the lawfulness of the inventory search, Justice Balkin argued that the Supreme Court should have granted the defendant's motion to suppress that evidence.

People v. Corley, 197 A.D.3d 1324, 151 N.Y.S.3d 900 (2d Dept. 2021)

Issue: appeal of criminal conviction for being excessive; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a defendant's appeal of his criminal conviction rendered by the County Court, Orange County upon his guilty plea.
- In an unsigned, one-paragraph opinion, the Second Department (Justices LaSalle, Rivera, Duffy, and Ford) affirmed, holding that defendant did not waive his right to appeal his sentence but that "[n]evertheless, the sentence imposed was not excessive."

Point of Concern

- The panel holds that the defendant's sentence was not excessive in just one short sentence without further analysis or justification.

People v. Cullen, 42 Misc. 3d 140(A), 986 N.Y.S.2d 867 (2d Dept. 2014)

Issues: evidence in criminal proceedings, right to fair criminal trials; not authored by Justice LaSalle; panel vote: 3-0; not reviewed by the Court of Appeals.

Summary

- This case involved an appeal of a defendant's conviction of criminal trespass based on concerns regarding the evidence that was admitted by the Justice Court of the Town of Pelham, Westchester County. Prior to trial, the defendant asked the Justice Court to redact portions of a video that the prosecution intended to introduce at trial. The defendant argued that this evidence would be prejudicial. The Justice Court did not redact these portions of the video, and the defendant was convicted by a jury.
- The defendant appealed, arguing that the Justice Court violated her Sixth Amendment right to confront witnesses.
- In an unsigned opinion, the Second Department (Justices Nicolai, LaSalle, and Marano) reversed and remitted the matter for a new trial. The Second Department held that "the prejudicial impact of the audio portion of the video outweighed any probative value. Thus, the audio should have been redacted." The Second Department added that by failing to redact the requested portions of the video, the "defendant was deprived of a fair trial."

People v. DeFelice, 82 N.Y.S.3d 90 (N.Y. App. Div. 2d Dept. 2018)

Issue: evidentiary disclosure under *Brady*; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals

Summary

- This case concerns whether, in a criminal trial, the state's failure to turn over information to the defense constituted a *Brady* violation. At trial in the Suffolk County Court, defense counsel requested to be given information by the state, arguing that it constituted *Brady* material. In the alternative, they requested that the court review the material to determine whether it should be disclosed under *Brady*. The court agreed to review the material in camera. No material was ultimately disclosed to the defendant, who was convicted of second degree murder, criminal facilitation, and hindering prosecution. Defendant

appeals his conviction, arguing that the failure to disclose the requested information was a *Brady* violation.

- On this appeal, the state was unable to provide any material that they presented to the trial court for in camera review, and they had no record in their files of what material may have been submitted to the trial court. The Second Department (Justices Scheinkman, Balkin, Sgroi, and LaSalle) held that, to the extent that material was produced to the trial court for in camera review, it is properly part of the record, and the defendant's *Brady* claim would be reviewable on direct appeal. It therefore directed the lower court to hold a hearing to reconstruct the record as to what, if any, material was provided for in camera review and then to report back to the Second Department.
- NOTE: The case returned to the Second Department for consideration of a different evidentiary issue in *People v. DeFelice* (2020), see below.

People v. DeFelice, 119 N.Y.S.3d 491 (N.Y. App. Div. 2d Dept. 2020)

Issue: suppression of evidence in a criminal trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the suppression of evidence in a criminal trial and the state's failure to turn over information to the defense constituted a *Brady* violation. At trial in the Suffolk County Court, defense counsel requested to be given information by the state, arguing that it constituted *Brady* material. In the alternative, they requested that the court review the material to determine whether it should be disclosed under *Brady*. The court agreed to review the material in camera. No material was ultimately disclosed to the defendant, who was convicted of second-degree murder, criminal facilitation, and hindering prosecution. Defendant appealed to the Second Department on the basis that this failure to disclose constituted a *Brady* violation. On appeal, the state was not able to identify what information had been submitted for in camera review, so the Second Department remitted the case to the lower court for a hearing to reconstruct the record (see *DeFelice* 2018, above). The case now returns to the Second Department for consideration of the *Brady* claim, as well as claims that the court improperly failed to suppress (1) defendant's statements made before receiving a Miranda warning and (2) portions of defendant's written statement pertaining to uncharged drug crimes.
- The Second Department (Justices Scheinkman, Balkin, LaSalle, and Wooten) affirms the lower courts conviction, holding that (1) the undisclosed information was not *Brady* material, (2) defendant's statements to law enforcement officials were properly admitted because they were not the product of custodial interrogation and therefore did not require a Miranda warning, and (3) although portions of the defendant's written statement related to uncharged drug crimes should not have been admitted at trial, the court's error in admitting them was harmless.
    - With respect to the *Brady* material, the panel lays out the legal standard for establishing a *Brady* violation and then concludes that, after reviewing the evidence at issue, it was not *Brady* material. It does not elaborate on this further or discuss the nature of the information sought by the defense.

- With respect to the statements to law enforcement, the panel holds that defendant's interview with law enforcement at his home after calling 911 was not a custodial interrogation. Nor was his conversation with officers at the police station, where he voluntarily accompanied them to assist in locating his girlfriend. The panel also notes that the defendant's statements after being advised of and voluntarily waiving his Miranda rights were voluntarily given.
- With respect to portions of the defendant's written statement pertaining to uncharged drug crimes, the panel holds that the court should have redacted them, as they were not material to the incident at issue or necessary to assist the jury in understanding the narrative or facts of the case. However, the panel concludes that redacting this information would not have changed the verdict, and was therefore harmless error.

Points of Concern

- The panel does not critically engage with the question of whether defendant's interview with law enforcement at the police station was a custodial interrogation. It summarily accepts the proposition that defendant's statements were not part of a custodial interrogation merely because he traveled to the station voluntarily for a purpose other than interrogation. The opinion does not analyze the factors a court might consider in determining whether an interrogation is custodial and merely asserts that, under the briefly presented circumstances, "a reasonable person, innocent of any crime, would not have believed that he was in custody."
- The opinion seems quick to dismiss the lower court's error as harmless with respect to the statements about uncharged crimes, finding that "the proof of the defendant's guilt was overwhelming and there is no significant probability that the jury would have acquitted the defendant had the uncharged crimes evidence not been admitted." The court provides no further explanation or analysis of the improperly admitted evidence's potentially prejudicial effects. The opinion also states summary conclusions with respect to defendant's other claims.

*****People v. Delvillartron***, 120 A.D.3d 1429, 992 N.Y.S.2d 363 (2d Dept. 2014)

Issue: evidence supporting criminal conviction, probable cause for arrest; concurrence/dissent authored by Justice LaSalle; panel vote: 3-1; not reviewed by Court of Appeals.

Summary

- This case concerns an appeal by a man convicted of burglary and criminal possession of stolen property by a jury before the Supreme Court, Queen County. He argued that the evidence was legally insufficient to prove his guilt for either charge.
- The Second Department (Justices Balkin, Austin, and Barros, with Justice LaSalle concurring in part) vacated the defendant's conviction for criminal possession of stolen property in the third degree and reversed the judgment of the trial court, remitting for further proceedings. The Second Department held that the evidence was legally insufficient to prove the defendant's guilt of criminal possession, and that while it was

legally sufficient to establish the defendant's guilt of burglary, that conviction must also be reversed because the defendant's arrest was not supported by probable cause.

- Justice LaSalle authored an opinion concurring in part and dissenting in part. He agreed with the majority's holding that the evidence was legally insufficient to prove the defendant's guilt of criminal possession of stolen property but argued that the police officers had probable cause to arrest the defendant for burglary.

Other Notes

- The facts of the case are as follows:

> [T]he police received a radio transmission regarding a robbery in progress, perpetrated by two black males, at a Queens residence . . . When the police arrived, two of the complainants . . . used gestures to direct the officers' attention to two men, Myers and Santos, who were walking on the sidewalk, about four houses away. Myers and Santos, who were the only civilians on the block, started running, and the officers chased them . . . When Myers and Santos turned a corner several blocks from the complainants' house, the officers lost sight of them briefly. When one of the officers turned the corner, he did not see any people, but saw the rear passenger door on a sport utility vehicle being closed. The vehicle was legally parked and the engine was off. The officer ran to the vehicle and peered inside through the tinted windows. After spotting Myers and Santos in the rear passenger seat, the officer "punched" the driver's side window to alert the driver not to drive away. The officer pulled the driver's door open and saw the defendant in the driver's seat, "fumbling" with the keys and trying to put them in the ignition. The officer pulled the defendant out of the car, placed him face-down on the ground, and handcuffed him . . . The defendant was later taken to the precinct, where, after being advised of his rights, he made inculpatory statements.

- The defendant was charged and convicted of burglary in the second degree and criminal possession of stolen property in the third degree
- The majority and Justice LaSalle agreed that based on this fact pattern, there was not sufficient evidence to establish that the defendant possessed the property that Myers and Santos stole or acted in concert with Myers and Santos to steal that property. Accordingly, both agreed that the defendant's conviction for that offense should be vacated.
- Regarding probable cause for the arrest, the majority held while officers had probable cause to arrest Myers and Santos when they were pointed out by the victims, because officers only encountered the defendant while "he was sitting in the driver's seat of a lawfully parked car with the engine off and the keys not in the ignition, a full avenue away from, and not within sight of, the complainants' house" it was just as likely that he was not complicit in Myers and Santos's criminal activity as he was the getaway driver and thus officers did not have probable cause to arrest him at that time.
- In dissent, LaSalle concluded, "Contrary to the conclusion of the majority, in evaluating the totality of the circumstances, I do not believe the defendant's behavior can be viewed as 'innocuous.' Indeed, in my view, the totality of the facts and circumstances would lead a reasonable person possessing the same expertise as the arresting officer to

conclude that the defendant was acting in concert with Myers and Santos, in attempting to assist them to flee the scene of the home invasion."

- Accordingly, LaSalle would have affirmed the conviction for burglary in the second degree and vacated the conviction for burglary in the third degree based on the lack of sufficient evidence.

****People v. Derival*,** 122 N.Y.S.3d 78 (2d Dept. 2020)

Issue: whether Supreme Court erred in holding the defendant guilty of criminally negligent homicide in car collision; Justice LaSalle authored a dissent; panel vote: 3-2; not reviewed by Court of Appeals.

Summary

- This case concerns the appeal of a conviction for criminally negligent homicide resulting from a motor-vehicle accident. The dispute mainly concerned what weight to give various evidence, including the testimony of an expert witness and several witnesses from the scene of the accident.
- The majority of the panel (Justices Austin, Hinds-Radix, and Iannacci) held that the state failed to prove beyond a reasonable doubt that the defendant failed to perceive a substantial and unjustifiable risk which caused death of his passenger and thus the verdict of guilt was against the weight of the evidence. Specifically, the court found the evidence was contradictory and insufficient.
    - "Our dissenting colleagues suggest that the testimony supports a finding of criminal negligence. We cannot agree. To the contrary, the credible evidence demonstrates to a reasonable extent that DiNuzzo failed to yield to the defendant's vehicle, which had passed his vehicle, and then came into contact with the defendant's vehicle thereby setting off the sequence of tragic events which followed."
- Justice LaSalle dissented (in which Justice Chambers concurred) finding that the County Court correctly weighed the evidence when it convicted the defendant of criminally negligent homicide. "The defendant's decision to pass the two vehicles when it was clearly unsafe to do so, couple with the dangerous speeding, created as unjustifiable risk which ultimately caused the death of his passenger. Our colleagues in the majority disagree, and choose to credit the views of the defendant's expert—which are not only inconsistent with the physical evidence but also directly contradicted by the defendant's own account of the accident."

People v. DeWoody, 6 N.Y.S.3d 290; 127 A.D.3d. 831 (2d Dept. 2015)

Issue: departure from guidelines to raise risk level of person convicted of sex-offense; not authored by LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Duchess County Court departed from the risk assessment and ordered the person to register as a level three registrant on the sex offender registry. DeWoody was assessed a total of 100 points under the risk assessment instrument, which would presumptively require level 2 registration, but the trial court departed upward to level 3 (public registration for life) based on evidence that the "defendant had sexually abused two young girls eight years before his commission of the sex offenses that were the basis of this SORA proceeding." The defendant appealed.
- In unsigned opinion, the Second Department (Justices Bakin, Austin, Sgroi, and LaSalle) held that clear and convincing evidence of uncharged sex crimes could constitute an appropriate aggravating factor for purposes of an appropriate aggravating factor when those uncharged sex crimes had not been accounted for in the risk assessment. The panel further held that the lower court appropriately exercised its discretion in upwardly departing on the basis that the risk assessment undercounted the defendant's risk to reoffend.

Point of Concern

- The panel opinion provides a very cursory treatment of legal issues.

People v. Fox, 123 A.D.3d 844, 998 N.Y.S.2d 440 (2d Dept. 2014)

Issue: suppression of incriminating statements to law enforcement and adequacy of jury instructions; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerned a criminal defendant's appeal of his conviction for manslaughter in the second degree as a hate crime, among other charges. The underlying offense occurred when the defendant was 19 years old. He and a group of friends lured a gay man to their neighborhood with the intention of stealing marijuana or money from him. They originally had no intention of using force, but one of the defendant's friends suddenly attacked the victim and, with the defendant, chased the man onto a highway where he was struck and killed by traffic.
- The defendant appealed the denial of his motion to suppress statements he made to law enforcement. Detectives woke the defendant up in his college dorm room at 2am and took him to a precinct station house where they questioned him for eight minutes before administering *Miranda* warnings.
- The defendant also argued the trial court did not adequately instruct the jury that his intoxication at the time of the offense could have negated his intent to commit a crime. The defendant further appealed his conviction on several other grounds, including the propriety of jury instructions, the sufficiency of the evidence against him, and the effectiveness of his counsel, and further appealed his sentence as excessive.
- The Second Department (Justices LaSalle, Balkin, Hinds-Radix, and Leventhal) in an unsigned opinion rejected all of the defendant's arguments and affirmed his conviction and sentence. On suppression, the court found that the defendant was not "taken into

custody" until the point of his questioning when the detectives gave *Miranda* warnings, that he validly waived his *Miranda* rights before making incriminating statements. On the jury instructions, the court held the defendant's objection was unpreserved. The court stated that in any event, the instructions were sufficient, even though the trial court gave the intoxication instruction only with respect to two of the charges, because the jury could have made the "elementary logical inference[]" that the same instruction applied to the other charges. The court summarily rejected the defendant's other arguments.

Points of Concern

- The court's suppression ruling saw no problem with law enforcement's questioning of a teenaged defendant who was dragged from his bed in the middle of the night to a police station. The court acknowledged that the questioning began "at the station house" and that "the defendant was never told he was free to leave." Yet the court concludes that "a reasonable person" in those circumstances "would not have believe that he was in police custody." Moreover, the court unquestioningly accepted the trial court's reliance "on the testimony of several detectives, that the defendant was not taken into custody until he was provided with *Miranda* warnings and implicated himself in the attack on the victim"—essentially taking the detectives' own word for it that they did nothing wrong. In short, the court appeared to disregard clear indicia of custodial interrogation.
- The court's ruling on the jury instruction issue, while arguably consistent with precedent, failed to grapple at all with whether it is reasonable to assume that a jury would make the "logical inference[]" that intoxication could negate the intent element of an offense even though the intoxication instruction was not given regarding that offense. It seems equally plausible to think that a jury could infer from the lack of an intoxication instruction on one charge that it is not applicable to that charge, especially when that instruction was explicitly given regarding another charge.
- The court summarily dismissed the majority of the defendant's arguments, including his ineffective assistance of counsel claim and excessive sentence claim, providing essentially no analysis on which to evaluate the court's rulings.

People v. Gerald, 197 A.D.3d 1324, 153 N.Y.S.3d 588 (2d Dept. 2021)

Issues: application to withdraw guilty plea and ineffective assistance of counsel; not authored by Justice LaSalle; panel vote: 3-2; not reviewed by the Court of Appeals.

Summary

- This case concerns a defendant's appeal of his criminal conviction rendered by the County Court, Suffolk County upon his guilty plea. After entering his guilty plea and prior to his sentencing date, the defendant moved to withdraw his guilty plea, arguing that he pled guilty due to his misunderstanding of a relevant legal concept and of the prosecution's evidence of his guilt due to ineffective assistance of counsel. The prosecution opposed this motion. The County Court sentenced the defendant in accordance with the plea agreement, and the defendant appealed.
- In an unsigned opinion, the Second Department (Justices Miller, Duffy, and Wooten) reversed the judgment, holding that the defendant's plea was not entered "voluntarily, knowingly, and intelligently" and that the prosecution has not alleged any prejudice that

would result from the withdrawal of the guilty plea. The Second Department granted the defendant's application to withdraw his guilty plea "as a matter of discretion in the interest of justice," and remitted the matter to the County Court for further proceedings.

- Justice Chambers (joined by Justice LaSalle) authored an opinion concurring in part and dissenting in part. These Justices agreed "that the County Court erred in summarily denying" the withdrawal application but argued that "the record . . . does not warrant granting the defendant's application outright."

Point of Concern

- The dissenters support their argument that the defendant's application should not be granted outright by referencing facts that are unrelated to the key inquiry of the validity of guilty pleas: that they "be entered voluntarily, knowingly and intelligently." The dissenters instead reference comments that the defendant made before the County Court that were unrelated to his understanding of plea deal he was offered.

People v. Guallpa-Lema, 188 A.D.3d 1108, 132 N.Y.S.3d 648 (2d Dept. 2020)

Issues: assignment of risk level to sex offender; not written by Justice LaSalle; panel vote: 5-0; not reviewed by the Court of Appeals.

Summary

- This case involves whether a person designated a level two "sex offender" by the lower court was correctly scored points on factors 4, 6, and 8 of the risk-assessment instrument.
- The Second Department (Justices Mastro, Leventhal, Miller, Duffy, and Lasalle) found that he was properly scored because the defendant's statements in his presentence report and testimony of a detective supported points under factor 4, points were proper on factor 11 because the presentence report established that the victim was sleeping at the time of the offense, and points under factor 8 were appropriate because the defendant was less than 20 when he engaged in his first sexual offense.

People v. Hall, 44 N.Y.S.3d 102 (2d Dept. 2016)

Issue: voluntariness of post-*Miranda* statements made to law enforcement; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns defendant's appeal of his conviction on the grounds that the Kings County Court improperly failed to suppress statements he made to law enforcement officials after he was advised of his *Miranda* rights.
- The Second Department (Justices Balkin, Dickerson, LaSalle, and Connolly) affirmed the trial court's judgment, holding that the record supported the court's determination that, under the circumstances, the defendant's statements were not involuntary. The opinion provides that a court must look to the totality of the circumstances to determine the voluntariness of an inculpatory statement, and it must weigh factors including the duration

and conditions of detention, the manifest attitude of the police towards the defendant, the existence of threat or inducement, and the age, physical state, and mental health of the defendant. However, it does not provide a factual analysis to explain how it reached its conclusion. The panel dismissed the defendant's other contentions as unpreserved for appellate review, and, in any case, without merit.

Point of Concern

- The opinion does not describe the facts or circumstances surrounding defendant's statements to law enforcement, making it difficult to evaluate the propriety of its conclusion that they were voluntarily made.

People v. Hitchcock, 86 N.Y.S.3d 189 (2d Dept. 2018)

Issue: risk level assessment of person convicted of sex-offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Westchester County Court designated defendant as a level three registrant on the sex offender registry, assessing him 15 points under risk factor 11 based on a history of drug or alcohol abuse and assessing him 20 points under risk factor 13 for engaging in unsatisfactory conduct by engaging in sexual misconduct while confined or supervised. Defendant appealed.
- The Second Department (Justices Roman, Sgroi, Maltese, and LaSalle) held that the defendant was properly assessed as a level three sex offender. It found that the state presented clear and convincing evidence to support the challenged risk assessments, and that, in any case, defendant's contention challenging his assessment of 15 points under risk factor 11 was unpreserved for appellate review. The court also agreed with the Supreme Court's denial of defendant's application for a downward departure from his presumptive risk level designation because he failed to identify and establish the existence of an appropriate mitigating factor that tends to establish a lower likelihood of reoffense or danger to the community and was not adequately taken into account by the guidelines.

Point of Concern

- This short opinion provides no analysis of the evidence the state presented to support its risk assessment, and its finding that it was clear and convincing is conclusory. Similarly, it does not elaborate on what information defendant presented in his application for a downward departure.

People v. Hoedouglas, 183 A.D.3d 840, 122 N.Y.S.3d 558 (2d Dept. 2020)

Issues: race discrimination in jury selection; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals

Summary

- This case involves a defendant's claim that the prosecution was discriminatorily striking Black prospective jurors.
- The Second Department (Justices Scheinkman, Austin, Hinds–Radix, and LaSalle) held that the defendant did not demonstrate a pattern of discriminatory strikes or questions by the prosecution or that a disproportionate number of strikes was used against Black prospective jurors. The court declared that "defense counsel did not compare the challenged juror to similarly situated unchallenged prospective jurors, point to factors in the challenged juror's background that made him likely to be pro-prosecution, or enunciate any factor that suggested that the prosecutor exercised the challenge due to the prospective juror's race."

Point of Concern

- The panel opinion is sparse on facts that would allow an analysis of defense counsel's claim about the racial discriminatory use of strikes by the prosecution. Note that the *Batson* standard for showing racial discrimination in the jury voir dire is hard to meet and the court's suggestion that defense counsel must "point to factors in the challenged juror's background that made him likely to be pro-prosecution" could make that an even harder standard to meet.

People v. Jackson, 172 A.D.3d 748, 97 N.Y.S.3d 493 (2d Dept. 2019)

Issues: *Miranda* rights of criminal defendants and fair trials; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns whether the defendant made an intelligent, knowing, and voluntary waiver of his *Miranda* rights and whether the trial court was correct to deny the defendant's request to instruct the jury on the affirmative defense of duress. The defendant was arrested and charged with murder in the second degree, kidnapping in the first degree, and robbery in the first degree for the abduction of an individual who had a heart attack and died during the incident.
- The Second Department (Justices Chambers, Maltese, Lasalle, and Barros) affirmed the conviction. It held that the record of the pretrial hearing showed that the defendant's *Miranda* rights were validly waived and not the product of coercion. The court also held that there was no reasonable view of the evidence that would support a duress affirmative defense.

Point of Concern

- There is no reasoning supporting the panel's assertion that the record showed there was no coercion or violation of *Miranda*.

People v. Jones, 60 N.Y.S.3d 445 (2d Dept. 2017)

Issue: suppression of un-Mirandized statements to law enforcement; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the suppression in a criminal case of statements made to law enforcement without the benefit of a *Miranda* warning. During trial in Westchester County Court, the defendant moved to suppress statements made to law enforcement officials as the product of a custodial interrogation conducted without a *Miranda* warning. A hearing was held, and the court decided not to suppress the statements. The defendant was convicted and appealed the court's denial of his motion to suppress.
- The Second Department (Justices Leventhal, LaSalle, Brathwaite Nelson, and Christopher) held that the statements should have been suppressed, but that the error was harmless, and it upheld the conviction.
    - It found that the evidence presented at the suppression hearing established that a reasonable, innocent person would not have believed that he or she was free to leave the police station at the time defendant made his statements.
    - It also found that the court erred in concluding that defendant's statements were admissible because they were spontaneous, and not the result of interrogation.
    - However, the panel determined that the proof of defendant's guild was overwhelming and there was no reasonable possibility that the jury would have acquitted him, even if not for "this constitutional error."
    - The panel additionally dismissed as without merit the defendant's contention that the lower court improperly declined to suppress physical evidence.

Point of Concern

- The opinion includes no discussion of the underlying facts, making it difficult to evaluate the propriety of its conclusions. This is particularly troubling insofar as the panel summarily concludes that the lower court's constitutional violation was harmless error.

People v. Kohout, 44 N.Y.S.3d 470 (2d Dept. 2016)

Issue: risk level assessment of person convicted of sex-offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Queens County Court designated defendant as a level two registrant on the sex offender registry, assessing him a total of 95 points. Defendant appealed, contending that the Supreme Court should have downwardly departed from the presumptive risk level and found him to be a level one sex offender.
- The Second Department (Justices Balkin, Austin, Sgroi, and LaSalle) held that the lower court appropriately exercised its discretion in declining to depart from the presumptive risk level. The short opinion recites the defendant's burden under the law to identify an

appropriate mitigating factor and prove the existence of that factor in the case by a preponderance of the evidence. It then notes that if the defendant satisfies this burden, the court may, as a matter of discretion, downwardly depart from the presumptive risk level. The opinion then concludes that the Supreme Court "providently exercised its discretion" in designating defendant a level two sex offender.

Point of Concern

- Nowhere in this opinion does the panel address the circumstances of the individual defendant. It does not even note whether he identified a mitigating factor or proved its existence. Given the impact of the risk level designation on the defendant, it is troubling that the Second Department provided him with no meaningful explanation of its decision.

People v. Laboriel, 195 A.D.3d 1042, 146 N.Y.S.3d 810 (2d Dept. 2021), *aff'd*, 38 N.Y.3d 1109, 192 N.E.3d 333 (2022)

Issue: confinement beyond end of determinate prison sentence; not authored by Justice LaSalle; panel vote: 5-0; affirmed 5-2 by the Court of Appeals.

Summary

- This case concerns a man's challenge to his criminal sentence as illegal and excessive, and his challenge to the validity of his guilty plea. In a different decision, *People v Laboriel*, 191 A.D.3d 802 (2d Dept 2021), the Second Department affirmed (in a panel containing Justice LaSalle) the Supreme Court's sentence. The defendant then moved for reargument and the Second Department issued this decision.
- In this Second Department decision (Justices LaSalle, Mastro, Miller, Duffy, and Wooten), the court recalled and vacated its earlier decision which merely affirmed the Supreme Court's sentence. Here, the Second Department held that "[t]he sentence imposed was not illegal" and that "[t]o the extent that the defendant challenges the validity of his plea of guilty, this contention is improperly raised on this excessive sentence appeal."

Other Notes

- The Second Department decision and order on the motion is brief. The majority opinion from the Court of Appeals is similarly brief and affirms the Second Department's holding in four sentences.
- At the Court of Appeals, Justice Rivera wrote a dissenting opinion, which Justice Wilson joined. The dissent noted that "[i]t is undisputed that [the defendant] served the carceral period of his sentence and that when the time came for his release, he was held for an additional nine months" and that this "denial of liberty beyond a lawfully imposed sentence" was a governmental failure to uphold its promise to release a person who has served their entire carceral period of their sentence.

People v. Lagville, 26 N.Y.S.3d 316 (2d Dept. 2016)

Issue: risk assessment under sex-offender statute; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Richmond County Court designated the defendant a level three registrant on the sex offender registry.
- The panel (Justices Leventhal, Dickerson, Duffy, and LaSalle) affirmed, finding the government was entitled to an automatic presumption of the risk level because there had been "a clinical assessment that the offender was diagnosed with pedophilia."
- The court rejected the defendant's argument he was entitled to a downward departure from his presumptive risk level. The defendant identified an appropriate mitigating factor, receiving treatment, that could provide a basis for a discretionary downward departure but the court found he failed to establish that his response to treatment was exceptional.

People v. Larman, 175 A.D.3d 509, 509, 107 N.Y.S.3d 61, 62 (2d Dept. 2019)

Issues: jury trial rights of criminal defendants; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case involves an appeal from a criminal conviction where the defendant claimed that his fundamental right to a jury trial was denied. After trial, during jury deliberations, an alternate juror participated in deliberations with 11 sworn members of the jury while the 12th sworn juror was absent for a period of time. After this was called to the trial court's attention, it replaced the alternate juror with the 12^{th} juror and gave a curative instruction that the jury should disregard its prior deliberations.
- The Second Department (Justices Scheinkman, Cohen, Maltese, and LaSalle) reversed the defendant's conviction and ordered a new trial. Under the Criminal Procedure Law, "Following the court's charge, ... the jury must retire to deliberate upon its verdict" and "after the jury has retired to deliberate, the court must either (1) with the consent of the defendant and the People, discharge the alternate jurors, or (2) direct the alternate jurors not to discuss the case and further direct that they be kept separate and apart from the regular jurors. Once deliberations begin, a regular juror may be replaced by an alternate juror only with the defendant's written consent." Given that the court substituted the juror without a written waiver, the panel ruled the defendant's rights were violated.
- The decision represents a straightforward application of statutory law, and direct Court of Appeals precedence and protects the jury trial rights of defendants.

People v. Latham, 80 N.Y.S.3d 128 (2d Dept. 2018)

Issue: waiver of right to appeal upon guilty plea; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns whether a defendant who waived his right to appeal may challenge his sentence as excessive. Defendant pleaded guilty to a criminal charge and was sentenced, as a second felony offender, to an indeterminate term of imprisonment for two to four years. Defendant appealed the sentence as excessive.
- On appeal, the state argued the defendant had waived his right to appeal.
- The Second Department (Justices Rivera, Miller, Duffy, and LaSalle) determined that the waiver was invalid because it was not made knowingly, intelligently, and voluntarily; however, the sentence was not excessive. The opinion explains that, although "there is no mandatory litany that must be used in order to obtain a valid waiver of appellate rights… the best way to ensure that the record reflects that the right is known and intentionally relinquished by the defendant is to fully explain to the defendant, on the record, the nature of the right to appeal and the consequences of waiving it." It elaborates on what a thorough explanation should contain and finds that the Supreme Court did not provide such an explanation to the defendant. It also notes that a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal. The opinion also takes note of the fact that defense counsel barely participated during the proceedings and did not sign waiver form.

People v. Lee, 59 N.Y.S.3d 35 (2d Dept. 2017)

Issue: admissibility of evidence and reliability of cross-racial identification; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns an appeal from a criminal conviction by the Queens County Court. Defendant contended on appeal that police testimony recounting the location of her bedroom, based on information given to them by a nontestifying witness, violated the Sixth Amendment's Confrontation Clause and constituted improper bolstering and hearsay. Defendant also asserted that the trial court improperly declined to charge the jury on the unreliability of cross-racial identification.
- The Second Department (Justices Hall, Sgroi, Maltese, and LaSalle) rejected each of defendant's contentions and upheld the conviction and sentence.
    - With respect to the police testimony, the panel held that the 6th Amendment and bolstering objections were unpreserved for appellate review, and in any event, without merit. The hearsay objection was raised at trial, but the panel held that the jury instruction to not consider the testimony for its truth alleviated any possible prejudice to the defendant.
    - With respect to the unreliability of cross-racial identification, the panel found that the defendant never placed the issue in evidence during trial, and the court's charge correctly conveyed the applicable principles on witness credibility and identification testimony.

Point of Concern

- The opinion provides no analysis or reasoning to support its conclusions.

People v. Lowery**,** 35 N.Y.S.3d 684 (2d Dept. 2016)

Issue: risk assessment under sex-offender statute; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Kings County Court designated the defendant a level two registrant on the sex offender registry.
- In a four-paragraph unsigned order, the Second Department (Justices Randall, Roman, LaSalle, and Barros) found the Supreme Court had not adequately set forth its factual findings but nevertheless affirmed the decision after looking at the record and finding the risk assessment and denial of a downward departure was supported by clear and convincing evidence.
- The court found the risk assessment appropriate based on clear and convincing evidence that he engaged in a continuing course of sexual misconduct against the complainant. The court rejected the defendant's argument that the court erred in assessing his risk due to a history of substance abuse as supported by clear and convincing evidence where the defendant admitted "to the abuse of marijuana and hashish" and that the defendant was referred to a substance abuse treatment program "based on his history of substance abuse coupled with an elevated alcohol screening score.

Point of Concern

- The panel provides very short treatment of the appeal and dedicates a single sentence with no specific analysis to the defendant's argument that a downward departure was warranted.

People v. Martinez, 3 N.Y.S.3d 408 (2d Dept. 2015)

Issue: assignment of elevated risk level to person convicted of sex offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a decision by the Suffolk County Court to apply a 10-point assessment for "forcible compulsion" as part of the defendant's risk assessment score, which required the defendant to register as level 2. The defendant appealed.
- In a unanimous unsigned opinion, the Second Department (Justices Skelos, Miller, Hinds-Radix, and LaSalle) affirmed, holding that the court properly found that clear and convincing evidence of forcible compulsion as part of the offense – even though it was not an element of the crime.

- The defendant argued the lower court had improperly imposed the 10-point assessment for forcible compulsion because it was not an element of the underlying crime he had been convicted for leading to the SORA hearing. Quoting precedent, the panel held that SORA court is not limited to the elements of the crime and the SORA court could consider evidence from defendants' admissions, victim statements, and other trustworthy sources. The panel then held that the court properly relied on "the written statement to the Suffolk County Police Department made by the mother of the 5–year–old complainant and the defendant's admissions at the plea allocution demonstrated that the 44–year–old defendant wrapped his arm around the complainant's waist, which prevented the complainant from moving away from the defendant and enabled him to commit the crime of forcible touching."

People v. Menjivar, 993 N.Y.S.2d 166 (2d Dept. 2014)

Issue: assignment of risk level to person convicted of sex offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of a level 2 risk assessment to a person convicted of a sex offense, who had pled guilty to engaging in oral sexual conduct with a 14-year-old. At the hearing to assign a risk level, the lower court ordered the defendant to register as level 2 (public registration, for life), on the basis of a total score of 85 points on the risk assessment instrument, which included an assessment of 20 points for a finding that there were two victims—the 14-year-old and the defendant's two-year-old child who was present at the time of the oral sexual conduct with the 14 year-old. The defendant appealed.
- In an unsigned unanimous opinion, the Second Department (Justices Skelos, Roman, Hinds-Radix, and LaSalle) reversed and remanded, holding that there was not clear and convincing evidence that the two-year-old was a victim or witnessed or was aware of any of the sexual conduct. Accordingly, there was no basis to assess the 20 points for multiple victims, and the defendant was assessed at level 1.

People v. Mora, 195 A.D.3d 866, 145 N.Y.S.3d 839 (2d Dept. 2021)

Issues: ineffective assistance of counsel; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals

Summary

- This case involves a claim of ineffective assistance of counsel by a criminal defendant.
- The Second Department (Justices Lasalle, Austin, Barros, and Wooten) affirmed the defendant's conviction, holding that he received effective assistance of counsel. The court held that defense counsel's cross examination of witnesses, and his declining to present an affirmative defense case, did not constitute ineffective assistance of counsel. It

held that the decision to call an expert is generally a tactical decision and, in many instances, cross examination will suffice to challenge the prosecution's experts. The court held that "the record shows that trial counsel effectively cross-examined the People's witnesses, including the experts, and elicited testimony that was damaging to the People's case" and his decision to not present his own witnesses reflected a "reasonable legal strategy that the best way to defend this case was through impeachment of the People's witnesses."

Point of Concern

- The panel opinion is too sparse on facts to allow for an analysis of defense counsel's representation.

People v. Nettles, 186 A.D.3d 861, 128 N.Y.S.3d 610 (2d Dept. 2020)

Issue: probable cause for no-knock search warrant; not authored by Justice LaSalle; panel vote: 3-2; not reviewed by the Court of Appeals.

Summary

- This case concerns a defendant's appeal of his criminal conviction by the Kings County Supreme Court. Specifically, the defendant sought review of the denial of his motion to controvert a no-knock search warrant that the NYPD obtained based on information from a confidential informant. The police officers found a limited amount of contraband and a handgun after executing the search, and they charged the defendant with criminal possession of a firearm. The defendant moved to controvert the warrant and for a *Darden* hearing. The Supreme Court denied the motion and the defendant appealed.
- The Second Department (Justices Barros, Christopher, and Wooten) reversed. The court granted the defendant's motion to controvert the search warrant, dismissed the indictment, and remitted the matter to the Supreme Court. The Second Department held that the prosecution failed to meet their burden at the *Darden* hearing to establish that they had probable cause for the warrant.
- Justice Dillon, joined by Justice LaSalle, dissented, arguing that the conviction should be upheld. The dissenters argued that the informant had been proven reliable on prior investigations.

Point of Concern

- The dissenters dismiss evidence discussed by the majority opinion regarding contradictory information about the confidential informant's reliability. The dissenters speculatively stated that the contradictions were "perhaps by oversight or typographical error" in the affidavits that were submitted, and used this speculation to argue that the defendant's criminal conviction should be upheld.

People v. On Sight Mobile Opticians, 40 Misc. 3d 95, 100, 971 N.Y.S.2d 656 (App. Term 2d Dept., 9th & 10th Jud.Dists. 2013), *rev'd*, 24 N.Y.3d 1107, 26 N.E.3d 234 (2014)

Issues: First Amendment challenge to zoning provision governing signage; not authored by Justice LaSalle; panel vote: 3-0; reversed 6-0 by the Court of Appeals.

Summary

- This case involves a First Amendment challenge to a town's zoning laws. The defendant was charged with violating the Town of Brookhaven's zoning ordinance 57A-11 which prohibited commercial advertising on public property and roads. This was enacted to "avoid[] an unsightly proliferation of unnecessary signs," "[p]rotect[] the public from improperly located or distracting signs which create a hazard to said public by virtue of their construction, location and/or illumination" and allow "effective means for political expression." The defendant argued that 57A-11 was unconstitutional and the entirety of chapter 57A, which contained the provisions regulating the location and configuration of commercial and noncommercial signs, was unconstitutional because it impermissibly favored commercial speech over noncommercial speech.
- The Appellate Term (Justices LaSalle, Nicolai and Iannacci) held, that while 57A-11 was constitutional, 57A in its entirety was unconstitutional because it impermissibly favored commercial speech over noncommercial speech given that it permitted "commercial advertising in every zoning district aside from public lands and roads, and bars noncommercial speech in most contexts in which commercial speech is allowed." The court further found that the constitutional provisions of 57A, like 57A-11, were not segregable from the unconstitutional provisions of 57A favoring commercial speech because they were so inextricably interwoven.
- The Court of Appeals (Justices Lippman, Read, Smith, Pigott, Rivera and Abdus–Salaam) granted leave and unanimously reversed the Appellate Term. It held that since 57A-11 dealt only with the unique problems posed by signs on public right-of-ways, it could be segregated from the rest of 57A, and thus it was unnecessary for the Court to rule on the constitutionality of the other provisions. The Court then applied a 1984 Supreme Court case, *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), to hold that 57A-11 was constitutional because it was content neutral and directly served the Town's valid interests in traffic safety and aesthetics.

Point of Concern

- This case is interesting in that the Appellate Term found that the entirety of a law was unconstitutional in violation of the First Amendment even though the section directly at issue in the case was held to not violate the First Amendment.

People v. Pendleton, 128 A.D.3d 856, 9 N.Y.S.3d 126 (2d Dept. 2015)

Issue: requirement of hearing to assess whether a criminal defendant is an "incapacitated person" such that their prosecution should not proceed; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerned a criminal defendant's appeal of his conviction for assault in the second degree as a hate crime and possession of a weapon in the second degree. The charges arose from an incident in which the defendant pursued two people on the street while "uttering racial epithets." The defendant brandished a hammer and used it to strike one of the people on the knee. The defendant, whom the decision implied had been

institutionalized for mental-health treatment, argued that the court was required to hold a hearing to determine whether he was competent to proceed. He also asserted several other arguments.

- The Second Department (Justices LaSalle, Dillon, Austin, and Leventhal) in an unsigned opinion rejected all of the defendant's arguments and affirmed the judgment. The court noted that the criminal procedure law required the trial court to hold a competency hearing only if it is requested by the defense or the prosecutor, and in this case neither did. The court rejected the defendant's remaining arguments.

Point of Concern

- The court's ruling on the requirement of a competency hearing appeared to be a correct application of the statute. The court's rulings on most of the defendant's other arguments, however, were accompanied by little reasoning. For example, the court acknowledged that the trial court had erred in denying the defendant's request for a jury charge relating to witness credibility, but concluded without further elaboration that "the error was harmless, as there [was] no significant probability that the jury would have acquitted the defendant if the charge had been given."

People v. Rivera, 195 A.D.3d 644, 144 N.Y.S.3d 631 (2d Dept. 2021)

Issues: *Brady* violation, fair trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This is the appeal of a criminal conviction where the defendant argued on appeal for a reversal of his conviction due to an alleged *Brady* violation where the prosecution turned over an exculpatory statement made by another person at trial during its case-in-chief.
- The Second Department (Justices Lasalle, Dillon, Miller, and Connolly) held that this did not violate *Brady* because "Brady does not require that disclosure be made at any particular point in the proceedings, but only that it be made in time for the defense to use it effectively." The court held that because the statement was entered into evidence during the defense case, and the defense did not recall any witnesses for cross examination based on the statement, it was "afforded a meaningful opportunity to make use of [the] statement, and there is no indication that earlier disclosure might have had any effect on the outcome of the trial."

Point of Concern

- Turning over significant statements favorable to the defendant during trial is not good practice. Even assuming arguendo that it did not violate *Brady*, the panel decision does not seem to grasp this reality or comment negatively on the prosecution's conduct in this case. This is especially troubling because prosecutors will undoubtedly cite this case as support that they can turn over *Brady* evidence during trial and not violate the Constitution.

***People v. Rodriguez*,** 17 N.Y.S.3d 753 (2d Dept. 2015)

Issue: rights of criminal defendant at trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a post-conviction challenge in which a defendant convicted of murder in the second degree and assault in the first and second degree appealed from a judgment of the Kings County Supreme Court.
- On appeal, the panel (Justices Rivera, Roman, LaSalle, and Barros) reviewed the denial of a motion to suppress a videotaped statement the defendant made to law enforcement officials.
- The panel found the Supreme Court should have suppressed the defendant's taped video confession because it was the result of a *Miranda* violation, but that reversal was not required since there was overwhelming proof of the defendant's guilt (including prior untainted statements, his codefendant's trial testimony and surveillance video) such that there was no reasonable possibility the admission affected the verdict. The court summarily rejected three other arguments including that the Supreme Court erred in its *Sandoval* ruling and in denying a missing witness charge and that the defendant was provided with ineffective assistance of counsel.
- The defendant was later denied leave to appeal and denied release in a related federal habeas petition. *See Rodriguez v. Graham*, No. 17 CIV. 3395, 2017 WL 2838144, at *1 (E.D.N.Y. June 30, 2017).

People v. Rosario, 81 N.Y.S.3d 566 (2d Dept. 2018)

Issue: risk-level assessment of person convicted of sex offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Kings County Court designated defendant as a level three registrant on the sex offender registry, assessing him 15 points under risk factor 11 based on a history of drug or alcohol abuse and assessing him 15 points under risk factor 12 based on defendant's refusal to participate in treatment. Defendant appealed.
- The Second Department (Justices Mastro, Dillon, Maltese, and LaSalle) held that the defendant was properly assessed as a level three sex offender. It found that the state presented clear and convincing evidence to support the challenged risk assessments, and that defendant's additional contention that he was improperly assessed under risk factor 1 need not be addressed, because it would not effect his designation as a level three sex offender based on the points assessed under other risk factors.
    - For risk factor 11, the resentence report and case summary completed by the Board of Examiners of Sex Offenders was clear and convincing evidence of defendant's history of drug or alcohol abuse.
    - For risk factor 12, "refusal to participate in a sex offender treatment program automatically demonstrates an unwillingness to accept responsibility for the crime." Defendant contended that he may have refused the treatment because he

was afraid of an other inmate; however, the panel notes that "the risk assessment guidelines do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment."

People v. Rukasov, 17 N.Y.S.3d 772 (2d Dept. 2015)

Issue: risk assessment under sex-offender statute; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Richmond County Court designated the defendant a level two registrant on the sex offender registry.
- The panel (Justices Rivera, Roman, LaSalle, and Barros) found the court appropriately determined that the presumptive risk level did not over-assess the danger presented by the defendant and the risk of re-offense and properly denied the defendant's application for a downward departure from his designation as a level two sex offender.

****People v. Sanchez***, 50 N.Y.S.3d 83 (2d Dept. 2017), *rev'd*, 96 N.E.3d 762 (2018)

Issue: whether defendant was entitled to have jury receive instructions about justification for homicide; Justice LaSalle wrote an opinion concurring in part and dissenting in part; panel vote: 3-1 (LaSalle concurring in part and dissenting in part); the Court of Appeals reversed 5-2, adopting Justice LaSalle's dissent.

Summary

- This is an appeal by criminal defendant Sanchez from a Dutchess County Court judgment, after trial, convicting him of manslaughter in the first degree, assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree, upon a jury verdict.
- Sanchez raised several issues on appeal, including the sufficiency of the evidence and whether manslaughter in the second degree should have been included but the main issue on appeal was whether the County Court should have submitted a justification defense charge to the jury with respect to the manslaughter in the first degree and assault charges.
- The Second Department majority (Justices Leventhal, Cohen, and Duffy) held that the County Court erred by declining to charge a justification defense, that the error was not harmless, and that the manslaughter and assault convictions should be vacated. The panel rejected Sanchez's other claims.
- Judge LaSalle authored his own opinion, concurring in part and dissenting in part with respect to the justification defense. LaSalle determined there was no reasonable view of the evidence that would have permitted the jury to find that defendant's conduct was justified and would have affirmed the convictions.

Discussion

- Defendant Sanchez was convicted of manslaughter in the first degree for the shooting death of Ines Amigon. He was also convicted of assault in the first degree and assault in the second degree for the shootings of Rolando Baldemar and Sandy Vivaldo, respectively, as well as criminal possession of a weapon in the second degree.
    - Defendant was at a bar with friends when several men beat him in the bathroom. He had been stabbed in a bar fight several weeks earlier and thought the beating had reopened his stab wound. As he and his friends exited the bar to seek medical attention, the defendant retrieved a gun from his friend's backpack in the car. His friend and co-defendant, Martinez-Mendoza, then used the gun to fire towards people gathered outside the bar, hitting Amigon.
        - There are numerous disputed facts, such as whether the men who beat Sanchez continued to threaten him and his friends outside the bar and whether Sanchez handed the gun to Martinez-Mendoza, or Martinez-Mendoza grabbed the gun from him upon seeing someone else reach for what he thought was a gun.
        - Martinez-Mendoza testified at trial pursuant to a plea agreement and maintained that defendant handed him the gun and then pointed out the man who had hurt him. He testified that he fired the gun out of anger and because he was drunk. This conflicted with the defendant's testimony and Martinez-Mendoza's prior statements. On cross-examination, Martinez-Mendoza admitted that he aimed the gun at people outside the bar to protect his friends and keep people away from them, that he was fearful for their safety, and wanted to protect them.
- In considering these facts, the majority holds that a justification charge should have been given and that the error was not harmless.
    - "In determining whether the evidence warrants a justification charge, the court must assess the record in the light most favorable to the defendant" and draw all reasonable inferences in the defendant's favor. This is even the case where, like here, some evidence contradicts defendant's testimony, where defendant's and witnesses' testimony conflict, and even where there is strong evidence negating a defendant's testimony relating to justification.
    - A duty to retreat "does not arise until the defendant forms a reasonable belief that another person is using or about to use deadly force," and here, a jury might decide, viewing the evidence in the light most favorable to the defendant, that it was not until the defendant returned to his companions with the gun that the threat of deadly force became imminent.
    - The defendant was entitled to assert the justification defense notwithstanding that his codefendant who shot the victims pleaded guilty to the same offenses.
        - Finding that a codefendant's guilty plea "precludes the defendant from establishing his entitlement to a justification charge, regardless of whether an examination of the record as a whole would support such a charge, would impermissibly infringe upon the defendant's right to due process."
        - It would not be unreasonable for the jury to reject Martinez-Mendoza's testimony as unworthy of belief, or to believe that he fired the gun because he feared deadly physical force

- Justice LaSalle dissents, concluding that there was no reasonable view of the evidence that would have permitted the jury to find that the defendant's conduct was justified, and the trail court properly denied the defendant's request for a justification charge.
    - "To be entitled to a justification charge relating to the use of deadly force, the record must include evidence that the defendant reasonably believed the victim was using or was about to use deadly physical force and that he or she could not safely retreat." Justice LaSalle emphasized the subjective and objective elements required here – the belief must be both actual by the defendant and reasonable.
    - In applying this to the facts, Justice LaSalle draws a different conclusion from the majority, finding that, even viewed in the light most favorable to the defendant, "there was no reasonable view of the evidence that would have permitted the jury to find that the defendant's conduct was justified," that the use of deadly physical force was imminent or that defendant and his friends could not have retreated with complete safety.
        - Although defendant testified that approximately 15 people followed him outside the bar and threatened to kill his friends, none of those individuals stopped or interfered with defendant's ability to leave.
        - Although defendant stated that the people outside the bar probably had knives and that he saw something he thought was a gun, he did not testify that he saw any of the individuals actually possess or display a knife or other weapon. "The testimony that he saw one of the individuals reach for something at his waist… was not evidence that the individual was reaching for a weapon."
        - Instead of leaving or remaining in the safety of the car, defendant retrieved the gun and returned to the area where he alleged that he and his friends were being threatened.
    - Justice LaSalle agrees with the majority that "where a principal is entitled to a justification charge, a codefendant charged with acting-in-concert with the principal is also entitled to a justification charge." However, he reasons that Martinez-Mendoza's guilty plea established that he was guilty of intentional murder, presumably rendering him ineligible for a justification defense.

Points of Concern

- Although Justice LaSalle's opinion recites facts put forward by both the state and the defendant in turn, some of the language suggests sympathy towards the prosecution, as well as towards law enforcement in general.
    - "Notably, much of the defendant's testimony… was contradicted by the testimony of all the People's witnesses."
    - He notes several times in his opinion that the defendant did not call the police or ask his friends to call the police.
- Justice LaSalle's opinion is skeptical of the notion that a person reaching towards their waistband gives rise to a reasonable belief that they are retrieving a gun and that deadly force is imminent. If applied to the context of law enforcement use of excessive force, this likely aligns with NYCLU's views.

Other Notes

- The majority decision was subsequently reversed by the Court of Appeals in favor of Justice LaSalle's dissenting view. *People v. Sanchez*, 31 N.Y.3d 949 (2018).

- "Even assuming that the jury could rationally find that defendant subjectively believed he had been threatened with the imminent use of deadly physical force, "the jury could not rationally conclude that his reactions were those of a reasonable [person] acting in self-defense."
- Further, on this record, there was no reasonable view of the evidence that defendant could not safely retreat at the time that deadly physical force was used.

People v. Shane, 187 A.D.3d 1219, 131 N.Y.S.3d 227 (2d Dept. 2020)

Issues: *Miranda*, expert witnesses in criminal trials; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case involves a defendant's challenge that his *Miranda* rights were not knowingly, intelligently and voluntarily waived during a custodial interrogation and that certain expert testimony should not have permitted.
- The Second Department (Justices Scheinkman, LaSalle, Brathwaite Nelson, and Iannacci) affirmed the defendant's conviction, crediting the detective's testimony that he gave the defendant written *Miranda* warnings and that the defendant read the written warnings, wrote "yes" and signed his name next to each of the warnings, and indicated that he understood his rights and was willing to speak with the detective.
- As to the expert witness claim, the Second Department ruled that the lower court correctly exercised its discretion in allowing the testimony of an expert on the subject of "child sexual abuse accommodation syndrome" to explain the issue of delayed disclosure, to counter the defense claim that the complainant fabricated the sexual abuse allegations, and to explain why the complainant might not recall with specificity when certain of the alleged incidents occurred. Though the court agreed that the expert did improperly opine on two hypotheticals that included the facts of the case, the court found this error harmless.

Point of Concern

- It is unclear if the defense challenged the admissibility of the expert on child sexual abuse accommodation syndrome (CSAAS) through a *Frye* Hearing, but it is worth noting that CSAAS is junk science. It is not recognized by American Psychiatric Association, the American Psychological Association, or the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and several states including New Jersey prohibit have prohibited expert witnesses on CSAAS.[1]

[1] https://whyy.org/segments/n-j-high-court-bars-longtime-behavioral-theory-from-child-sexual-abuse-cases/ , https://slate.com/news-and-politics/2005/04/stupid-syndrome-syndrome.html

People v. Smith, 40 N.Y.S.3d 473 (2d Dept. 2016)

Issue: risk-level assessment of person convicted of sex offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Westchester County Court designated the defendant as a level three registrant on the sex offender registry. The defendant appealed.
- The Second Department (Justices Balkin, Hall, Cohen, and LaSalle) affirmed the lower court's designation.
    - The panel found that the Supreme Court properly assessed 20 points against defendant under risk factor 6, because the state established by clear and convincing evidence that the victim was drugged and asleep at the beginning of the incidence and therefore physically helpless.
    - The panel rejected the defendant's contention that the victim's physical helplessness was connected with her age, and that assessing points under both risk factors 5 and 6 therefore constituted double counting.
    - The panel concluded that the lower court properly assessed 20 points under risk factor 7 because the defendant and victim met for the first time on the night of the crime and were therefore strangers.
    - The opinion additionally states, without providing factual support, that the state presented clear and convincing evidence that defendant did not genuinely accept responsibility for his conduct and minimized his behavior, warranting the assessment of 10 points under risk factor 12.
    - Finally, the opinion notes that defendant failed to identify any appropriate mitigating factor which would warrant a downward departure from his presumptive designation as a level three sex offender.

***People v. Taylor*,** 21 N.Y.S.3d 300 (2d Dept. 2015)

Issue: rights of criminal defendant at trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a post-conviction challenge in which a defendant convicted of second-degree robbery and third-degree assault appealed from a judgment of the Suffolk County Supreme Court.
- In a short decision, the panel (Justices Dillon, Sgroi, Cohen, and LaSalle) rejected arguments raised on appeal that the evidence at trial was legally insufficient, that there was prosecutorial misconduct during summation, that he was deprived of effective assistance of counsel, that the County Court improperly instructed the jury, and that a limitation of the defense's cross-examination violated his sixth amendment rights.
- The only argument specifically addressed with reference to the record was the defendant's argument that his identification by a witness was due to an impermissibly suggestive showup procedure. The court found the identification of the defendant was near the scene of the crime and not the result of a police-arranged confrontation.

Point of Concern

- The opinion engages in no analysis, making it impossible to determine the propriety of its conclusions.

People v. Torres, 177 A.D.3d 579, 113 N.Y.S.3d 707 (2d Dept. 2019)

Issues: *Miranda* warnings; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case is an appeal from a criminal conviction where the defendant claimed that a Miranda violation occurred.
- After reviewing the record, the Second Department (Justices Scheinkman, Miller, Maltese, and Lasalle) agreed with the County Court's determination that a Miranda violation did not occur where a Spanish-speaking defendant's written statement was transcribed into English by the interviewing detective but read back to the defendant in Spanish before the defendant signed and adopted the statement. The panel also held that the record established the defendant was "lucid" and "coherent" during the interview and found that his argument that he should have been provided a doctor before the administration of the *Miranda* warning was meritless.

Point of Concern

- The panel opinion does not provide a fulsome description of the record or defendant's argument, which is particularly troubling since there is some suggestion that there were language access issues and the defendant seemed to have claimed that he needed medical attention during the interrogation.

People v. Tsintzelis, 153 A.D.3d 558, 59 N.Y.S.3d 741 (2d Dept. 2017), *rev'd*, 35 N.Y.3d 925, 146 N.E.3d 1160 (2020)

Issues: inadmissible evidence in criminal trials and Confrontation Clause violations; not authored by Justice LaSalle; panel vote: 4-0; reversed 7-0 by the Court of Appeals.

Summary

- This case concerns an appeal by a defendant who was convicted of criminal mischief and petit larceny by a jury verdict before the Queens County Supreme Court. The defendant argued that the entrance of a DNA analyst's hearsay testimony into evidence violated the defendant's rights under the Confrontation Clause.
- The Second Department (Justices Dillon, Roman, Miller, and LaSalle) affirmed the Supreme Court's judgment. The Second Department held that the defendant's rights under the Confrontation Clause were violated when the Supreme Court admitted evidence from a nontestifying DNA analys, but that this error was harmless given "overwhelming" evidence of the defendant's guilt.

- The Second Department also stated that the Supreme Court providently exercised its discretion in denying the defendant's discovery request, and that it was "legally sufficient" to support the defendant's conviction.

Other Notes

- The Court of Appeals unanimously reversed the Second Department's judgment and ordered a new trial, holding that the analyst's hearsay testimony violated the defendant's confrontation rights and that because "the People relied solely on the evidence of the DNA profile . . . to prove the defendants" guilt at trial, the errors were not harmless. The Court of Appeals issued this ruling jointly for two cases with similar fact patterns (*People v. Tsintzelis* and *People v. Velez*, 164 A.D.3d 622, 78 N.Y.S.3d 671 (2d Dept. 2018)).
- Justice Rivera wrote separately concurring in result, and Justice Wilson joined. Justice Rivera discussed the prosecution's failure "to present the proper witnesses and elicit the proper testimony" to establish an analyst's role in DNA testing.

People v. Tucker, 15 N.Y.S.3d 224 (2d Dept. 2015)

Issue: rights of criminal defendant at trial; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns a post-conviction challenge in which a defendant convicted of manslaughter in the second degree, unlawful fleeing a police officer in a motor vehicle in the first degree, assault in the second degree, aggravated unlicensed operation of a motor vehicle in the third degree, grand larceny in the third degree, and criminal possession of stolen property in the third degree, appealed from a judgment of the Suffolk County Court.
- The Second Department (Justices Eng, Hall, Hinds-Radix, and LaSalle) rejected the defendant's arguments, finding the County Court properly upheld the prosecutor's exercise of a peremptory challenge to exclude a prospective African-American juror; that the prosecution's evidence established the defendant's guilt beyond a reasonable doubt; and that the sentence was not excessive.
- The defendant was later denied leave to appeal and denied relief in a related habeas petition, *Tucker v. Yelich*, 2017 WL 3669613 (E.D.N.Y. Aug. 24, 2017).

Point of Concern

- The opinion engages in no analysis, making it impossible to determine the propriety of its conclusions.

People v. Williams, 9 N.Y.S.3d 156 (2d Dept. 2015)

Issue: departure from guidelines to raise risk level of person convicted of sex-offense; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the assignment of the level of risk for a person convicted of a sex offense. The Westchester County Court departed from the risk assessment and ordered the person to register as a level three registrant on the sex offender registry nearly ten years after his original designation at level one based on his conviction of a new crime and violation of a condition of his probation, and because the conduct underlying the new crime and the violation was "of a nature that indicates an increased risk of a repeat sex offense." The defendant appealed.
- In an unsigned opinion, the Second Department (Justices Mastro, Skelos, Dickerson, and LaSalle) affirmed, rejecting the defendant's argument that the Supreme Court erred in granting the upward modification without first obtaining a new Risk Assessment Instrument from the Board of Examiners of Sex Offenders. The court reasoned that the correction law at issue does not require it and the instrument would have been almost identical in any event.

People v. Wilson, 997 N.Y.S.2d 725 (2d Dept. 2014)

Issue: suppression of incriminating statements by defendant in criminal case; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns incriminating statements by a defendant convicted of second-degree murder and other offenses. The Queens County Supreme Court denied his pre-trial motion to suppress the statements, as well as a corresponding request to elicit testimony from law-enforcement officials concerning exculpatory statements he had made. After he was convicted at trial, he appealed.
- In a unanimous unsigned opinion, the Second Department (Justices Rivera, Hinds-Radix, Duffy, and LaSalle) affirmed the conviction.
- Without discussion, the panel found the defendant's statement was made after a proper Miranda warning and was attenuated from the unmirandized prior statements of the police.
- Also with very little discussion, the appellate court dispatched the defendant's claim that the trial court should have allowed him to elicit testimony from the police of his exculpatory written statement to them. The court held this was hearsay testimony and thus properly excluded.

Point of Concern

- The lack of any detailed discussion makes it impossible to assess the panel's conclusions on the important claims presented by the defendant.

People v. Valle, 39 Misc.3d 126(A), 971 N.Y.S.2d 74 (2nd App. Term 2013)

Issue: ineffective assistance of counsel arising from failure to inform defendant of immigration consequences of guilty plea; not authored by Justice LaSalle; panel vote: 3-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the claim of a criminal defendant who pled guilty to sexual misconduct that he was denied effective assistance of counsel because his attorney misinformed him of the immigration consequences of his plea. The trial granted the defendant's motion to vacate his plea, and the prosecution appealed.
- In a six-paragraph unsigned opinion, the Appellate Term (Justices Niccolai, Iannacci, and LaSalle) affirmed the lower's court's vacating of the guilty plea. The panel held "the defendant's sworn allegation that his attorney gave him incorrect advice that his plea would not affect his immigration status established that this attorney's representation fell below the objective standard of reasonableness under Strickland." The panel further accepted the defendant's assertion he would not have pled guilty had he been given accurate advice.

People v. Zelaya, 170 A.D.3d 1206, 96 N.Y.S.3d 683 (2d Dept. 2019)

Issues: *Miranda* rights of criminal defendants and fair trials; not authored by Justice LaSalle; panel vote 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns (1) whether the defendant's initial pre-*Miranda* statement to police officers was the product of a custodial interrogation; (2) whether the defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights prior to giving statements to officers at police precinct; and (3) whether comments indicating that the defendant was incarcerated pending trial deprived him of a fair trial. Prior to being Mirandized, a Spanish-speaking defendant gave an inculpatory response to police officers after they arrived at his home and asked him if he knew why the police were called. Then he was taken to the police station where he was advised of his *Miranda* rights and gave oral and written statements to the police. At trial, it appears that a prospective juror made comments and two witnesses provided testimony indicating that the defendant was incarcerated pending trial. The defendant was convicted.
- The Second Department (Justices Mastro, Cohen, Maltese, and Lasalle) affirmed the defendant's conviction. It held that his pre-*Miranda* statements were not made as the result of custodial interrogation. Further, it held that the defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights at the station where an officer translated the *Miranda* rights into Spanish and that the defendant's written statement was read back to him in Spanish before he signed and adopted the statement as his own. Regarding the fair trial claim, while the court recognized that "evidence indicating that a defendant was incarcerated pending trial may impair a defendant's presumption of innocence," it held that the statements at issue did not suggest that the defendant was incarcerated pending trial.

Points of Concern

- Without reasoning, the panel held that it agreed with the lower court that the inculpatory statements made by the defendant at his home were not the result of a custodial interrogation.
- Beyond asserting "neither the prospective juror nor the two witnesses specifically indicated that the defendant had been incarcerated pending or during trial," the panel opinion provides no insight into the actual contested statements that the defendant claimed implied that he was incarcerated, making it impossible to assess the panel's assertion that those statements did not suggest that the defendant was incarcerated pending trial.

Putland v. New York State Department of Corrections and Community Supervision, 158 A.D.3d 633, 72 N.Y.S.3d 93 (2d Dept. 2018)

Issue: parole application; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a challenge by an incarcerated person to the Parole Board's denial of petitioner's parole application. The petitioner, who was incarcerated to indeterminate terms of 9 years to life for a murder conviction and 3.5 to 10 years for a sodomy conviction for actions committed when he was 15 years old, commenced this action after being denied parole for the 14th time at age 50.
- The Supreme Court, Orange County granted the petition, annulled the determination, and remitted the matter to the Parole Board for a new interview before a different panel.
- In an unsigned opinion, the Second Department (Justices Dillon, Leventhal, Hinds-Radix, and LaSalle) affirmed the Supreme Court's decision. The Second Department reached this holding in light of a Third Department decision issued during the pendency of the appeal that held that youth characteristics must be considered in parole determinations for people punished by life in prison for crimes they committed as minors.

Queens Branch of Bhuvaneshwar Mandir, Inc. v. Sherman, 66 N.Y.S.3d 284 (2d Dept. 2017)

Issue: First Amendment principles governing court involvement in civil disputes between religious parties; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- The Queens Branch of the Bhuvaneshwar Mandir Inc., a religious institution, held an election for its board of trustees. After the election, the plaintiffs moved to confirm the results, and defendants cross-moved to declare their opposing slate of candidates as the winner, on the ground that a substantial majority of voters were ineligible. The Queens County Court found for plaintiffs and confirmed the results. The defendants appealed.

- The Second Department (Justices Rivera, Roman, LaSalle, and Barros) considered whether the First Amendment permitted the court to interfere in this matter involving a religious organization. It noted that "civil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution" and that "courts may rely upon internal documents, such as a congregation's bylaws, but only if those documents do not require interpretation of ecclesiastical doctrine." The court held that resolving whether ineligible individuals voted in Mandir's election did not require intrusion into constitutionally protected ecclesiastical matters and affirmed the Supreme Court's decision confirming the election results.

Point of Concern

- This case indicates willingness to engage in the affairs of religious institutions within certain parameters.

Rapuzzi v. City of New York, 186 A.D.3d 1548, 131 N.Y.S.3d 76 (2d Dept. 2020)

Issues: probable cause for arrest, municipal liability; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns an action to recover damages under federal law for false arrest and imprisonment, malicious prosecution, negligent hiring and retention, and intentional infliction of emotional distress. The plaintiff asserted claims against New York City and the NYPD. The defendants moved for summary judgment, and the Supreme Court, Kings County denied the motion. The defendants appealed.
- In an unsigned decision, the Second Department (Justices Austin, Maltese, LaSalle, and Brathwaite Nelson) reversed, holding that the Supreme Court should have granted the defendants' motion for summary judgment. The panel held that the defendants established their prima facie entitlement to judgment as a matter of law.

Points of Concern

- The Second Department's opinion scarcely referenced facts that the plaintiff alleged in support of his claims, and instead repeated that "the plaintiff failed to raise a triable issue of fact."
- The only area where the Second Department discussed the plaintiff's factual allegations was in reference to "discrepancies between the eyewitnesses' description of their attackers and the plaintiff's appearance at the time of his arrest the following day." Despite this evidentiary concern, the Second Department found the police had probable cause and that the plaintiff "failed to present sufficient evidence to rebut the presumption of probable cause." It did not elaborate on the purported insufficiency of the discrepancy in the eyewitnesses' description.
- The Second Department held that the defendants' submission of deposition transcripts "establishing that identified citizens had provided information accusing the plaintiff of specific crimes . . . was sufficient to provide the police with probable cause." Finding, without more, that accusations from identified citizens are sufficient to establish probable

cause creates a standard that could be easily abused, such as by allowing frivolous police calls to establish a constitutional basis for arrests so long as the caller is not anonymous.

Other Note

- The Second Department also held, without further elaboration, that the defendants "established their prima facie entitlement to judgment as a matter of law" by establishing "the lack of a causal link between the policies, customs, or practices of the municipality, and any alleged constitutional violations."

State Div. of Hum. Rts. v. Steve's Pier One, Inc., 123 A.D.3d 728, 998 N.Y.S.2d 206 (2d Dept. 2014)

Issue: review of finding of employment discrimination made by New York State Division of Human Rights; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the New York State Division of Human Rights' (DHR) determination that an employer discriminated against its employee by subjecting him to a hostile work environment and constructively discharged him because of his sex. DHR awarded the employee damages, back pay, and compensatory damages. The DHR petitioned to enforce its determination.
- The Second Department (Justices LaSalle, Rivera, Hinds-Radix, and Duffy) granted the petition to enforce the DHR's determination in favor of the employee. The court, applying a deferential standard of review, held that substantial evidence supported the DHR's finding of discrimination, the DHR's decision to hold the owner of the employer restaurant individually liable for discrimination, the award of compensatory damages for mental anguish and humiliation, and the award of back pay.

State v. Ted B., 15 N.Y.S.3d 366 (2d Dept. 2015)

Issue: civil commitment of person convicted of sex offenses; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns the conditions under which the state may civilly commit a person convicted of sex offenses. The detained person appealed from the Orange County Supreme Court's determination that he had waived his right to a jury trial and that he suffered from a mental abnormality requiring commitment.
- The panel (Justices Skelos, Chambers, Duffy, and LaSalle) reversed, finding an on-the-record colloquy is required to ensure a person detained for sex offense violations has validly waived their statutory and constitutional right to a jury trial on the issue of mental abnormality. The requirement was not satisfied where the waiver was based solely upon a letter the detained person wrote to the Supreme Court, and where there is nothing in the record to show that the waiver was knowing and voluntary.

- The panel reversed and set aside the findings of mental abnormality, remitting for a trial on the issue. There was a new substantive appeal after that trial adjudicated by a different panel.

Williams v. The City of New York, 129 A.D.3d 1066, 12 N.Y.S.3d 256 (2d Dept. 2015)

Issue: action to recover damages for civil rights violations; not authored by Justice LaSalle; panel vote: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a police shooting that severely injured the plaintiff. The plaintiff sought damages under federal law, alleging the police used excessive force. The trial court explained that the two sides gave very different accounts of the shooting: the police claimed they shot the plaintiff after they identified themselves to him and he pointed a gun at them, whereas the plaintiff claimed the police never identified themselves, he never pointed his gun at them, and that he had his hands up when they shot him. The defendant officers and the City moved for summary judgement on the excessive force claim.
- The trial court denied the summary judgment motion, noting that the facts were disputed as to whether the officers' use of deadly force was reasonable in the circumstances.
- The Second Department (Justices LaSalle, Dillon, Austin, and Leventhal) affirmed in an unsigned opinion, agreeing with the trial court's reasoning.

Point of Concern

- None. The court's decision properly applied the summary judgment standard and declined to grant summary judgment to the defendants given the core facts were in dispute—the two sides gave radically different accounts of the shooting, and if the plaintiff's account were true, the officers' use of force would not have been reasonable.

OPINIONS BY JUSTICE LaSALLE THAT DO NOT PRESENT
CIVIL-RIGHTS ISSUES

****Fisch v. Davidson*, 204 A.D.3d 104, 112, 165 N.Y.S.3d 85, 91 (2d Dept. 2022)

Issue: meaning of "residence" for purposes of determining proper venue for a case; authored by Justice LaSalle; panel decision: 4-0; not reviewed by the Court of Appeals.

Summary

- This case concerns a dispute over the proper venue for a divorce proceeding. It does not directly implicate any civil rights or civil liberties issues.

****Masullo v. City of Mt. Vernon,* 41 A.D.3d 95, 31 N.Y.S.3d 607 (2d Dept. 2016)

Issue: disability payments for firefighters; authored by Justice LaSalle; panel vote: 4-0; not reviewed by Court of Appeals.

Summary

- This case concerns the application of a New York state statute regarding disability payments for firefighters injured in the line of duty (General Municipal Law Sec 207-a(2)) to a former firefighter. The opinion deals primarily with factual issues regarding the petitioner's claim for benefits.
- The former fighter filed an Article 78 petition seeking disability payments for injuries incurred in the line of duty against New York City and the City's Fire Department. The petitioner sought review of determinations that terminated his benefits and argued that these determinations were not supported by substantial evidence.
- The issue before the Court was whether a state statute governing these payments authorizes a municipality to terminate permanent disability retirement benefits previously awarded and to require a firefighter to submit a formal application subject to a procedure adopted after the firefighter's retirement. The Supreme Court (Westchester County) held that the City had the authority to terminate petitioner's benefit because it was engaging in an initial eligibility determination, not a redetermination, when doing so.
- The Second Department (Justice LaSalle authoring, Justices Mastro, Chambers, and Roman joining) reviewed this case de novo because the petitioner raised a substantial evidence question. The Second Department held that a municipality cannot terminate previously awarded benefits under the statute nor require the submission of a formal application for such benefits after a firefighter has retired. The Court granted the firefighter's petition and remitted the case to the Supreme Court for the reinstatement of his benefits.

NYCLU COMPILATION OF DECISIONS INVOLVING NEW YORK COURT OF APPEALS NOMINEE HECTOR D. LaSALLE

2022 WL 17480752
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of 1160 MAMARONECK AVENUE CORP., appellant,

v.

CITY OF WHITE PLAINS, et al., respondents.

2018-11308
|
(Index No. 1831/17)
|
Argued—May 9, 2022
|
December 7, 2022

Synopsis

Background: Landowner, which operated nursery on property, commenced hybrid article 78 proceeding, seeking review of negative declaration of city's common council pursuant to State Environmental Quality Review Act (SEQRA) with respect to zoning amendments banning processing activities by nurseries located within residential district, annulment of zoning amendments, and judgment declaring amendments invalid as arbitrary and unconstitutional. The Supreme Court, Westchester County, Paul I. Marx, J., granted summary judgment for city, city's mayor, and council. Landowner appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] landowner lacked standing to challenge adequacy of council's environmental review of amendments pursuant to SEQRA;

[2] amendments did not violate due process clause;

[3] amendments did not violate equal protection clause; and

[4] amendments were not arbitrary; but

[5] Supreme Court should have entered judgment making appropriate declaration, rather than dismissing landowner's claim for judgment declaring amendments invalid as arbitrary and unconstitutional.

Affirmed as modified.

West Headnotes (17)

[1] Environmental Law

Standing to bring State Environmental Quality Review Act (SEQRA) challenge is threshold issue, and burden of establishing standing is on party seeking review of governmental action on basis of alleged procedural and substantive SEQRA violations. N.Y. ECL § 8-0101 et seq.

[2] Environmental Law

Landowner, which operated nursery on property, lacked standing to challenge adequacy of city common council's environmental review pursuant to State Environmental Quality Review Act (SEQRA) of zoning amendments banning processing activities by nurseries located within residential district; gravamen of landowner's complaint was that amendments would cause landowner to suffer economic harm, rather than any environmental injury. N.Y. ECL § 8-0101 et seq.

[3] Environmental Law

To establish standing under State Environmental Quality Review Act (SEQRA), a petitioner must show (1) an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA. N.Y. ECL § 8-0101 et seq.

[4] Environmental Law

To qualify for standing to raise challenge under State Environmental Quality Review Act (SEQRA), party must demonstrate that it will suffer injury that is environmental and not solely economic in nature. N.Y. ECL § 8-0101 et seq.

[5] **Environmental Law**

For purposes of determining standing to raise challenge under State Environmental Quality Review Act (SEQRA), economic injury is not by itself within zone of interests which SEQRA seeks to protect. N.Y. ECL § 8-0101 et seq.

[6] **Constitutional Law**

Facial constitutional challenges are disfavored.

[7] **Constitutional Law**

Legislative enactments enjoy a strong presumption of constitutionality, and parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt.

[8] **Constitutional Law**

Courts must avoid, if possible, interpreting presumptively valid statute in way that will render it unconstitutional.

[9] **Zoning and Planning**

As legislative acts, zoning ordinances carry presumption of constitutionality.

[10] **Constitutional Law**

Where challenged legislation does not involve suspect class or interfere with exercise of fundamental right, scope of judicial review on equal protection claim is limited to whether classification is rationally related to legitimate governmental objective. U.S. Const. Amend. 14.

[11] **Zoning and Planning**

For facial substantive due process challenges, zoning ordinance must be upheld where it is adopted for legitimate governmental purpose and there is reasonable relation between end sought to be achieved by regulation and means used to achieve that end. U.S. Const. Amend. 14.

[12] **Zoning and Planning**

Municipalities may enact land-use restrictions or controls to enhance quality of life by preserving character and desirable aesthetic features of community.

[13] **Zoning and Planning**

Zoning laws must generally be enacted in accordance with a comprehensive land use plan.

[14] **Zoning and Planning**

City zoning amendments banning processing activities by nurseries located within residential district did not violate equal protection clause; amendments did not involve suspect class or interfere with exercise of fundamental right, and were rationally related to legitimate governmental purpose. U.S. Const. Amend. 14.

[15] **Zoning and Planning**

City zoning amendments banning processing activities by nurseries located within residential district were not facially violative of due process clause; amendments were adopted for legitimate governmental purpose and there was reasonable relation between end sought to be achieved by amendments and means used to achieve that end. U.S. Const. Amend. 14.

[16] **Zoning and Planning**

City zoning amendments banning processing activities by nurseries located within residential district were not arbitrary; amendments were in accordance with well-considered comprehensive plan, and fell within bounds of zoning power delegated to city by statute.

[17] **Zoning and Planning**

Trial court in landowner's action challenging city zoning amendments banning processing activities by nurseries located within residential district, upon finding that amendments were not arbitrary and unconstitutional, should have entered judgment making appropriate declaration, rather than dismissing so much of proceeding/action as sought judgment declaring that zoning amendments were invalid as arbitrary and unconstitutional.

Attorneys and Law Firms

McCullough, Goldberger & Staudt, LLP, White Plains, NY (Patricia W. Gurahian of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains, NY (Peter A. Meisels and John B. Martin of counsel), for respondents.

HECTOR D. LASALLE, P.J., FRANCESCA E. CONNOLLY, LARA J. GENOVESI, WILLIAM G. FORD, JJ.

DECISION & ORDER

***1** In a hybrid proceeding pursuant to CPLR article 78 to review a negative declaration of the respondent/defendant City of White Plains pursuant to the State Environmental Quality Review Act, dated January 3, 2017, made in connection with certain amendments to the zoning ordinance of the respondent/defendant City of White Plains, and to annul the amendments to the zoning ordinance, and action for a judgment declaring that the amendments to the zoning ordinance are invalid as arbitrary and unconstitutional, the petitioner/plaintiff appeals from an order and judgment (one paper) of the Supreme Court, Westchester County (Paul I. Marx, J.), dated July 23, 2018. The order and judgment granted the motion of the respondents/defendants for summary judgment dismissing the petition/complaint, denied the petition, and dismissed the proceeding/action.

ORDERED that the order and judgment is modified, on the law, by deleting the provision thereof dismissing so much of the proceeding/action as sought a judgment declaring that the amendments to the zoning ordinance are invalid as arbitrary and unconstitutional, and adding thereto a provision declaring that the amendments to the zoning ordinance are not invalid as arbitrary and unconstitutional; as so modified, the order and judgment is affirmed, with costs to the respondents/defendants.

The petitioner/plaintiff, 1160 Mamaroneck Avenue Corp., is the owner of real property located within the respondent/defendant City of White Plains, upon which it operates a nursery. The petitioner/plaintiff's nursery is a nonconforming nursery use located in a residential district. The petitioner/plaintiff's operations include the processing, grinding, and composting of raw materials such as top soil, wood chips, and mulch (hereinafter processing activities). In January 2017, the City's Common Council, upon determining that processing activities had various harmful effects that were incompatible within residential districts, adopted amendments to the City's zoning ordinance (hereinafter the zoning amendments) which ban processing activities by nurseries located within a residential district. The zoning amendments had been considered a Type I action under the State Environmental Quality Review Act (hereinafter SEQRA), and were given a negative declaration pursuant to SEQRA by the Common Council, following its environmental review thereof as lead agency.

The petitioner/plaintiff then commenced this hybrid proceeding pursuant to CPLR article 78 to review the negative declaration and to annul the zoning amendments, and action for a judgment declaring that the zoning amendments are invalid as arbitrary and unconstitutional. The City, the City's Mayor, and the Common Council (hereinafter collectively the respondents/defendants), moved for summary judgment dismissing the petition/complaint. In an order and judgment dated July 23, 2018, the Supreme Court granted the motion, denied the petition, and dismissed the proceeding/action. The petitioner/plaintiff appeals.

***2** **[1]** Standing to bring a SEQRA challenge is a threshold issue, and the burden of establishing standing is on the party seeking review of governmental action on the basis of alleged procedural and substantive SEQRA violations (*see Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 573 N.E.2d 1034).

[2] **[3]** **[4]** **[5]** "To establish standing under SEQRA, a petitioner must show (1) an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interests

sought to be protected or promoted by SEQRA" (*Matter of Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo,* 112 A.D.3d 726, 727–728, 977 N.Y.S.2d 272). Further, to qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature (*see Matter of County Oil Co., Inc. v. New York City Dept. of Envtl. Protection,* 111 A.D.3d 718, 719, 975 N.Y.S.2d 114). Economic injury is not by itself within the zone of interests which SEQRA seeks to protect (*see Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d at 777, 570 N.Y.S.2d 778, 573 N.E.2d 1034; *Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency,* 76 N.Y.2d 428, 433, 559 N.Y.S.2d 947, 559 N.E.2d 641; *Matter of Board of Fire Commrs. of the Fairview Fire Dist. v. Town of Poughkeepsie Planning Bd.,* 156 A.D.3d 621, 623, 67 N.Y.S.3d 30). Here, the gravamen of the petition/complaint is that the zoning amendments will cause the petitioner/plaintiff to suffer economic harm. Such allegations are insufficient to confer standing to challenge the adequacy of the Common Council's environmental review of the zoning amendments under SEQRA (*see Matter of County Oil Co., Inc. v. New York City Dept. of Envtl. Protection,* 111 A.D.3d 718, 975 N.Y.S.2d 114; *Matter of Bridon Realty Co. v. Town Bd. of Town of Clarkstown,* 250 A.D.2d 677, 672 N.Y.S.2d 887). Accordingly, the Supreme Court correctly granted that branch of the motion which was for summary judgment dismissing so much of the petition/complaint as sought to review the negative declaration.

[6] [7] [8] [9] "It is well settled that facial constitutional challenges are disfavored. 'Legislative enactments enjoy a strong presumption of constitutionality ... [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will render it unconstitutional' " (*Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.,* 20 N.Y.3d 586, 593, 965 N.Y.S.2d 61, 987 N.E.2d 621, quoting *LaValle v. Hayden,* 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 773 N.E.2d 490). "As legislative acts, zoning ordinances carry" that same "presumption of constitutionality" (*Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville,* 51 N.Y.2d 338, 344, 434 N.Y.S.2d 180, 414 N.E.2d 680).

[10] [11] [12] [13] Where, as here, "the challenged legislation does not involve a suspect class or interfere with the exercise of a fundamental right, the scope of judicial review" on an equal protection claim "is limited to whether the classification is rationally related to a legitimate governmental objective" (*Terminello v. Village of Piermont,* 92 A.D.3d 673, 674, 938 N.Y.S.2d 162; *see Country Bank v. Broderick,* 120 A.D.3d 463, 464–465, 991 N.Y.S.2d 100). Likewise, for facial substantive due process challenges, a zoning ordinance must be upheld where it "is adopted for a legitimate governmental purpose and there is a 'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end' " (*Asian Ams. for Equality v. Koch,* 72 N.Y.2d 121, 132, 531 N.Y.S.2d 782, 527 N.E.2d 265, quoting *McMinn v. Town of Oyster Bay,* 66 N.Y.2d 544, 549, 498 N.Y.S.2d 128, 488 N.E.2d 1240; *see Epstein v. Board of Appeals of Vil. of Kensington,* 222 A.D.2d 396, 397, 634 N.Y.S.2d 725; *Kasper v. Town of Brookhaven,* 142 A.D.2d 213, 217–218, 535 N.Y.S.2d 621). While municipalities may "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of the community" (*Matter of Wallach v. Town of Dryden,* 23 N.Y.3d 728, 743, 992 N.Y.S.2d 710, 16 N.E.3d 1188 [internal quotation marks omitted]), zoning laws must generally be enacted in accordance with a comprehensive land use plan (*see Asian Ams. for Equality v. Koch,* 72 N.Y.2d at 131, 531 N.Y.S.2d 782, 527 N.E.2d 265; *Matter of Village of Chestnut Ridge v. Town of Ramapo,* 45 A.D.3d 74, 88, 841 N.Y.S.2d 321).

***3 [14] [15] [16]** Here, the respondents/defendants demonstrated, prima facie, that the zoning amendments were rationally related to a legitimate governmental purpose, and that there was a reasonable relation between the end sought to be achieved by the zoning amendments and the means used to achieve that end. The respondents/defendants further demonstrated, prima facie, that the zoning amendments are in accordance with a well-considered comprehensive plan, and fall within the bounds of the zoning power delegated to the City by statute (*see Asian Ams. for Equality v. Koch,* 72 N.Y.2d at 121, 531 N.Y.S.2d 782, 527 N.E.2d 265; *Matter of JDM Holdings, LLC v. Village of Warwick,* 200 A.D.3d 880, 160 N.Y.S.3d 297; *Hogue v. Village of Dering Harbor,* 199 A.D.3d 904, 154 N.Y.S.3d 449). In opposition, the petitioner/plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court correctly granted that branch of the motion which was for summary judgment dismissing so much of the petition/complaint as sought to annul the zoning amendments.

[17] Finally, the Supreme Court should not have dismissed so much of the proceeding/action as sought a judgment declaring that the zoning amendments are invalid as arbitrary and unconstitutional, but rather should have entered a

judgment making the appropriate declaration (*see Matter of JDM Holdings, LLC v. Village of Warwick,* 200 A.D.3d at 883, 160 N.Y.S.3d 297; *C.F. v. New York City Dept. of Health & Mental Hygiene,* 191 A.D.3d 52, 64, 139 N.Y.S.3d 273). Accordingly, we modify the order and judgment by adding thereto a provision declaring that the zoning amendments are not invalid as arbitrary and unconstitutional (*see Lanza v. Wagner,* 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670).

LASALLE, P.J., CONNOLLY, GENOVESI and FORD, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2022 WL 17480752, 2022 N.Y. Slip Op. 06923

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162 A.D.3d 659
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of ADVANCED RECOVERY, INC., et al., petitioners/cross respondents,

v.

Erin FULLER, respondent,
New York State Division of Human Rights, respondent/cross petitioner.

2015–06564
|
(Index No. 3690/15)
|
Argued October 30, 2017
|
June 6, 2018

Attorneys and Law Firms

James J. Herkenham, Port Jervis, NY, for petitioners/cross respondents.

Bergstein & Ullrich, LLP, Chester, N.Y. (Stephen Bergstein of counsel), for respondent.

Caroline J. Downey, Bronx, N.Y. (Toni Ann Hollifield and Michael K. Swirsky of counsel), for respondent/cross petitioner.

MARK C. DILLON, J.P., RUTH C. BALKIN, ROBERT J. MILLER, HECTOR D. LASALLE, JJ.

DECISION & JUDGMENT

***660** Proceeding pursuant to Executive Law § 298 to review a determination of the Commissioner of the New York State Division of Human Rights dated April 1, 2015, which adopted the recommendation and findings of an Administrative Law Judge dated February 20, 2015, made after a hearing, finding that the petitioners/cross respondents discriminated against the complainant on the basis of sex and disability, awarding the complainant compensatory damages in the principal sums of $14,560 for back pay, plus interest at the rate of 9% per year from November 4, 2010, and $30,000 for mental anguish and humiliation, plus interest at the rate of 9% per year from April 1, 2015, assessing a civil fine and penalty against the petitioners/cross respondents in the sum of $20,000, plus interest at the rate of 9% per year from April 1, 2015, and directing the petitioners/cross respondents to prominently post a copy of the poster of the New York State Division of Human Rights in their place of business where employees are likely to view it, and cross petition by the New York State Division of Human Rights pursuant to Executive Law § 298 to enforce the determination.

ADJUDGED that the determination is confirmed, the petition is denied, the proceeding is dismissed on the merits, and the cross petition is granted, with costs to the respondent/cross petitioner payable by the petitioners/cross respondents.

The complainant filed a complaint with the respondent/cross petitioner, the New York State Division of Human Rights (hereinafter SDHR), against her former employer, the petitioner/cross respondent Advanced Recovery, Inc., and its president and chief executive officer, the petitioner/cross respondent Mark Rea (hereinafter together the petitioners), alleging that the petitioners discriminated against her on the basis of sex and disability. After a hearing before an Administrative Law Judge, the Commissioner of the SDHR adopted the Administrative Law Judge's recommendation and findings in favor of the complainant. The petitioners commenced this proceeding pursuant to Executive Law § 298 to review the SDHR's determination. The SDHR cross-petitioned to enforce the determination.

The scope of judicial review under the Human Rights Law is extremely narrow and is confined to the consideration of whether the determination of the SDHR is supported by substantial evidence in the ****152** record (*see 300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 179–181, 408 N.Y.S.2d 54, 379 N.E.2d 1183; *Matter of Briggs v. New York State Div. of Human Rights*, 142 A.D.3d 663, 664, 36 N.Y.S.3d 729). Substantial evidence is "such relevant ***661** proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d at 180, 408 N.Y.S.2d 54, 379 N.E.2d 1183; *see Matter of Briggs v. New York State Div. of Human Rights*, 142 A.D.3d at 664, 36 N.Y.S.3d 729). Courts may not weigh the evidence or reject the SDHR's determination where the evidence is conflicting and room for choice exists (*see Matter of Briggs v. New York State Div. of Human Rights*, 142 A.D.3d at 664, 36 N.Y.S.3d 729).

Here, there is substantial evidence in the record to support the SDHR's determination that the complainant established a prima facie case of discrimination, and that the petitioners' proffered reasons for terminating the complainant's employment were a pretext for unlawful discrimination (*see Matter of Tosha Rests., LLC v. New York State Div. of Human Rights*, 79 A.D.3d 1337, 911 N.Y.S.2d 734; *Matter of New York State Off. of Mental Health v. New York State Div. of Human Rights*, 75 A.D.3d 1023, 906 N.Y.S.2d 181).

The petitioners' remaining contentions are either not properly before this Court or without merit.

DILLON, J.P., BALKIN, MILLER and LASALLE, JJ., concur.

All Citations

162 A.D.3d 659, 77 N.Y.S.3d 151 (Mem), 2018 Fair Empl.Prac.Cas. (BNA) 199,833, 2018 N.Y. Slip Op. 03974

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186 A.D.3d 704
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Luis ALVAREZ, appellant,

v.

Anthony J. ANNUCCI, etc., respondent.

2019–04287
|
(Index No. 3128/18)
|
Argued—February 27, 2020
|
August 19, 2020

Attorneys and Law Firms

Robert S. Dean, New York, N.Y. (Camilla Hsu of counsel), for appellant.

Letitia James, Attorney General, New York, N.Y. (Anisha S. Dasgupta and Blair J. Greenwald of counsel), for respondent.

REINALDO E. RIVERA, J.P., HECTOR D. LASALLE, BETSY BARROS, ANGELA G. IANNACCI, JJ.

DECISION & ORDER

***704** In a proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent, Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision, inter alia, to release the petitioner from Queensboro Correctional Facility, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Queens County (Diccia T. Pineda–Kirwan, J.), entered November 29, 2018. The order and judgment granted the respondent's motion to dismiss the petition and dismissed the proceeding.

ORDERED that the order and judgment is affirmed, without costs or disbursements.

In 2016, the petitioner was convicted of sexual abuse in the first degree and was sentenced to a determinate term of imprisonment of three years, to be followed by seven years of postrelease supervision. He reached the maximum expiration date of his prison sentence on October 5, 2017. At that time, the New York State Department of Corrections and Community Supervision (hereinafter DOCCS) transferred him to Fishkill Correctional Facility, then to Queensboro Correctional Facility (hereinafter Queensboro), which DOCCS has designated a residential treatment facility (*see* 7 NYCRR 100.90[c][3]).

The petitioner commenced this proceeding pursuant to CPLR article 78 to compel the respondent, Anthony J. Annucci, Acting Commissioner of DOCCS, inter alia, to comply with his obligations pursuant to Correction Law § 201(5) and 9 NYCRR 8002.7 to assist the petitioner in finding housing located more than 1,000 feet from "school grounds" (Executive Law § 259–c[14]; Penal Law § 220.00[14]), and to release him from Queensboro to either a residential treatment facility, as defined by Correction Law § 2(6), or to approved housing in the community, in compliance with the residency restrictions of the Sexual Assault Reform Act of 2000 (L 2000, ch 1, as amended; hereinafter SARA). During the pendency of the proceeding, DOCCS transferred the petitioner to community housing. The Supreme Court granted the respondent's motion to dismiss the petition and dismissed the proceeding. The court concluded, inter alia, that the proceeding had been rendered academic by the petitioner's release to compliant housing, and that no exceptions to the ****304** mootness doctrine applied. The petitioner appeals, seeking reinstatement of the petition and a determination on the merits.

***705** "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 713, 431 N.Y.S.2d 400, 409 N.E.2d 876; *see Matter of Abbygail G. [Christine Y.-Karen M.],* 177 A.D.3d 878, 880, 115 N.Y.S.3d 40). "Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries. Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v. Daines,* 19 N.Y.3d 1087, 1090, 955 N.Y.S.2d 831, 979 N.E.2d 1158 [citation omitted]). Here, the contentions raised in connection with this proceeding have been rendered academic because the petitioner has been released from the residential treatment facility to community housing (*see Matter of Kirkland v. Annucci,* 150 A.D.3d 736, 737–738, 54 N.Y.S.3d 40). However, an exception to the mootness doctrine is warranted here.

"The mootness doctrine precludes courts from considering questions which, although once active, have become academic by the passage of time or by a change in circumstances" (*Matter of Melinda D.,* 31 A.D.3d 24, 28, 815 N.Y.S.2d 644; *see Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d at 714, 431 N.Y.S.2d 400, 409 N.E.2d 876). " 'If academic, an appeal is not to be determined unless it falls within the exception to the doctrine that permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would otherwise be nonreviewable' " (*Matter of Abbygail G. [Christine Y.-Karen M.],* 177 A.D.3d at 880, 115 N.Y.S.3d 40, quoting *Matter of Melinda D.,* 31 A.D.3d at 28, 815 N.Y.S.2d 644; *see Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d at 714, 431 N.Y.S.2d 400, 409 N.E.2d 876). " 'The exception to the mootness doctrine requires the existence of three common factors: (1) a likelihood the issue will repeat, either between the same parties or among other members of the public, (2) an issue or phenomenon typically evading appellate review, and (3) a showing of significant or important questions not previously passed upon' " (*Matter of Abbygail G. [Christine Y.-Karen M.],* 177 A.D.3d at 880, 115 N.Y.S.3d 40, quoting *Matter of Melinda D.,* 31 A.D.3d at 28, 815 N.Y.S.2d 644; *see Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d at 714, 431 N.Y.S.2d 400, 409 N.E.2d 876).

Here, all three factors excepting this appeal from the mootness doctrine are present. The issue of whether a certain facility is a legitimate residential treatment facility has already resulted in litigation, is significant, and will typically evade appellate review due to the passage of time during which individuals subject to postrelease supervision, such as the instant petitioner, obtain SARA-compliant housing (*see Matter of Gonzalez v. Annucci,* 32 N.Y.3d 461, 470–471, 93 N.Y.S.3d 236, 117 N.E.3d 795; ***706** *People ex rel. Rosario v. Superintendent, Fishkill Correctional Facility,* 180 A.D.3d 920, 120 N.Y.S.3d 411). Thus, the Supreme Court should have applied the exception to the mootness doctrine and reached the merits of the petitioner's claims. However, we agree with the court's decision to dismiss the proceeding, albeit on different grounds than those stated by the court.

On this record, the petitioner has failed to demonstrate that Queensboro is not a legitimate residential treatment facility for sex offenders, or that DOCCS's determination to place him there was irrational. ****305** Moreover, the evidence fails to demonstrate that the conditions of the petitioner's placement at Queensboro were in violation of DOCCS's statutory or regulatory obligations (*see* Correction Law §§ 2[6], 73[2]).

The petitioner's remaining contentions are without merit.

RIVERA, J.P., LASALLE, BARROS and IANNACCI, JJ., concur.

All Citations

186 A.D.3d 704, 127 N.Y.S.3d 303 (Mem), 2020 N.Y. Slip Op. 04552

149 A.D.3d 830
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Hugo ARGUDO, appellant,

v.

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, et al., respondents.

April 12, 2017.

Synopsis

Background: Driver's license applicant brought hybrid action against the New York State Department of Motor Vehicles (DMV), seeking review of the denial of his license application under article 78 and judgment declaring that emergency regulations adopted by DMV addressing relicensing of recidivist drunk drivers conflicted with other laws and were unconstitutional. The Supreme Court, Nassau County, Winslow, J., denied the petition and dismissed the action. Applicant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] DMV did not usurp legislature's authority by enacting the emergency regulations;

[2] DMV had statutory authority to enact the emergency regulations;

[3] denial of the application did not violate the Ex Post Facto Clause; and

[4] denial of the application was not arbitrary and capricious.

Affirmed as modified.

West Headnotes (5)

[1] **Constitutional Law** Encroachment on legislature

To determine whether an administrative agency has usurped the power of the legislature, courts must consider whether the agency: (1) operated outside of its proper sphere of authority by balancing competing social concerns in reliance solely on its own ideas of sound public policy; (2) engaged in typical, interstitial rulemaking or wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) acted in an area in which the legislature has repeatedly tried, and failed, to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions; and (4) applied its special expertise or technical competence to develop the challenged regulations.

1 Case that cites this headnote

[2] **Automobiles** Reinstatement or new license, in general

Constitutional Law Encroachment on legislature

Department of Motor Vehicles (DMV) did not usurp the legislature's authority by enacting emergency regulations addressing relicensing of recidivist drunk drivers; in enacting the regulations, DMV did not act on its own ideas of public policy, but rather implemented the legislature's policies of promoting highway safety and reducing instances of impaired and intoxicated driving. 15 NYCRR 136.5(b)(2).

2 Cases that cite this headnote

[3] **Automobiles** Reinstatement or new license, in general

Department of Motor Vehicles (DMV) had statutory authority to enact emergency regulations addressing relicensing of recidivist drunk drivers; DMV's Commissioner had broad statutory authority to promulgate regulations to "regulate and control the exercise of" DMV's powers, among those powers was the Commissioner's authority to approve or deny relicensing applications, including those submitted by individuals whose licenses were revoked for alcohol-related driving offenses, and Commissioner was entitled, on a case-by-case basis, to refuse to restore a revoked license

in the public safety and welfare. McKinney's Vehicle and Traffic Law §§ 215(a), 510(5), (6)(a), 1193(2)(b)(12), (2)(c)(1); 15 NYCRR 136.5(b)(2).

1 Case that cites this headnote

[4] **Automobiles** Reinstatement or new license, in general

Constitutional Law Licenses in general

Denial of driver's license application pursuant to emergency regulations enacted by Department of Motor Vehicles (DMV) to address relicensing of recidivist drunk drivers did not violate the Ex Post Facto Clause; the regulations were enacted for nonpunitive purposes, and were not so punitive in effect as to negate that nonpunitive intent. U.S.C.A. Const. art. 1, § 10, cl. 1; 15 NYCRR 136.5(b)(2).

1 Case that cites this headnote

[5] **Automobiles** Reinstatement or new license, in general

Department of Motor Vehicles' (DMV) denial of applicant's driver's license application pursuant to regulations addressing relicensing of recidivist drunk drivers was not arbitrary and capricious; applicant's driving record included three alcohol-related convictions and four convictions for operating a motor vehicle without a license, 27 points had been assessed to the applicant's driving record within the 25 years preceding the date of the revocable offense, and applicant's driving record also included three speeding convictions for which five or more points were assessed. 15 NYCRR 136.5(b)(2).

Attorneys and Law Firms

****590** Lavallee Law Offices, PLLC, Farmingdale, NY (Ryan L. Brownyard of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York, NY (Steven C. Wu and Matthew W. Grieco of counsel), for respondents.

RUTH C. BALKIN, J.P., L. PRISCILLA HALL, HECTOR D. LaSALLE, and BETSY BARROS, JJ.

Opinion

***830** In a hybrid proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of ****591** Motor Vehicles Appeals Board dated June 25, 2013, which affirmed the denial of the petitioner/plaintiff's application for a driver license, and action for a judgment declaring that amendments to 15 NYCRR part 136 effective September 25, 2012, conflict with the Vehicle and Traffic Law and other laws and are unconstitutional, the petitioner/plaintiff appeals from a judgment of the Supreme Court, Nassau County (Winslow, J.), entered July 17, 2014, which denied the petition and dismissed the proceeding/action.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof dismissing the action, and adding thereto a provision declaring that amendments to 15 NYCRR part 136 effective September 25, 2012, do not conflict with the Vehicle and Traffic Law or other laws and are constitutional; as so modified, the judgment is affirmed, with costs to the respondents.

The petitioner/plaintiff (hereinafter the petitioner) accumulated 27 points on his driving record and was convicted of three alcohol-related driving offenses before his driver license was revoked for the third time in 2011. In September 2012, the New York State Department of Motor Vehicles (hereinafter the DMV) adopted emergency regulations to address the relicensing of recidivist drunk drivers. Effective September 25, 2012, those regulations amended 15 NYCRR part 136 to provide, among other things, that the Commissioner of Motor Vehicles (hereinafter the Commissioner) shall conduct a lifetime review of an individual's driving record when applying for relicensing, and if such individual has three or four alcohol- or drug-related driving convictions or incidents within a 25–year look-back period, as well as one or more serious driving offenses within the same 25 years, the Commissioner shall deny the application (*see* 15 NYCRR 136.5[b][2]). A serious driving offense was defined, inter alia, as a conviction of two or more violations for which 5 or more points are assessed on a violator's driving record or 20 or more points from any violations (*see* 15 NYCRR 136.5[a][2][iii], [iv]). An exemption from the regulations can be obtained if an individual presents "unusual, extenuating, ***831** and compelling" circumstances that may form the basis to deviate from the general policy (*see* 15 NYCRR 136.5[d]).

In October 2012, the petitioner filed an application for a new driver license with the DMV. In March 2013, the DMV's Driver Improvement Bureau denied the petitioner's application, citing the new regulation, 15 NYCRR 136.5(b)(2). After the denial was affirmed by the DMV Appeals Board, the petitioner commenced this hybrid CPLR article 78 proceeding and declaratory judgment action. The Supreme Court denied the petition and dismissed the proceeding/action.

[1] **[2]** Contrary to the petitioner's contention, the DMV did not usurp the Legislature's authority by enacting the new regulations. To determine whether an administrative agency has usurped the power of the Legislature, courts must consider whether the agency: (1) "operat[ed] outside of its proper sphere of authority" by balancing competing social concerns in reliance "solely on [its] own ideas of sound public policy;" (2) engaged in typical, "interstitial" rulemaking or "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance;" (3) "acted in an area in which the Legislature has repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions;" and (4) applied its "special expertise or technical competence" to develop the challenged regulations (****592** *Boreali v. Axelrod,* 71 N.Y.2d 1, 12–14, 523 N.Y.S.2d 464, 517 N.E.2d 1350 [internal quotation marks omitted]; *see Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.,* 125 A.D.3d 105, 108, 2 N.Y.S.3d 231, *affd.* 27 N.Y.3d 174, 32 N.Y.S.3d 1, 51 N.E.3d 512). In enacting the challenged regulations, the DMV did not act on its own ideas of public policy, but rather implemented the Legislature's policies of promoting highway safety and reducing instances of impaired and intoxicated driving (*see Matter of Acevedo v. New York State Dept. of Motor Vehs.,* 132 A.D.3d 112, 119, 14 N.Y.S.3d 790).

[3] The petitioner's further contention that the new regulations violate the doctrine of separation of powers is without merit. The Legislature has vested the Commissioner with broad authority to promulgate regulations to "regulate and control the exercise of" the DMV's powers (Vehicle and Traffic Law § 215[a]). Among those powers is the Commissioner's authority to approve or deny relicensing applications (*see* Vehicle and Traffic Law § 510[5]), including those submitted by individuals whose licenses were revoked for alcohol- or drug-related driving offenses (*see* Vehicle and Traffic Law § 1193 [2][c][1]). Indeed, the Vehicle and Traffic Law provides that "[a] license ***832** ... may be restored by direction of the [C]ommissioner but not otherwise" (Vehicle and Traffic Law § 510[5]), and that, "[w]here revocation [of a license] is mandatory," a new license shall not be issued for the statutorily-designated period of time, "except in the discretion of the [C]ommissioner" (Vehicle and Traffic Law § 510[6][a]). Further, while the Vehicle and Traffic Law establishes minimum periods of revocation for alcohol-or drug-related driving offenses, it also provides that revoked licenses may only be restored "in the discretion of the [C]ommissioner" (Vehicle and Traffic Law § 1193[2][c][1]), and "that the [C]ommissioner may, on a case [-]by [-]case basis, refuse to restore a license which otherwise would be restored [under the statute], in the interest of the public safety and welfare" (Vehicle and Traffic Law § 1193[2][b][12]). Together, these statutory provisions lead to the inexorable conclusion that the Legislature intended to grant the DMV regulatory authority over the relicensing of persons with multiple alcohol and/or drug-related driving offenses (*see Matter of Acevedo v. New York State Dept. of Motor Vehs.,* 132 A.D.3d 112, 14 N.Y.S.3d 790; *Matter of Shearer v. Fiala,* 124 A.D.3d 1291, 3 N.Y.S.3d 473).

[4] In addition, contrary to the petitioner's contention, "because the regulations were enacted for nonpunitive purposes, and were not so punitive in effect as to negate that nonpunitive intent," the denial of the petitioner's application pursuant to the amended regulations did not constitute a violation of the Ex Post Facto Clause of the United States Constitution (*Matter of McKevitt v. Fiala,* 129 A.D.3d 730, 731, 10 N.Y.S.3d 554).

[5] Furthermore, despite the petitioner's contention, the DMV's denial of his application for a driver license was not arbitrary and capricious. The DMV's decision to deny the petitioner's application was amply supported by the evidence. The petitioner's driving record included three alcohol-related convictions, and four convictions for operating a motor vehicle without a license. In addition, 27 points have been assessed to the petitioner's driving record within the 25 years preceding the date of the revocable offense, which represents a serious driving offense. The petitioner's driving record also includes three speeding convictions for which 5 or more points were assessed. The new regulations rationally embody the ****593** Legislature's intent to grant the respondents/defendants regulatory authority over the relicensing of recidivist drunk drivers and, employing that authority, the Commissioner has created a uniform set of rules to promote

road safety while allowing, through the exemption criteria, case-by-case consideration of each relicensing application. The petitioner has failed to establish that the DMV failed to follow ***833** its own precedent or treated similarly situated individuals differently (*see generally Matter of Corona Realty Holdings, LLC v. Town of N. Hempstead,* 32 A.D.3d 393, 820 N.Y.S.2d 102).

The petitioner's remaining contentions are without merit.

All Citations

149 A.D.3d 830, 51 N.Y.S.3d 589, 2017 N.Y. Slip Op. 02786

133 A.D.3d 745
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Kevin BANKS, petitioner,

v.

John RHEA, etc., respondent.

Nov. 18, 2015.

Synopsis

Background: Son brought Article 78 proceeding, seeking to review determination of the New York City Housing Authority (NYCHA), which found that he was not eligible to succeed to the lease of his late mother's apartment as a remaining family member.

[Holding:] The Supreme Court, Appellate Division, held that substantial evidence supported NYCHA's determination.

Petition denied.

West Headnotes (1)

[1] **Landlord and Tenant** Succession rights

Substantial evidence supported New York City Housing Authority's (NYCHA) determination that son was not eligible to succeed to the lease of his late mother's apartment as a remaining family member; evidence indicated that son never obtained written permission for permanent residency from housing manager in which he lived with his mother and did not, prior to his mother's death, continuously reside in his mother's apartment for a period of at least one year from the date of authorized occupancy, so as to become a remaining family member with the right of succession to the lease.

3 Cases that cite this headnote

Attorneys and Law Firms

****338** Seymour W. James, Jr., New York, N.Y. (Mimi Rosenberg and Emily Ruben of counsel), for petitioner.

Kelly D. MacNeal, New York, N.Y. (Corina L. Leske and Seth E. Kramer of counsel), for respondent.

MARK C. DILLON, J.P., ROBERT J. MILLER, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

Opinion

***745** Proceeding pursuant to CPLR article 78 to review a determination of the New York City Housing Authority dated October 10, 2012, which adopted the recommendation of a hearing officer dated September 14, 2012, made after a hearing, denying the petitioner's grievance challenging the denial of his request to succeed to the lease of his late mother's apartment as a remaining family member.

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, without costs or disbursements.

The petitioner sought to succeed to the lease of his late mother's apartment as a remaining family member in a building managed by the New York City Housing Authority (hereinafter NYCHA). His request was denied. After a hearing, NYCHA denied the petitioner's grievance challenging the denial of his request, finding that he was not a "remaining family member" within the meaning of NYCHA rules. The petitioner thereafter commenced this proceeding pursuant to CPLR article 78.

As relevant here, NYCHA rules provide that in order to succeed to a lease as a remaining family member, a claimant must have been authorized to occupy the apartment, and remain in continuous occupancy from the date he or she receives the housing manager's written permanent residency permission for not less than one year immediately prior to the date that the tenant vacates the apartment or dies (*see* New York City Housing Authority [NYCHA] Management Manual, ch. IV, § XII[A][2]). If the authorized occupancy is less than one year, the claimant is denied remaining family member status (*see id.*). Here, NYCHA's determination to deny the petitioner's remaining family member grievance was supported by substantial evidence (*see Matter of Hidalgo v. Rhea,* 126 A.D.3d 977, 978, 6 N.Y.S.3d 115; *Matter of Figueroa v. Rhea,* 120 A.D.3d 814, 814–815, 991 N.Y.S.2d 373; *Matter of Marcus v. New York City Hous. Auth.,* 106

A.D.3d 1088, 1089, 966 N.Y.S.2d 185). The record developed at the hearing established that the petitioner never obtained written permission for permanent residency from the housing manager of the public housing development in which he lived with his mother, and, in any event, did not, prior to his mother's death, continuously reside in his mother's apartment for a period of at least ***746** one year from the date of an authorized occupancy, so as to become a remaining family member with the right of succession to the lease pursuant to NYCHA's published rules (*see Matter of Hidalgo v. Rhea,* 126 A.D.3d at 978; *Matter of Figueroa v. Rhea,* 120 A.D.3d at 815, 991 N.Y.S.2d 373; *Matter of Perez v. New York City Hous. Auth.,* 99 A.D.3d 624, 624–625, 952 N.Y.S.2d 876).

The petitioner's remaining contentions are without merit.

All Citations

133 A.D.3d 745, 19 N.Y.S.3d 337, 2015 N.Y. Slip Op. 08406

KeyCite Yellow Flag - Negative Treatment
Distinguished by Wells Fargo Bank, N.A. v. Breuer, N.Y.A.D. 2 Dept., March 23, 2022

136 A.D.3d 951
Supreme Court, Appellate Division,
Second Department, New York.

John BARRY, et al., appellants,

v.

CADMAN TOWERS, INC., et al., defendants,
City of New York Department of Housing Preservation and Development, respondent.

Feb. 24, 2016.

Synopsis

Background: Former tenants brought action against city's department of housing preservation and development (HPD) and Mitchell–Lama housing company, seeking to recover damages for housing discrimination based on disability. The Supreme Court, Kings County, Landicino, J., granted HPD's motion to dismiss on statute of limitations grounds. Tenants appealed.

[Holding:] The Supreme Court, Appellate Division, held that claims accrued under the discovery rule when tenants were evicted.

Affirmed.

West Headnotes (4)

[1] Limitation of Actions Burden of proof in general

On a motion to dismiss a complaint on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired; in this regard, the defendant must establish, inter alia, when the cause of action accrued. McKinney's CPLR 3211(a)(5).

29 Cases that cite this headnote

[2] Limitation of Actions Burden of proof in general

On a motion to dismiss a complaint on the ground that the complaint is barred by the applicable statute of limitations, if the defendant satisfies the burden of establishing that the time in which to sue has expired, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period. McKinney's CPLR 3211(a)(5).

34 Cases that cite this headnote

[3] Limitation of Actions Civil rights

Causes of action pursuant to § 1983 accrue when the plaintiff knows or has reason to know of the injury which is the basis of his action. 42 U.S.C.A. § 1983.

[4] Limitation of Actions Civil rights

Former tenants' claims against city's department of housing preservation and development (HPD) alleging housing discrimination based on disability accrued under the discovery rule, and two-year statute of limitations under Fair Housing Act and three-year limitations period under § 1983 began to run, when they were evicted. Fair Housing Act, § 813(a)(1)(A), 42 U.S.C.A. § 3613(a)(1)(A); McKinney's CPLR 214.

1 Case that cites this headnote

Attorneys and Law Firms

****342** Robert M. Rambadadt, New York, NY, for appellants.

Zachary W. Carter, Corporation Counsel, New York, N.Y. (Kristin M. Helmers and Michael J. Pastor of counsel), for respondent.

WILLIAM F. MASTRO, J.P., JOHN M. LEVENTHAL, JEFFREY A. COHEN, and HECTOR D. LaSALLE, JJ.

Opinion

***951** In an action, inter alia, to recover damages for housing discrimination based on disability in violation of, among other things, the Fair Housing Act (42 U.S.C. § 3601 *et seq.*), and for violation of due process rights pursuant to 42 U.S.C. § 1983, the plaintiffs appeal (1) from an order of the Supreme Court, Kings County ****343** (Landicino, J.), dated April 4, 2013, which granted that branch of the motion of the defendant City of New York Department of Housing Preservation and Development which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it as time-barred, and (2), as limited by their brief, from so much of an order of the same court dated November 25, 2013, as, in effect, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order dated April 4, 2013, is dismissed, as that order was superseded by the order dated November 25, 2013, made, in effect, upon reargument; and it is further,

ORDERED that the order dated November 25, 2013, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

In 2005, the defendant City of New York Department of Housing Preservation and Development (hereinafter HPD) issued a determination (hereinafter the HPD determination), after a hearing, granting the application of the defendant Cadman Towers, Inc. (hereinafter Cadman Towers), a Mitchell–Lama housing company, for a certificate of eviction against the plaintiff John Barry, the late John J. Holub, and the plaintiff Raymond Weinstein for violation ***952** of the HPD primary residence rule (*see* 28 RCNY 3–02[n][4]). In a CPLR article 78 proceeding, this Court confirmed the HPD determination, as it was supported by substantial evidence in the record (*see Matter of Weinstein v. City of N.Y. Dept. of Hous. Preserv. & Dev.,* 39 A.D.3d 764, 764, 832 N.Y.S.2d 443).

In 2012, Barry, Weinstein, individually and in his capacity as administrator of Holub's estate, and the plaintiff Marshal S. Weinstein commenced this action alleging, inter alia, housing discrimination in violation of the Fair Housing Act (42 U.S.C. § 3601 *et seq.*) (hereinafter the Act) and violation of their due process rights pursuant to 42 U.S.C. § 1983. HPD moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it. By order dated April 4, 2013, the Supreme Court granted that branch of HPD's motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it as time-barred. By order dated November 25, 2013, the Supreme Court, in effect, upon reargument, adhered to its original determination.

[1] **[2]** **[3]** On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In this regard, the defendant must establish, inter alia, when the cause of action accrued (*see Rodeo Family Enters., LLC v. Matte,* 99 A.D.3d 781, 783–784, 952 N.Y.S.2d 581; *Swift v. New York Med. Coll.,* 25 A.D.3d 686, 687, 808 N.Y.S.2d 731; *Gravel v. Cicola,* 297 A.D.2d 620, 620–621, 747 N.Y.S.2d 33). If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (*see Singh v. Edelstein,* 103 A.D.3d 873, 875, 962 N.Y.S.2d 225; *Rodeo Family Enters., LLC v. Matte,* 99 A.D.3d at 784, 952 N.Y.S.2d 581). Causes of action pursuant to the Act have a two-year statute of limitations (*see* 42 U.S.C. § 3613[a][1][A]), and causes of action pursuant to 42 U.S.C. § 1983 have a three-year statute of limitations (*see* CPLR 214; *Way v. City of Beacon,* 96 A.D.3d 829, 832, 947 N.Y.S.2d 531; *Matter of* ****344** *Greenfield v. Town of Babylon Dept. of Assessment,* 76 A.D.3d 1071, 1073–1075, 908 N.Y.S.2d 251). Causes of action pursuant to 42 U.S.C. § 1983 "accrue[ ] 'when the plaintiff knows or has reason to know of the injury which is the basis of his action' " (*Palmer v. State of New York,* 57 A.D.3d 364, 364, 870 N.Y.S.2d 11, quoting *Pearl v. City of Long Beach,* 296 F.3d 76, 80 [2d Cir.]).

[4] Here, HPD met its initial burden by establishing that the ***953** plaintiffs knew of the injuries that formed the basis of their causes of action pursuant to 42 U.S.C. § 1983 in 2005, that the alleged acts of housing discrimination occurred no later than March 2005, and that this action was not commenced until July 2012, more than seven years later. In opposition to HPD's showing that the complaint was time-barred, the plaintiffs failed to raise a question of fact. Consequently, the Supreme Court, in effect, upon reargument, properly adhered to its determination granting that branch of

HPD's motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it as time-barred.

HPD's remaining contentions either are not properly before this Court or need not be reached in light of our determination.

All Citations

136 A.D.3d 951, 25 N.Y.S.3d 342, 2016 N.Y. Slip Op. 01277

End of Document

173 A.D.3d 1012
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Chad CAMPBELL, Appellant,

v.

Tina M. STANFORD, etc., Respondent.

2017–07216
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(Index No. 50465/17)
|
Argued—March 7, 2019
|
June 19, 2019

Synopsis

Background: Prisoner petitioned for review of determination of New York State Board of Parole denying his application to be released on parole. The Supreme Court, Dutchess County, Maria G. Rosa, J., denied petition. Prisoner appealed.

[Holding:] The Supreme Court, Appellate Division, held that the Board's denial was supported by substantial evidence.

Affirmed.

See also 197 A.D.2d 930.

West Headnotes (7)

[1] Pardon and Parole Review

Judicial review of a determination of the Parole Board is narrowly circumscribed.

[2] Pardon and Parole Review

A Parole Board determination to deny early release may be set aside on only where it evinces irrationality bordering on impropriety.

[3] Pardon and Parole Factors governing decision, in general

Pardon and Parole Reasons for decision

The Parole Board is required to consider the relevant statutory factors in determining an application for parole, although it is not required to address each factor in its decision or accord all the factors equal weight. N.Y. Executive Law § 259-i(2)(c)(A).

[4] Sentencing and Punishment Juvenile offenders

A juvenile homicide offender has a substantive constitutional right not to be punished with life imprisonment for a crime reflecting transient immaturity. U.S. Const. Amend. 8.

[5] Sentencing and Punishment Juvenile offenders

For an individual convicted as a juvenile, a constitutional sentence guarantees, at some point, a meaningful opportunity to obtain release. U.S. Const. Amend. 8.

[6] Pardon and Parole Factors governing decision, in general

Decision of the New York State Board of Parole denying prisoner's application for release to parole was supported by substantial evidence, even though the effects of prisoner's condition, encephalitis, could have included a lack of empathy, and even though the Board found that prisoner's remorse was shallow, where the Board considered the prisoner's youth and its attendant characteristics in relationship to the commission of the offenses, and the Board did not base its determination solely upon the seriousness of the offenses nor disproportionately rely upon community opposition to prisoner's release. N.Y. Executive Law § 259-i(2)(c)(A).

2 Cases that cite this headnote

[7] **Pardon and Parole** Factors governing decision, in general

Discretionary release on parole may not be solely granted as a reward for exemplary conduct. N.Y. Executive Law § 259-i(2)(c)(A).

Attorneys and Law Firms

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Letitia James, Attorney General, New York, N.Y. (Steven C. Wu and Mark S. Grube of counsel), for respondent.

REINALDO E. RIVERA, J.P., JEFFREY A. COHEN, HECTOR D. LASALLE, FRANCESCA E. CONNOLLY, JJ.

DECISION & ORDER

***1012** In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Board of Parole dated May 4, 2016, which, after an interview held pursuant to Executive Law § 259–i(2)(a)(i), denied the petitioner's application to be released to parole, the petitioner appeals from a judgment of the Supreme Court, Dutchess County (Maria G. Rosa, J.), dated May 15, 2017. The judgment denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, without costs or disbursements.

On August 1, 1990, the petitioner, then 14 years old, telephoned 15–year–old Cindy Lewis, a neighbor and schoolmate, and asked her to meet him at the middle school athletic ***1013** field. Lewis arrived at the field shortly thereafter with 17–month–old Curtis Rizzo, whom she was babysitting. The petitioner confessed to the police, among others, to fatally stabbing Lewis and Rizzo and slitting their throats. In addition, the DNA of sperm recovered from Lewis's vagina matched the defendant's DNA (*see People v. Campbell,* 197 A.D.2d 930, 931, 602 N.Y.S.2d 282). On September 28, 1991, the petitioner was convicted of two counts of murder in the second degree. On February 10, 1992, the petitioner was sentenced by the Supreme Court, Wayne County, as a juvenile offender to consecutive indeterminate terms of imprisonment of nine years to life on each conviction. On appeal, the judgment was affirmed (*see id.* at 930, 602 N.Y.S.2d 282).

The petitioner first became eligible for parole release in 2008, and his application ****463** was denied on August 5, 2008. Subsequent applications for parole were denied by the New York State Board of Parole (hereinafter the Parole Board) in 2010, 2012, and 2014. On May 3, 2016, the petitioner, who was then 40 years old and had been incarcerated for 25 years, appeared before the Parole Board, via video conference, in connection with his fifth parole release application interview. In support of his application, the petitioner submitted a 24–page parole packet containing, among other things, a personal statement, wherein the petitioner expressed his remorse for the crimes, and numerous letters advocating for the petitioner's release, including letters from the Bard Prison Initiative, the Fortune Society, the Osbourne Association, and the petitioner's Rising Hope instructor. The petitioner's institutional and educational record reflected that he had obtained his GED, was accepted to Bard College in 2015, and completed various programs, including, among others, Aggression Replacement Training, Alcohol and Substance Abuse Training, Sex Offender Program, Transitional Services Phases I, II, and III, and Rising Hope Post–Secondary Program in Ministry and Human Services. Furthermore, the petitioner was assessed "low" for all risk factors on his Correctional Offender Management Profiling for Alternative Sanctions risk assessment dated February 26, 2016. The petitioner's institutional record also reflected two infractions, one in 1999, and the other in 2011.

During the parole release interview, the petitioner discussed the crimes underlying his convictions, his rehabilitative efforts, his release plans, and his remorse for the crimes and the impact the crimes had on the victims, the victims' families, and the entire community. When it was noted that there was significant opposition to the petitioner's release, the petitioner reiterated that he was "extremely sorry" and that he wished he ***1014** could apologize to every person affected by the crimes. The petitioner claimed that he was a changed person. One member of the Parole Board explicitly acknowledged the petitioner's remorse.

In a determination dated May 4, 2016, the Parole Board denied the petitioner's fifth application for parole release. The Parole Board found that the petitioner's crimes were heinous

and caused irreparable harm to many in the community, and that the petitioner demonstrated blatant disregard for the law and the sanctity of human life. The Parole Board further found that although the petitioner expressed remorse during the interview and had completed all recommended programs, he "appear[ed]" to have a "disconnect" regarding the gravity of his actions. The Parole Board remarked that the petitioner's remorse was "shallow" and that he needed to further reflect on why he singled out this particular victim. The Parole Board stated that consideration was given to all statutory factors, including, inter alia, the petitioner's extensive rehabilitative efforts, his risk to the community, the letters of support, his age at the time of the crime, and the considerable opposition to his release. The Parole Board determined that the petitioner's release remained incompatible with the welfare of society and would so deprecate the seriousness of his crimes as to undermine respect for law.

In September 2016, the petitioner filed an administrative appeal. In a decision dated October 26, 2016, the Parole Board's determination was affirmed. Thereafter, the petitioner commenced this proceeding pursuant to CPLR article 78 to review the Parole Board's determination, arguing, inter alia, that he was denied parole, once again, based solely upon the nature of the underlying offenses. The petitioner asserted that the Parole Board failed to consider ****464** that he was only 14 years old when he committed the crimes. He also described the circumstances of his youth, including that he did not believe that he was loved by his mother, that he was in special education classes, and that he had been diagnosed with encephalitis. The petitioner contended that the Parole Board's determination was arbitrary and capricious and that it failed to explain in sufficient detail the reasons for the denial.

In a judgment dated May 15, 2017, the Supreme Court denied the petition and dismissed the proceeding. The court found that, contrary to the petitioner's contention, although "[t]he majority of the decision denying parole focuses on the crimes of conviction," the Parole Board also considered the petitioner's age at the time of the crimes. The court further ***1015** noted that although the petitioner expressed his remorse in a personal statement and again during the parole release interview, the Parole Board was in the best position to assess the petitioner's credibility. The petitioner appeals.

[1] **[2]** **[3]** Judicial review of a determination of the Parole Board is narrowly circumscribed (*see Matter of Briguglio v. New York State Bd. of Parole,* 24 N.Y.2d 21, 29, 298 N.Y.S.2d 704, 246 N.E.2d 512; *Matter of Coleman v. New York State Dept. of Corr. & Community Supervision,* 157 A.D.3d 672, 69 N.Y.S.3d 652; *Matter of Esquilin v. New York State Bd. of Parole,* 144 A.D.3d 797, 797, 40 N.Y.S.3d 279). A Parole Board determination to deny early release may be set aside only where it evinces "irrationality bordering on impropriety" (*Matter of Russo v. New York State Bd. of Parole,* 50 N.Y.2d 69, 77, 427 N.Y.S.2d 982, 405 N.E.2d 225; *see Matter of Silmon v. Travis,* 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704, 741 N.E.2d 501; *Matter of Banks v. Stanford,* 159 A.D.3d 134, 142, 71 N.Y.S.3d 515; *Matter of LeGeros v. New York State Bd. of Parole,* 139 A.D.3d 1068, 1069, 30 N.Y.S.3d 834). The Parole Board is required to consider the relevant statutory factors (*see* Executive Law § 259–i[2][c][A]), although it is not required to address each factor in its decision or accord all the factors equal weight (*see Matter of King v. New York State Div. of Parole,* 83 N.Y.2d 788, 791, 610 N.Y.S.2d 954, 632 N.E.2d 1277; *Matter of Coleman v. New York State Dept. of Corr. & Community Supervision,* 157 A.D.3d at 672, 69 N.Y.S.3d 652; *Matter of Marszalek v. Stanford,* 152 A.D.3d 773, 773, 59 N.Y.S.3d 432). Whether the Parole Board considered the proper factors and followed the proper guidelines should be assessed based on the written determination evaluated in the context of the parole interview transcript (*see Matter of Siao–Pao v. Dennison,* 11 N.Y.3d 777, 778, 866 N.Y.S.2d 602, 896 N.E.2d 87; *Matter of Jackson v. Evans,* 118 A.D.3d 701, 702, 987 N.Y.S.2d 422).

[4] **[5]** It is true that a juvenile homicide offender "has a substantive constitutional right not to be punished with life imprisonment for a crime 'reflect[ing] transient immaturity' " (*Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision,* 140 A.D.3d 34, 38, 30 N.Y.S.3d 397, quoting *Montgomery v. Louisiana,* 577 U.S. ——, ——, 136 S Ct 718, 735, 193 L.Ed.2d 599), and that "children who commit even heinous crimes are capable of change" (*Montgomery v. Louisiana,* 577 U.S. at ——, 136 S Ct at 736). Thus, for an individual convicted as a juvenile, a constitutional sentence guarantees, at some point, a "meaningful opportunity to obtain release" (*Graham v. Florida,* 560 U.S. 48,75, 130 S.Ct. 2011, 176 L.Ed.2d 825).

[6] **[7]** We note that the literature in the record indicates that the effects of encephalitis could include "[a] lack of awareness ****465** and insensitivity" and a "lack of warmth and empathy." We further note that the Parole Board found that the petitioner appeared to have a "disconnect" and that his remorse was "shallow." Nevertheless, ***1016** the interview

record and the text of the subject determination establish that the requisite statutory factors were properly considered, and the record does not support the conclusion that the Parole Board's determination evinces irrationality bordering on impropriety. Contrary to the petitioner's contention, the Parole Board considered the petitioner's "youth and its attendant characteristics in relationship to the commission of the crime[s] at issue" (*Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision,* 140 A.D.3d at 39, 30 N.Y.S.3d 397; *see Matter of Allen v. Stanford,* 161 A.D.3d 1503, 1504–1505, 78 N.Y.S.3d 445; *Matter of Putland v. New York State Dept. of Corr. & Community Supervision,* 158 A.D.3d 633, 634, 72 N.Y.S.3d 93), and did not base its determination solely upon the seriousness of the offenses (*cf. Matter of Rossakis v. New York State Bd. of Parole,* 146 A.D.3d 22, 27, 41 N.Y.S.3d 490; *Matter of Ramirez v. Evans,* 118 A.D.3d 707, 987 N.Y.S.2d 415; *Matter of Gelsomino v. New York State Bd. of Parole,* 82 A.D.3d 1097, 1098, 918 N.Y.S.2d 892). The record does not reflect that the Parole Board disproportionately relied upon community opposition to his release (*see Matter of Applewhite v. New York State Bd. of Parole,* 167 A.D.3d 1380, 1381–1382, 91 N.Y.S.3d 308). In addition, the interview transcript indicates that the Parole Board took into account a number of other factors that reflected well on the petitioner, but determined that these factors did not outweigh the factors that militated against granting parole. The Parole Board was not required to give each factor equal weight and was entitled to place greater emphasis on the severity of the petitioner's crimes (*see Matter of Robinson v. New York State Bd. of Parole,* 162 A.D.3d 1450, 1451, 81 N.Y.S.3d 235; *Matter of Copeland v. New York State Bd. of Parole,* 154 A.D.3d 1157, 1158, 63 N.Y.S.3d 548). Discretionary release may not be solely granted as a reward for exemplary conduct (*see Silmon v. Travis,* 95 N.Y.2d at 478, 718 N.Y.S.2d 704, 741 N.E.2d 501).

Since the petitioner failed to sustain his burden of demonstrating that the challenged determination was irrational, we agree with the Supreme Court's determination to deny the petition and dismiss the proceeding (*see Matter of Marszalek v. Stanford,* 152 A.D.3d at 773, 59 N.Y.S.3d 432; *Matter of Esquilin v. New York State Bd. of Parole,* 144 A.D.3d at 797, 40 N.Y.S.3d 279; *Matter of LeGeros v. New York State Bd. of Parole,* 139 A.D.3d at 1069, 30 N.Y.S.3d 834; *cf. Matter of Coleman v. New York State Dept. of Corr. & Community Supervision,* 157 A.D.3d at 672, 69 N.Y.S.3d 652).

RIVERA, J.P., COHEN, LASALLE and CONNOLLY, JJ., concur.

All Citations

173 A.D.3d 1012, 105 N.Y.S.3d 461, 2019 N.Y. Slip Op. 04936

139 A.D.3d 890
Supreme Court, Appellate Division,
Second Department, New York.

Demetrio DAVILA, respondent-appellant,

v.

CITY OF NEW YORK, et al., appellants-respondents.

May 18, 2016.

Synopsis

Background: Apartment resident brought action against city and police officers to recover damages for personal injuries on theories of negligence and use of excessive force in violation of § 1983. Following entry of jury verdict in favor of resident, the Supreme Court, Kings County, Wade, Jr., J., denied defendants' motion for judgment as a matter of law or to set aside jury verdict on the issue of damages. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] force used by police was not excessive;

[2] police were entitled to qualified immunity; and

[3] governmental function immunity precluded liability for the allegedly negligent conduct of police officers in attempting to restrain apartment resident.

Reversed.

West Headnotes (11)

[1] Arrest Use of force

Force used by police officers in attempting to restrain apartment resident, who had a long history of mental illness and was behaving erratically, was not excessive; although officers' attempt to restrain resident resulted in both he and the officers falling down a flight of stairs, officers were aware that they were dealing with an emotionally disturbed person who had started or attempted to start a fire, and who had been throwing items out of the window of the apartment where he lived with his parents, and as officers attempted to approach resident, he punched one of them in the face and fled up the stairs. U.S.C.A. Const.Amend. 4.

[2] Arrest Mode of stop

Arrest Use of force

A claim that a law enforcement official used excessive force during the course of an arrest, investigatory stop, or other seizure of the person is to be analyzed under the objective reasonableness standard of the Fourth Amendment. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[3] Arrest Use of force

In determining whether a police officer's use of force was reasonable, within the meaning of the Fourth Amendment, a jury must take into account police officers' frequent need to make split-second judgments about how much force is necessary in circumstances that are tense, uncertain, and rapidly evolving, and avoid applying the 20/20 vision of hindsight. U.S.C.A. Const.Amend. 4.

1 Case that cites this headnote

[4] Searches and Seizures Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Under the Fourth Amendment reasonableness standard, it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others, and this is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. U.S.C.A. Const.Amend. 4.

[5] Civil Rights Sheriffs, police, and other peace officers

Police officers were entitled to immunity from apartment resident's § 1983 claims for use of excessive force; officers of reasonable competence could disagree on whether officers should have waited for the emergency services to arrive, instead of approaching resident initially and then, after he struck one officer, rushing the resident and attempting to handcuff him. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

[6] **Civil Rights** Sheriffs, police, and other peace officers

The dispositive question in determining whether a police officer is entitled to qualified immunity is whether the violative nature of particular conduct is clearly established, and this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.

2 Cases that cite this headnote

[7] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

The exacting standard for qualified immunity gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.

1 Case that cites this headnote

[8] **Municipal Corporations** Police and fire

Governmental function immunity precluded municipal liability for the allegedly negligent conduct of police officers in attempting to restrain apartment resident, who had a long history of mental illness and was behaving erratically, which resulted in resident and officers falling down a flight of stairs; allegedly negligent acts of the police officers were discretionary, rather than ministerial, and city sufficiently pleaded the governmental immunity defense in their verified answer and amended answer.

1 Case that cites this headnote

[9] **Municipal Corporations** Duties absolutely imposed

Municipal Corporations Discretionary powers and duties

Under the doctrine of governmental function immunity, government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general; discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.

1 Case that cites this headnote

[10] **Municipal Corporations** Discretionary powers and duties

States Governmental or proprietary functions

Even if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability pursuant to the doctrine of governmental function immunity if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority.

[11] **Appeal and Error** Reply briefs

Apartment resident's argument that he was prejudiced by trial court's instruction to the jury to proceed to damages without addressing resident's negligence claim if it found for the resident on the issue of excessive force was not properly before Appellate Division, where resident did not address the issue in his main brief, but only in his reply.

Attorneys and Law Firms

****308** Zachary W. Carter, Corporation Counsel, New York, N.Y. (Pamela Seider Dolgow, Margaret G. King, and Andrew John Potak of counsel), for appellants-respondents.

Herschel Kulefsky, New York, N.Y. (Rubert & Gross, P.C. [Soledad Rubert], of counsel), for respondent-appellant.

WILLIAM F. MASTRO, J.P., REINALDO E. RIVERA, LEONARD B. AUSTIN, and HECTOR D. LaSALLE, JJ.

Opinion

***890** In an action to recover damages for personal injuries, etc., the defendants appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Kings County (Wade, Jr., J.), entered February 19, 2014, as, upon a jury verdict on the ***891** issue of liability, upon the denial of those branches of their motion which were pursuant to CPLR 4401 for judgment as a matter of law dismissing the causes of action to recover damages for negligence and excessive force, made at the close of the plaintiff's case, and upon the denial of their motion pursuant to CPLR 4404 to set aside the jury verdict on the issue of damages awarding the plaintiff the principal sums of $1.5 million for past pain and suffering and $3.5 million for future pain and suffering, is in favor of the plaintiff and against them in the principal sum of $5 million, and the plaintiff cross-appeals from stated portions of the same judgment.

ORDERED that the judgment is reversed insofar as appealed from, on the law, those branches of the defendants' motion which were pursuant to CPLR 4401 for judgment as a matter of law dismissing the causes of action alleging negligence and excessive force are granted, and the complaint is dismissed; and it is further,

ORDERED that the cross appeal is dismissed as academic; and it is further,

ORDERED that the defendants are awarded one bill of costs.

On the morning of March 10, 2005, two police officers responded to several 911 emergency calls reporting a disturbance at an apartment building in Brooklyn where the plaintiff resided with his parents. While the officers were attempting to restrain the plaintiff, who had a long history of mental illness and was behaving erratically, both he and the officers fell down a flight of stairs. The plaintiff subsequently commenced this action to recover damages for personal injuries on theories, inter alia, of negligence and use of excessive force in violation of 42 U.S.C. § 1983. As relevant to this appeal, at the conclusion of a jury trial, the jury found in favor of the plaintiff on his causes of action to recover damages for negligence and use of excessive force, and awarded him damages. The defendants moved, inter alia, pursuant to CPLR 4401 for judgment as a matter of law dismissing those causes of action, and the Supreme Court denied those branches of their motion.

[1] **[2]** **[3]** **[4]** The Supreme Court erred in denying that branch of the defendants' motion which was pursuant to CPLR 4401 for ****309** judgment as a matter of law dismissing the cause of action alleging the use of excessive force by the police officers. "A claim that a law enforcement official used excessive force during the course of an arrest, investigatory stop, or other 'seizure' of the person is to be analyzed under the 'objective reasonableness' standard of the Fourth Amendment" (*Vizzari v. Hernandez,* 1 A.D.3d 431, 432, 766 N.Y.S.2d 883, quoting U.S. Const. 4th Amend.; *see Graham v. Connor,* ***892** 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443; *Combs v. City of New York,* 130 A.D.3d 862, 864–865, 15 N.Y.S.3d 67; *Campagna v. Arleo,* 25 A.D.3d 528, 529, 807 N.Y.S.2d 629). In determining whether the use of force was reasonable, the jury must take into account police officers' frequent need to make "split-second judgments" about how much force is necessary "in circumstances that are tense, uncertain, and rapidly evolving," and avoid applying "the 20/20 vision of hindsight" (*Graham v. Connor,* 490 U.S. at 396–397, 109 S.Ct. 1865; *see Plumhoff v. Rickard,* ——U.S. ——, ——, 134 S.Ct. 2012, 2020, 188 L.Ed.2d 1056; *Holland v. City of Poughkeepsie,* 90 A.D.3d 841, 844, 935 N.Y.S.2d 583; *Campagna v. Arleo,* 25 A.D.3d at 529, 807 N.Y.S.2d 629). "[I]t is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others ... This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes" (*City & Cnty. of San Francisco v. Sheehan,* ——U.S. ——, ——, 135 S.Ct. 1765, 1775, 191 L.Ed.2d 856 [internal quotation marks omitted]).

Here, it is undisputed that, by the time they arrived at the scene, the defendant officers were aware that they were dealing with an emotionally disturbed person, that the person had started or attempted to start a fire, and that he had been throwing items out of the window of the apartment where he lived with his parents. Upon entering the building's stairwell, the officers were confronted by the plaintiff, naked except for a pair of underpants around his knees or ankles. The circumstances almost immediately became more tense

when the officers attempted to approach the plaintiff and he punched one of them in the face and fled up the stairs, screaming. While the officers could have waited for the Emergency Services Unit (hereinafter ESU) to arrive and take over, it cannot be said that, by approaching the plaintiff and speaking to him, they employed excessive force. In addition, viewing the evidence in the light most favorable to the plaintiff, and affording him "every inference which may properly be drawn from the facts presented" (*Szczerbiak v. Pilat,* 90 N.Y.2d 553, 556, 664 N.Y.S.2d 252, 686 N.E.2d 1346; *see Messina v. Staten Is. Univ. Hosp.,* 121 A.D.3d 867, 868, 994 N.Y.S.2d 644; *Leonard v. New York City Tr. Auth.,* 90 A.D.3d 858, 859, 934 N.Y.S.2d 721), it cannot be said that, after the plaintiff struck one officer in the face and ran up the stairs screaming, the officers used force beyond what was objectively reasonable to contain the plaintiff, an emotionally disturbed person whom they viewed as posing a danger to himself and others, and who had committed a crime by assaulting an officer and then resisting arrest (*see Koeiman v. City of New York,* 36 A.D.3d 451, 829 N.Y.S.2d 24). The plaintiff's expert witness, a retired police officer who testified that the officers' actions did not comport with acceptable police practice, "did ***893** not furnish any basis for his conclusion that the officers departed from established protocol" (*Pacheco v. City of New York,* 104 A.D.3d 548, 550, 961 N.Y.S.2d 408).

[5] **[6]** **[7]** Moreover, under the circumstances of this case, the officers' actions would be entitled to qualified immunity as ****310** a matter of law. "If found to be objectively reasonable, [an] officer's actions are privileged under the doctrine of qualified immunity" (*Lepore v. Town of Greenburgh,* 120 A.D.3d 1202, 1203, 992 N.Y.S.2d 329; *see Williams v. City of New York,* 129 A.D.3d 1066, 1067, 12 N.Y.S.3d 256; *Holland v. City of Poughkeepsie,* 90 A.D.3d 841, 844, 935 N.Y.S.2d 583). "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Mullenix v. Luna,* ––U.S. ––––, ––––, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 [internal quotation marks omitted]). While the doctrine does not require "a case directly on point, ... existing precedent must have placed the statutory or constitutional question beyond debate" (*Ashcroft v. al-Kidd,* 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149; *see Mullenix v. Luna,* 136 S.Ct at 308). "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized" (*Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271). The dispositive question is whether the violative nature of particular conduct is clearly established (*see Ashcroft v. al–Kidd,* 563 U.S. at 742, 131 S.Ct. 2074; *Mullenix v. Luna,* 136 S.Ct. at 308). "This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition" (*Mullenix v. Luna,* 136 S.Ct. at 308 [internal quotation marks omitted]; *see Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583; *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272). "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts" (*Mullenix v. Luna,* 136 S.Ct. at 308 [internal quotation marks omitted]; *see Saucier v. Katz,* 533 U.S. at 205, 121 S.Ct. 2151). "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law' " (*City & Cnty. of San Francisco v. Sheehan,* 135 S.Ct. at 1774, quoting *Ashcroft v. al–Kidd,* 563 U.S. at 743, 131 S.Ct. 2074; *see Malley v. Briggs,* 475 U.S. at 341, 106 S.Ct. 1092; *Estate of Jaquez v. City of New York,* 104 F.Supp.3d 414, 420 [S.D.N.Y.]).

Here, considering the specific context of the case (*see Mullenix v. Luna,* 136 S.Ct. at 308), it is clear that officers ***894** of reasonable competence could disagree (*Malley v. Briggs,* 475 U.S. at 341, 106 S.Ct. 1092) on whether the defendant officers should have waited for the ESU to arrive, instead of approaching the plaintiff initially and then, after he struck one officer, rushing the plaintiff and attempting to handcuff him (*see City & Cnty. of San Francisco v. Sheehan,* –– U.S. ––––, 135 S.Ct. 1765, 191 L.Ed.2d 856; *see also Mullenix v. Luna,* –– U.S. ––––, 136 S.Ct. 305, 193 L.Ed.2d 255). Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 4401 for judgment as a matter of law dismissing the cause of action alleging the use of excessive force by the police officers.

[8] **[9]** **[10]** Likewise, the Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 4401 for judgment as a matter of law dismissing the cause of action alleging negligence based on the officers' actions. Under the doctrine of governmental function immunity, " '[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to ****311** the plaintiff, apart from any duty to the public in general'

" (*Valdez v. City of New York,* 18 N.Y.3d 69, 76–77, 936 N.Y.S.2d 587, 960 N.E.2d 356, quoting *McLean v. City of New York,* 12 N.Y.3d 194, 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167; *see Lauer v. City of New York,* 95 N.Y.2d 95, 99, 711 N.Y.S.2d 112, 733 N.E.2d 184; *Kelsey v. City of New York,* 108 A.D.3d 689, 968 N.Y.S.2d 903; *Miserendino v. City of Mount Vernon,* 96 A.D.3d 810, 946 N.Y.S.2d 605). "[D]iscretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Haddock v. City of New York,* 75 N.Y.2d 478, 484, 554 N.Y.S.2d 439, 553 N.E.2d 987 [internal quotation marks omitted]; *see McCants v. Hempstead Union Free Sch. Dist.,* 127 A.D.3d 941, 942, 8 N.Y.S.3d 337). "[E]ven if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority" (*Valdez v. City of New York,* 18 N.Y.3d at 76, 936 N.Y.S.2d 587, 960 N.E.2d 356; *see Shipley v. City of New York,* 25 N.Y.3d 645, 653, 16 N.Y.S.3d 1, 37 N.E.3d 58; *McLean v. City of New York,* 12 N.Y.3d at 202, 878 N.Y.S.2d 238, 905 N.E.2d 1167; *Lauer v. City of New York,* 95 N.Y.2d at 99, 711 N.Y.S.2d 112, 733 N.E.2d 184; *Mon v. City of New York,* 78 N.Y.2d 309, 313, 574 N.Y.S.2d 529, 579 N.E.2d 689; *Haddock v. City of New York,* 75 N.Y.2d at 484, 554 N.Y.S.2d 439, 553 N.E.2d 987).

Here, the Supreme Court properly found that the evidence established as a matter of law that the allegedly negligent acts of the police officers were discretionary, and not ministerial (*see Kelsey v. City of New York,* 2012 WL 2563826, 2012 N.Y. Misc. LEXIS 3061 [Sup.Ct., Queens County], *affd.* 108 A.D.3d 689, 968 N.Y.S.2d 903) and, ***895** therefore, that the doctrine of governmental function immunity precluded liability for the allegedly negligent conduct of the officers (*see Valdez v. City of New York,* 18 N.Y.3d at 76, 936 N.Y.S.2d 587, 960 N.E.2d 356). However, the court erred in refusing to dismiss the negligence cause of action based on its finding that the defense was untimely raised. In fact, the record demonstrates that the defendants sufficiently pleaded the governmental immunity defense in their verified answer and amended answer. Accordingly, the court erred in denying that branch of the defendants' motion (*see Murchison v. State of New York,* 97 A.D.3d 1014, 1017, 949 N.Y.S.2d 789).

[11] The plaintiff's argument that he was prejudiced by the Supreme Court's instruction to the jury to proceed to damages without addressing the negligence question if it found for the plaintiff on the issue of excessive force has been rendered academic by the foregoing analysis. In any event, that argument is not properly before this Court, since the plaintiff did not address this issue in his main brief, but only in his reply (*see Matter of Keyes v. Watson,* 133 A.D.3d 757, 759, 21 N.Y.S.3d 263). Further, since the plaintiff's notice of cross appeal was limited to the issue of the court's instruction to the jury, the plaintiff's contention that the Supreme Court erred in dismissing his cause of action for assault and battery is not properly before this Court (*see* CPLR 5515[1]; *Wenzel v. 16302 Jamaica Ave., LLC,* 115 A.D.3d 852, 853, 982 N.Y.S.2d 489).

In light of the above, the parties' remaining contentions have been rendered academic.

All Citations

139 A.D.3d 890, 33 N.Y.S.3d 306, 2016 N.Y. Slip Op. 03846

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Evenstad v. City of West St. Paul, D.Minn., January 25, 2018

150 A.D.3d 1104
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Michael DEVINE, respondent,

v.

Anthony J. ANNUCCI, etc., et al., appellants.

May 24, 2017.

Synopsis

Background: Petitioner, deemed a low level sex offender upon his conditional release from prison, sought Article 78 review, and relief in form of prohibition, with respect to Department of Corrections and Community Supervision (DCCS) decision to remove him from his home and to restrict his movement, alleging that those actions interfered with his First Amendment right to associate with his family and his right to be free from ex post facto punishment, and that Sexual Assault Reform Act (SARA) was unconstitutional on its face. The Supreme Court, Kings County, Lewis, J., 45 Misc.3d 1001, 994 N.Y.S.2d 819, granted petition as to claim that SARA was unconstitutional. DCCS appealed.

[Holding:] The Supreme Court, Appellate Division, held that retroactive application of SARA did not violate Ex Post Facto Clause as applied to petitioner.

Reversed and remitted.

West Headnotes (6)

[1] **Constitutional Law** Penal laws in general

Constitutional prohibition against ex post facto laws applies to penal statutes which disadvantage the offender affected by them. U.S.C.A. Const. Art. I, § 10.

[2] **Constitutional Law** Penal laws in general
Constitutional Law Punishment in general
Constitutional Law Criminal Proceedings

A statute will be considered an ex post facto law if it punishes as a crime an act previously committed, which was innocent when done, makes more burdensome the punishment for a crime, after its commission, or deprives one charged with crime of any defense available according to law at the time when the act was committed. U.S.C.A. Const. Art. I, § 10.

1 Case that cites this headnote

[3] **Constitutional Law** Penal laws in general

A statute that is enacted for nonpunitive purposes, and is not so punitive in effect as to negate that nonpunitive intent, may be retroactively applied without violating the Ex Post Facto Clause. U.S.C.A. Const. Art. I, § 10.

2 Cases that cite this headnote

[4] **Constitutional Law** Penal laws in general

To determine whether the prohibition against retroactive punishment imposed by the Ex Post Facto Clause applies, a court must first determine whether the legislature meant the statute to enact a regulatory scheme that is civil and nonpunitive; if so, the court must consider whether the statute is so punitive either in purpose or effect as to negate the legislature's intention to deem it civil. U.S.C.A. Const. Art. I, § 10.

2 Cases that cite this headnote

[5] **Action** Civil or criminal
Action Statutory Remedies

Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

[6] **Constitutional Law** Sex Offenders
Mental Health Sex offenders

Retroactive application of Sexual Assault Reform Act (SARA), which prohibited certain sex offenders who were released on parole, conditionally released, or subject to a period of post-release supervision from knowingly entering within 1,000 feet of school grounds at any time or from knowingly entering within 1,000 feet of other facilities or institutions where minor children congregate while a minor is present, did not violate the Ex Post Facto Clause as applied to sex offender who could not reside with his girlfriend due to application of the Act; SARA was part of a detailed and comprehensive regulatory scheme involving the State's ongoing monitoring, management and treatment of registered sex offenders, and offender failed to show by the "clearest proof" that the residency and travel restrictions imposed by SARA, as applied to him, were so punitive in their consequences as to transform the restrictions into punishment. U.S.C.A. Const. Art. I, § 10; McKinney's Executive Law § 259–c(14).

7 Cases that cite this headnote

West Codenotes

Negative Treatment Vacated
McKinney's Executive Law § 259–c(14)

Attorneys and Law Firms

****150** Eric T. Schneiderman, Attorney General, New York, NY (Steven C. Wu and Karen W. Lin of counsel), for appellants.

Lynn W.L. Fahey, New York, NY (Lisa Napoli of counsel), and Brooklyn Defender Services, Brooklyn, NY (Lisa Schreibersdorf and Susannah Karlsson of counsel), for respondent (one brief filed).

JOHN M. LEVENTHAL, J.P., SHERI S. ROMAN, SANDRA L. SGROI, and HECTOR D. LASALLE, JJ.

Opinion

***1104** In a hybrid proceeding, inter alia, pursuant to CPLR article 78 in the nature of prohibition to prohibit the enforcement of Executive Law § 259–c(14) against the petitioner/plaintiff, and action for a judgment declaring that Executive Law § 259–c(14) is unconstitutional, Anthony J. Annucci, Acting Commissioner, Department of Corrections and Community Supervision, and Mary Osborne, Deputy Director, Sex Offender Monitoring, Department of Corrections and Community Supervision, appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Kings County (Lewis, J.), dated September 29, 2014, as granted that branch of the petition/complaint which was to prohibit them from enforcing Executive Law § 259–c(14) against the petitioner/plaintiff on the ground that Executive Law § 259–c(14) violates the Ex Post Facto Clause of the United States Constitution (U.S.C.A. Const. Art. I, § 10[1]) as applied to the petitioner/plaintiff.

ORDERED that the judgment is reversed insofar as appealed from, on the law, without costs or disbursements, that branch of the petition/complaint which was pursuant to CPLR article 78 in the nature of prohibition to prohibit the appellants from enforcing Executive Law § 259–c(14) against the petitioner/plaintiff on the ground that Executive Law § 259–c(14) violates the Ex Post Facto Clause of the United States Constitution as applied to the petitioner/plaintiff is denied, and the matter is remitted to the Supreme Court, Kings County, for further proceedings on the remaining requests for relief in the petition/complaint.

***1105** On April 23, 2000, the petitioner/plaintiff (hereinafter the petitioner), then 22 years old, committed a sex offense against a 17–year–old girl. In 2002, he was convicted of three counts of sexual abuse in the first degree and was sentenced to a term of imprisonment of seven years. He was subsequently designated a level one sex offender under the Sex Offender Registration Act (Correction Law art 6–C). In August 2008, he was conditionally released from prison. In November 2008, he was resentenced, and a five-year period of postrelease supervision (hereinafter PRS) was added to his sentence. He challenged the resentence, and it was vacated by the Supreme Court. However, in March 2012, the resentence was reinstated on appeal.

****151** Meanwhile, the petitioner met his girlfriend and began residing with her in her home in Brooklyn. In February 2014, the petitioner's parole officer allegedly informed him that he was living too close to a school and that he would need to move to a location that was compliant with the Sexual Assault Reform Act (Executive Law § 259–c[14]; hereinafter SARA), which prohibits certain sex offenders who are released on parole, conditionally released, or subject to

a period of PRS from knowingly entering within 1,000 feet of school grounds at any time or from knowingly entering within 1,000 feet of other facilities or institutions where minor children congregate while a minor is present. The petitioner claims that SARA imposes upon him restrictions which virtually exclude him from residing and traveling within most of the borough of Brooklyn and, indeed, most of the City of New York. On March 21, 2014, the petitioner was ordered by his parole officer to report to a three-quarter house. At the time this proceeding/action was commenced, the petitioner was residing in a three-quarter house approximately three miles from his girlfriend's home.

The petitioner commenced this hybrid proceeding, inter alia, pursuant to CPLR article 78 in the nature of prohibition to prohibit Anthony J. Annucci, Acting Commissioner, Department of Corrections and Community Supervision, and Mary Osborne, Deputy Director, Sex Offender Monitoring, Department of Corrections and Community Supervision (hereinafter together the appellants) from continuing to mandate the removal of the petitioner from his home and from restricting his movement in and around the City of New York, and action for a judgment declaring that Executive Law § 259–c(14) is unconstitutional. The Supreme Court granted that branch of the petition which sought prohibition, concluding that SARA violates the Ex Post Facto Clause of the United States Constitution (U.S.C.A. Const. Art. I, § 10[1]) as applied to the petitioner, and denied the remaining requests for relief as academic.

[1] **[2]** **[3]** ***1106** The issue of whether it is permissible to retroactively apply SARA, which became effective on February 1, 2001, after the petitioner had committed the underlying sex offense, turns upon whether such application would violate the Ex Post Facto Clause of the United States Constitution, which provides that "[n]o State shall ... pass any ... ex post facto Law" (U.S.C.A. Const. Art. I, § 10[1]). The constitutional prohibition against ex post facto laws applies to "penal statutes which disadvantage the offender affected by them" (*Collins v. Youngblood,* 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30). "A statute will be considered an ex post facto law if it 'punishes as a crime an act previously committed, which was innocent when done,' 'makes more burdensome the punishment for a crime, after its commission,' or 'deprives one charged with crime of any defense available according to law at the time when the act was committed' " (*People v. Foster,* 87 A.D.3d 299, 306, 927 N.Y.S.2d 92, quoting *Beazell v. Ohio,* 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216; *see Rogers v. Tennessee,* 532 U.S. 451, 456, 121 S.Ct. 1693, 149 L.Ed.2d 697; *Collins v. Youngblood,* 497 U.S. at 42, 110 S.Ct. 2715, 111 L.Ed.2d 30; *Calder v. Bull,* 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648; *Kellogg v. Travis,* 100 N.Y.2d 407, 410, 764 N.Y.S.2d 376, 796 N.E.2d 467). In contrast, a statute that is enacted for nonpunitive purposes, and is not so punitive in effect as to negate that nonpunitive intent, may be retroactively applied without violating the Ex Post Facto Clause (*see U.S. v. Ward,* 448 U.S. 242, 248–249, 100 S.Ct. 2636, 65 L.Ed.2d 742).

****152** **[4]** **[5]** To determine whether the prohibition against retroactive punishment imposed by the Ex Post Facto Clause applies, a court must first determine whether the legislature meant the statute to enact a regulatory scheme that is civil and nonpunitive (*see Smith v. Doe,* 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164; *Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501). If so, the court must consider whether the statute is "so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil" (*Smith v. Doe,* 538 U.S. at 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 [internal quotation marks omitted]). "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (*id.* [internal quotation marks omitted]).

[6] The legislative history of SARA as originally enacted in 2000, as well as that of its 2005 amendment, make clear that it was intended to provide protection to children from the risk of recidivism by certain convicted sex offenders, rather than to punish such offenders for a past crime (*see Matter of Williams v. Department of Corr. & Community Supervision,* 136 A.D.3d 147, 24 N.Y.S.3d 18; *Wallace v. New York,* 40 F.Supp.3d 278 [E.D.N.Y.]; *see also People v. Diack,* 24 N.Y.3d 674, 677, 3 N.Y.S.3d 296, 26 N.E.3d 1151). Indeed, the Court of Appeals, in analyzing the issue of whether the State ***1107** has preempted the field of managing registered sex offenders, has stressed that SARA was part of "a detailed and comprehensive regulatory scheme involving the State's ongoing monitoring, management and treatment of registered sex offenders, which ... does not end when the sex offender is released from prison" (*People v. Diack,* 24 N.Y.3d at 685, 3 N.Y.S.3d 296, 26 N.E.3d 1151). Moreover, the petitioner has not shown by the "clearest proof" that the residency and travel restrictions imposed by SARA, as applied to him, are so punitive in their consequences as to transform the restrictions into punishment (*Smith v. Doe,* 538 U.S. at 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 [internal quotation marks omitted]). Accordingly, the retroactive application of SARA does not violate the Ex Post Facto Clause as applied to the petitioner.

Since the petitioner failed to demonstrate "a clear legal right" to prohibition on that ground (*Matter of Premo v. Breslin,* 89 N.Y.2d 995, 997, 657 N.Y.S.2d 391, 679 N.E.2d 630), the Supreme Court should have denied that branch of the petition/complaint.

We are aware that other jurisdictions have reached differing conclusions when confronted with ex post facto challenges to statutes similar to SARA. For example, the United States Court of Appeals for the Sixth Circuit held that the retroactive application of amendments to Michigan's Sex Offender Registration Act, including a prohibition on living, working, or loitering within 1,000 feet of a school, amounted to ex post facto punishment prohibited by the United States Constitution (*see Does # 1–5 v. Snyder,* 834 F.3d 696 [6th Cir.]). In contrast, the United States Court of Appeals for the Eighth Circuit held that an Arkansas statute relating to sex offender registration, which includes a residency restriction, is not an unconstitutional ex post facto law (*see Weems v. Little Rock Police Dept.,* 453 F.3d 1010 [8th Cir.]). In this case, the petitioner has not shown that the restrictions SARA imposed, as applied to him, violate the Ex Post Facto Clause. "[I]ssues regarding whether there are better or wiser ways to achieve the law's stated objectives are policy decisions belonging to the legislature and not the court" (*Matter of Williams v. Department of Corr. & Community Supervision,* 136 A.D.3d at 149, 21 N.Y.S.3d 678).

****153** In light of our determination, the remaining requests for relief in the petition/complaint are no longer academic. Accordingly, we remit the matter to the Supreme Court, Kings County, for further proceedings on the remaining requests for relief in the petition/complaint (*see e.g. Horowitz v. 763 E. Assoc., LLC,* 125 A.D.3d 808, 811, 5 N.Y.S.3d 118; *Headley v. City of New York,* 115 A.D.3d 804, 807, 982 N.Y.S.2d 149; *Lazarre v. Davis,* 109 A.D.3d 968, 969–970, 972 N.Y.S.2d 80).

All Citations

150 A.D.3d 1104, 56 N.Y.S.3d 149, 2017 N.Y. Slip Op. 04114

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174 A.D.3d 856
Supreme Court, Appellate Division,
Second Department, New York.

ELTINGVILLE LUTHERAN CHURCH, Appellant,

v.

Robert RIMBO, etc., et al., Respondents.

2018–10246
|
(Index No. 150331/16)
|
Argued - March 18, 2019
|
July 31, 2019

Synopsis

Background: Church commenced action against synod and its bishop seeking a determination that the synod's determination to place the church under synodical administration was unlawful, and seeking to enjoin the synod from closing the church, seizing or taking control of its property, or interfering with its operations, including the school operated by the church. The synod and bishop moved to dismiss the action based upon documentary evidence and for lack of subject matter jurisdiction. The Supreme Court, Richmond County, Alan C. Marin, J., granted the motion to dismiss. Church appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] trial court lacked subject matter jurisdiction to consider synod's decision to impose synodical administration, and

[2] church was not entitled to injunctive relief preventing synod from seizing or taking control of church's property.

Affirmed.

West Headnotes (10)

[1] **Constitutional Law** Religious Organizations in General

The First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs. U.S. Const. Amend. 1.

1 Case that cites this headnote

[2] **Religious Societies** Judicial supervision in general

Religious bodies are to be left free to decide church matters for themselves, uninhibited by state interference.

[3] **Religious Societies** Nature and status in general

By uniting with a denominational body, a local congregation consents to be bound by the ecclesiastical determinations of the denominational government, subject only to such appeals as the organism itself provides for.

[4] **Religious Societies** Jurisdiction of courts to determine rights of property

A court may resolve church property disputes when the case can be decided solely upon the application of neutral principles of law, without reference to any religious principle.

1 Case that cites this headnote

[5] **Religious Societies** Jurisdiction of courts to determine rights of property

When resolving a church property dispute, the court must apply objective, well-established principles of secular law to the issues.

[6] **Religious Societies** Actions to determine rights to property and funds; injunction

When resolving a church property dispute, the court may rely on internal church governing documents, but only if those documents do not require interpretation of ecclesiastical doctrine.

[7] **Religious Societies** Actions to determine rights to property and funds; injunction

When resolving a church property dispute, the court's focus is on the language of the deeds, the terms of the local church charter, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property.

[8] **Religious Societies** Jurisdiction of courts to determine rights of property

Synod's decision to impose synodical administration on local church was a nonjusticiable religious determination, and therefore trial court lacked subject matter jurisdiction to consider it; synod's determination could only be made, under synod law, upon finding that membership of church's congregation had become so scattered or so diminished in numbers as to make it impractical for congregation to fulfill purposes for which it was organized, or that it was necessary for synod to protect congregation's property from waste and deterioration. N.Y. CPLR § 3211(a)(2); N.Y. Religious Corporations Law § 17-c(2)(a)(iii).

[9] **Religious Societies** Jurisdiction of courts to determine rights of property

A synod's determination to impose synodical administration on a local church is a nonjusticiable religious determination.

[10] **Religious Societies** Actions to determine rights to property and funds; injunction

Church was not entitled to injunctive relief preventing synod from seizing or taking control of church's property following synod's imposition of synodical administration upon church; denominational and synod law, as well as governing state statute, provided that, upon imposing synodical administration, synod could take charge and control of a local congregation, and provisions of denominational and synod law pertaining to congregations which had disaffiliated with denomination were not applicable, as church had not disaffiliated with synod prior to imposition of synodical administration. N.Y. CPLR § 3211(a)(1); N.Y. Religious Corporations Law §§ 17-c(2)(a)(iii), 17-c(2)(b).

1 Case that cites this headnote

****41** In an action for declaratory and injunctive relief, the plaintiff appeals from an order of the Supreme Court, Richmond County (Alan C. Marin, J.), dated August 23, 2018. The order granted the defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint.

Attorneys and Law Firms

Crawford Bringslid Vander Neut, LLP, Staten Island, N.Y. (Allyn J. Crawford and Mara R. Levy of counsel), for appellant.

Capell Barnett Matalon & Schoenfeld LLP, New York, N.Y. (Joseph Milano of counsel), for respondents.

CHERYL E. CHAMBERS, J.P., ROBERT J. MILLER, HECTOR D. LASALLE, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

***857** ORDERED that the order is affirmed, with costs.

The plaintiff, Eltingville Lutheran Church (hereinafter Eltingville), is a member of the Evangelical Lutheran Church in America (hereinafter ELCA) and the Metropolitan New York Synod of the Evangelical Lutheran Church in America (hereinafter the Synod). Eltingville owns real property on Staten Island, and it operates a church and a school on the property. On March 15, 2016, the Synod Council imposed

synodical administration on Eltingville and appointed trustees to take control of Eltingville's property. The Synod advised Eltingville of its right to appeal the decision to the Synod Assembly.

Eltingville commenced this action against the Synod and its Bishop, seeking, in the first three causes of action, a judgment declaring that the Synod's determination to place it under synodical administration violated Religious Corporations Law § 17–c and section 13.24 of the Synod's constitution because the standards for synodical administration were not met. The fourth cause of action sought to enjoin the Synod from closing Eltingville's church, seizing or taking control over any part of Eltingville's real or other property, and interfering with the day-to-day operations of Eltingville's church and school. The Supreme Court temporarily enjoined the defendants from imposing synodical administration and taking any actions to close the church or interfere with its day-to-day operations. Eltingville thereafter took its first of two required votes to disaffiliate with the ELCA and the Synod (*see* Religious Corporations Law § 17–c[2][b]).

The defendants moved pursuant to CPLR 3211(a)(1), (2), (3), and (7) to dismiss the complaint, arguing that the Supreme Court lacked subject matter jurisdiction over the internal church dispute since the determination to impose synodical administration was a nonjusticiable religious determination which resulted in the Synod taking title to Eltingville's property. In an order dated August 23, 2018, the Supreme Court granted the defendants' motion. Eltingville appeals.

[1] **[2]** **[3]** "The First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing ***858** particular doctrines or ****42** beliefs" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d 282, 286, 849 N.Y.S.2d 463, 879 N.E.2d 1282). Religious bodies are to be left free to decide church matters for themselves, uninhibited by state interference (*see Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich,* 426 U.S. 696, 722, 96 S.Ct. 2372, 49 L.Ed.2d 151; *First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d 110, 116–117, 476 N.Y.S.2d 86, 464 N.E.2d 454). By uniting with a denominational body, a local congregation consents to be bound by the ecclesiastical determinations of the denominational government, subject only to such appeals as the organism itself provides for (*see Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich,* 426 U.S. at 711, 96 S.Ct. 2372).

[4] **[5]** **[6]** **[7]** However, a court may resolve church property disputes "when the case can be 'decided solely upon the application of neutral principles of ... law, without reference to any religious principle' " (*Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d at 286, 849 N.Y.S.2d 463, 879 N.E.2d 1282, quoting *Avitzur v. Avitzur,* 58 N.Y.2d 108, 115, 459 N.Y.S.2d 572, 446 N.E.2d 136; *see Jones v. Wolf,* 443 U.S. 595, 602–603, 99 S.Ct. 3020, 61 L.Ed.2d 775; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658; *First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d at 121, 476 N.Y.S.2d 86, 464 N.E.2d 454; *Merkos L'Inyonei Chinuch, Inc. v. Sharf,* 59 A.D.3d 403, 407, 873 N.Y.S.2d 148). The court must apply objective, well-established principles of secular law to the issues and may rely on internal church governing documents, but only if those documents do not require interpretation of ecclesiastical doctrine (*see Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d at 286, 849 N.Y.S.2d 463, 879 N.E.2d 1282; *First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d at 119–120, 476 N.Y.S.2d 86, 464 N.E.2d 454). "[T]he focus is on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property" (*First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d at 122, 476 N.Y.S.2d 86, 464 N.E.2d 454; *see Blaudziunas v. Egan,* 18 N.Y.3d 275, 280, 938 N.Y.S.2d 496, 961 N.E.2d 1107; *Episcopal Diocese of Rochester v. Harnish,* 11 N.Y.3d 340, 351–352, 870 N.Y.S.2d 814, 899 N.E.2d 920).

[8] **[9]** Here, the complaint challenged the Synod's determination to impose synodical administration upon Eltingville. Such a determination could only be made upon finding that "the membership of a congregation has become so scattered or so diminished in numbers as to make it impractical for such a congregation to fulfill the purposes for which it was organized or that it is ***859** necessary for this synod to protect the congregation's property from waste and deterioration" (Synod's Constitution § 13.24; *see* Religious Corporations Law § 17–c[2][a][iii]). A Synod's determination to impose synodical administration on a local church is a nonjusticiable religious determination (*see Matter of Metropolitan N.Y. Synod of the Evangelical Lutheran*

Church of Am. v. David, 95 A.D.3d 419, 419, 943 N.Y.S.2d 476; *cf. Upstate N.Y. Synod of Evangelical Lutheran Church in Am. v. Christ Evangelical Lutheran Church of Buffalo,* 185 A.D.2d 693, 693–694, 585 N.Y.S.2d 919). Accordingly, we agree with the Supreme Court's determination ****43** to grant those branches of the defendants' motion which were to dismiss the first three causes of action as nonjusticiable pursuant to CPLR 3211(a)(2).

[10] Eltingville contends that, assuming arguendo, the underlying dispute over synodical administration is an ecclesiastical matter, the Supreme Court should not have directed dismissal of the fourth cause of action, which sought injunctive relief to prevent the defendants from seizing its property, since the property issue may be resolved solely by reference to neutral principles of law. We disagree. The constitutions of the ELCA and the Synod, as well as the relevant state statute, provide that, upon imposing synodical administration, a Synod may take charge and control of the local congregation's property (*see* Religious Corporations Law § 17–c[2][a][iii]; [c][ii]). The provisions of the constitutions relied upon by Eltingville, involving a congregation which has disaffiliated with the ELCA and the Synod, are not applicable, since it is clear that Eltingville had not disaffiliated with the Synod prior to the imposition of synodical administration (*see* Religious Corporations Law § 17–c[2][b]).

Therefore, to the extent that the property issue may be determined by neutral principles of law (*cf. Russian Orthodox Convent Novo–Diveevo, Inc. v. Sukharevskaya,* 166 A.D.3d 1036, 1039–1040, 91 N.Y.S.3d 101), the governing church constitutions and relevant state statute establish that Eltingville is not entitled to the injunctive relief it seeks in the fourth cause of action (*see Episcopal Diocese of Rochester v. Harnish,* 11 N.Y.3d at 351–352, 870 N.Y.S.2d 814, 899 N.E.2d 920; *Matter of German Evangelical Lutheran St. Johannes Church v. Metropolitan N.Y. Synod of Lutheran Church in Am.,* 47 A.D.2d 904, 905, 366 N.Y.S.2d 214). Accordingly, the documentary evidence disproved an essential allegation of the complaint (*see Mitkowski v. Marceda,* 133 A.D.3d 574, 575, 19 N.Y.S.3d 313) and conclusively established a defense as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190). Therefore, we agree with the Supreme Court's determination ***860** to grant that branch of the defendants' motion which was to dismiss the fourth cause of action pursuant to CPLR 3211(a)(1).

CHAMBERS, J.P., MILLER, LASALLE and CHRISTOPHER, JJ., concur.

All Citations

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153 A.D.3d 87
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of EVERGREEN ASSOCIATION, INC., doing business as Expectant Mother Care/EMC Frontline Pregnancy Centers, appellant,

v.

Eric T. SCHNEIDERMAN, etc., respondent.

June 21, 2017.

Synopsis

Background: Not-for-profit organization that advocated against abortion petitioned for protective order and to quash Attorney General's subpoena duces tecum, alleging that subpoena was politically motivated attack on organization's First Amendment right to advocate its pro-life views, and that information demanded in subpoena was not substantially related to any demonstrated threat to the state interest in prohibiting the practice of medicine without a license. The Supreme Court, Westchester County, Joan B. Lefkowitz, J., denied petition. Organization appealed.

Holdings: The Supreme Court, Appellate Division, Cohen, J., held that:

[1] Attorney General was authorized to serve subpoena duces tecum on organization;

[2] Attorney General had adequate factual basis to support issuance of subpoena;

[3] documents sought by Attorney General were reasonably related to investigation; but

[4] subpoena was not narrowly tailored to require production of only those documents directly related to investigation, such that limitation on scope of demands was warranted.

Affirmed as modified.

West Headnotes (11)

[1] **Administrative Law and Procedure** Subpoena duces tecum

The requirements for the issuance of an investigatory subpoena duces tecum are (1) that the issuing agency has authority to engage in the investigation and issue the subpoena, (2) that there is an authentic factual basis to warrant the investigation, and (3) that the evidence sought is reasonably related to the subject of the inquiry.

3 Cases that cite this headnote

[2] **Attorney General** Powers and Duties

Attorney General was authorized to serve subpoena duces tecum on nonprofit corporation that was not operated for commercial gain and which advocated against abortion to take proof and make determination as to whether corporation engaged in repeated fraudulent or illegal acts or otherwise demonstrated persistent fraud or illegality in conducting its business. McKinney's Executive Law § 63(12).

1 Case that cites this headnote

[3] **Attorney General** Powers and Duties

Attorney General had adequate factual basis to support issuance of investigatory subpoena served on organization which advocated against abortion to determine whether organization was engaged in unauthorized practice of medicine; materials submitted by Attorney General included transcripts of testimony from public hearings, and an affirmation submitted under seal for in camera review that Attorney General adduced evidence that organization's centers were set up to look like medical offices, staff members were dressed in scrubs or lab coats, medical history was taken from clients, diagnoses of pregnancies, ectopic pregnancies,

and gestational age were made, and medical advice was given, including allegedly false advice.

[4] **Administrative Law and Procedure** Subpoena

The information forming the factual basis for the issuance of an investigatory subpoena need not be sufficient to establish fraud or illegality, or even provide probable cause, as long as the futility of the process is not inevitable or obvious; to satisfy this requirement, a state agency is not obligated to establish a strong and probable basis for the investigation, let alone probable cause as that term has been used in criminal law, but rather, all that is required is that the scope of the subpoena and the basis for its issuance be more than isolated or rare complaints lest the powers of investigation become potentially instruments of abuse and harassment.

[5] **Attorney General** Powers and Duties

In evaluating the Attorney General's justification for the issuance of a subpoena, there is a presumption that he is acting in good faith.

[6] **Attorney General** Powers and Duties

Documents sought by Attorney General from organization advocating against abortion were reasonably related to investigation into whether organization was practicing medicine without a license and misleading women into believing they were being seen by a medical doctor, although subpoena required production of a substantial number of documents; documents sought were potentially relevant to investigation, including documents providing information about services provided, education and credentials of staff members, exemplars of client registration forms, and acquisition of medical supplies, equipment, and machines.

[7] **Attorney General** Powers and Duties

An application to quash an investigatory subpoena issued by the Attorney General should be granted where the information sought is utterly irrelevant to any proper investigation.

1 Case that cites this headnote

[8] **Attorney General** Powers and Duties

In defending an investigative inquiry, the Attorney General must show only that the materials sought bear a reasonable relation to the subject matter under investigation and to the public purpose to be achieved.

[9] **Constitutional Law** Discovery and subpoenas

There is a danger that investigatory subpoenas may be used to intimidate or harass speakers who espouse views with which the government may disagree, and a government investigation should not be allowed to trespass on the First Amendment principle that debate on public issues should be uninhibited, robust, and wide-open. U.S.C.A. Const.Amend. 1.

[10] **Attorney General** Powers and Duties

Even where the Attorney General's purpose in serving an investigatory subpoena is found to be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

[11] **Attorney General** Powers and Duties
Constitutional Law Discovery requests and subpoenas

Attorney General's investigatory subpoena served on not-for-profit organization that advocated against abortion was not narrowly tailored to require production of only those documents directly related to alleged unauthorized practice of medicine, and thus limitation on scope of subpoena's demands was warranted to require disclosure of only those

documents that were substantially related to Attorney General's legitimate need to gather evidence to determine whether organization engaged in unauthorized practice of medicine and which did not unnecessarily intrude on organization's First Amendment right to freedom of association. U.S.C.A. Const.Amend. 1.

Attorneys and Law Firms

****137** American Catholic Lawyers Association, Inc., Bronxville, NY (Christopher A. Ferrara of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York, NY (Richard P. Dearing and Karen W. Lin of counsel), respondent pro se.

JOHN M. LEVENTHAL, J.P., JEFFREY A. COHEN, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

COHEN J.

***89** *Introduction*

The petitioner is a not-for-profit corporation committed to providing women experiencing ****138** unplanned pregnancies with ***90** alternatives to abortion. To this end, the petitioner operates 12 crisis pregnancy centers in New York City where its largely volunteer staff gives pregnant women advice and emotional support aimed at encouraging them not to terminate their pregnancies and to keep their babies. Following a series of public hearings that examined the practices of centers such as those operated by the petitioner, the Attorney General of the State of New York launched an investigation into whether the petitioner was engaging in the unauthorized practice of medicine through conduct including locating its centers in medical buildings and making them look like medical offices, requesting the medical histories of its clients, performing pregnancy tests and sonograms, estimating gestational age, and evaluating fetal health. As part of his investigation, the Attorney General served the petitioner with an investigatory subpoena duces tecum demanding documents relating, inter alia, to the petitioner's corporate structure and facilities, the names, education, and credentials of all of its staff members, the materials it provides to clients, its medical services, equipment, and supplies, and the source of its funding. The petitioner countered by commencing this proceeding to quash the subpoena, claiming that it was a politically motivated attack on its First Amendment right to advocate pro-life views. For the reasons that follow, we hold that although the Attorney General was authorized to serve the subpoena and the materials sought are reasonably related to the investigation, the subpoena infringes on the First Amendment right of the petitioner and the petitioner's staff members to freedom of association, and is not sufficiently tailored to serve the compelling investigative purpose for which it was issued. Accordingly, we limit the scope of the subpoena to more narrowly tailor it to the Attorney General's legitimate investigatory needs.

Background

The petitioner, Evergreen Association, Inc., doing business as Expectant Mother Care/EMC Frontline Frontline Pregnancy Centers (hereinafter Evergreen), is a not-for-profit corporation which operates crisis pregnancy centers throughout New York City. Evergreen states that it is "dedicated to providing women, free of charge, with alternatives to abortion so that they may keep and love their babies." According to Evergreen, its centers rely heavily on unpaid volunteers, who provide women experiencing unplanned pregnancies with nonmedical advice, emotional support, and material assistance. The centers also provide a variety of pregnancy-related services, including pregnancy testing, ultrasounds, and sonograms.

***91** Following a series of public hearings conducted in 2010 and 2011 into the practices of crisis pregnancy centers, the New York City Council found that Evergreen engaged in conduct which could constitute the unauthorized practice of medicine, including evaluating fetal health and requesting the medical history of clients. In October 2011, a televised news investigation of Evergreen's practices reported that Evergreen made diagnoses of gestational age and situated its centers in medical buildings making them appear like medical offices. In a radio interview that same year, the president of Evergreen refused to answer a question posed as to whether Evergreen employed medical personnel. As a result of these public allegations and investigations, the respondent, Eric T. Schneiderman, in his capacity as Attorney General of the State of New York, launched an investigation into Evergreen's conduct. According to the Attorney General, his independent investigation yielded additional information and evidence that ****139** Evergreen may be engaged in the unauthorized practice of medicine, including more proof that Evergreen facilities are located in medical buildings and designed like

medical clinics, that Evergreen refers to its clients as patients and requests their medical information, and that Evergreen conducts pregnancy tests and makes diagnoses regarding pregnancy, ectopic pregnancy, and gestational age.

On May 17, 2013, the Attorney General served a subpoena duces tecum on Evergreen, requesting copies of documents relating to its operations for the preceding three-year period. The subpoena advised Evergreen that the Attorney General was conducting an investigation into possible violations of Executive Law § 63(12) involving the unauthorized practice of medicine, and demanded 10 categories of documents relating, inter alia, to Evergreen's corporate structure and facilities, the education and credentials of its staff, the materials it provided to clients, its medical equipment and supplies, and the source of its funding. More specifically, the subpoena demanded:

"1. Documents sufficient to show [Evergreen's] organizational and corporate structure including the names and addresses of any parent or subsidiary corporation, certificates of incorporation and bylaws.

"2. Documents sufficient to identify the following information for each Center:

***92** "(a) Name under which the Center operates or advertises;

"(b) Address of the Center;

"(c) Telephone number and email address used by the Center;

"(d) Hours during which the Center is open for seeing Clients;

"(e) Names of any medical or counseling facilities that share office space with or operate in the same building as the Center; and

"([f]) Services provided at the Center.

"3. Documents sufficient to identify the following information for every Staff person, organized by Center location:

"(a) Name of Staff person and service provided by such Staff person;

"(b) Date of hire, termination (if any) and schedule for such Staff;

"(c) Credentials, degrees and relevant education, including all professional licenses and certifications by any local, state or federal government Agency; and

"(d) Staff hierarchies and reporting responsibilities for each Center.

"4. Documents sufficient to identify all policies, practices and procedures regarding responding to Clients' inquiries or providing services to Clients including, but not limited to, training materials, Staff handbooks, scripts, and other documents relied on to provide services to Clients, as well as any documents concerning referrals of Clients to medical, counseling, social or other services, including sonography or ultrasound, whether provided at any Center or other location.

"5. Documents sufficient to identify exemplars of all registration forms, documents, pamphlets and educational materials provided to Clients, whether to be kept or maintained by EMC or the Clients, and all forms completed by Staff regarding Clients.

***93** "6. Documents sufficient to identify all entities or persons to whom EMC refers Clients including, but not limited to, Agreements or contracts between EMC and with such entities or persons.

"7. Documents sufficient to show records for the purchase, donation, leasing, or other acquisition of any medical or medical-related supplies, equipment, or machines at any Center.

****140** "8. Documents sufficient to show all advertisements and promotional literature, brochures and pamphlets that EMC provided or disseminated to the public in New York State, including but not limited to, websites, pamphlets, billboards, and radio, television or internet broadcasts.

"9. All documents concerning any grant or other monies received from a local, New York State, or federal governmental Agency.

"10. Copies of all written complaints, formal or informal, concerning services provided or performed by EMC."

By letter dated June 8, 2013, Evergreen asked the Attorney General to withdraw the subpoena, contending that it threatened to violate Evergreen's constitutional rights, and was an overbroad and politically motivated "fishing

expedition." By letter dated June 14, 2013, the Attorney General notified Evergreen of his refusal to withdraw the subpoena.

Evergreen responded by commencing this proceeding for a protective order and to quash the subpoena, arguing that the Attorney General did not have a factual basis or legal authority to issue the subpoena, and that the subpoena violated its First Amendment rights and the First Amendment rights of its staff and clients. With regard to the existence of a factual basis to issue the subpoena, Evergreen noted that the instant investigation mirrored a 2002 investigation in which the then Attorney General withdrew an almost identical subpoena because there was no actual complaint or evidence to justify its issuance. Evergreen also maintained that it did not engage in any commercial transactions and provided all services pro bono, relying heavily on unpaid volunteers. According to Evergreen, these volunteers provided only nonmedical advice, within the common knowledge of informed lay people, and contained pro-life opinions that any American had the right to express and that did not require a license to espouse. Evergreen further ***94** submitted that Executive Law § 63(12) did not authorize the Attorney General to issue the subpoena because that statute pertains solely to entities engaged in business transactions, and did not apply to Evergreen because it is a not-for-profit organization which does not engage in commercial transactions.

Addressing the impact of the subpoena, Evergreen alleged that the subpoena had caused great distress to members of its staff, who were concerned that their lawful First Amendment right to persuade women to give birth would be treated as a violation of the law. Moreover, the subpoena invaded the privacy of the staff and would dissuade others from volunteering for Evergreen. Evergreen also alleged that Bronx Lebanon Hospital, which had provided Evergreen access to its ultrasound facilities and a supervising doctor for over 10 years, severed its relationship with Evergreen when it was notified of the subpoena.

Evergreen maintained that since the subpoena impacted on the First Amendment rights of its staff and clients to free speech and association, it could not be enforced without a compelling state interest and was subjected to exacting scrutiny. Evergreen urged that the Attorney General's subpoena and investigation had a chilling effect on the First Amendment liberties of Evergreen, its volunteers, and the women who might seek its pro bono services, and concluded by arguing that it, its staff, and its clients would be irreparably harmed by the deprivation of their constitutional rights unless its petition was granted in its entirety. In the alternative, Evergreen requested that the subpoena be held unconstitutionally overbroad and limited in its terms. In a memorandum of ****141** law in opposition to the petition, the Attorney General pointed out that as the chief legal officer of New York, he is charged with investigating and prosecuting violations of local, state, and federal law that threaten the well-being of New York residents. He explained that in this capacity, he is investigating whether Evergreen is engaged in the unauthorized practice of medicine in violation of Education Law articles 130 and 131. In furtherance of this investigation, he served the subpoena on Evergreen seeking specific information about Evergreen's facilities, staffing, training, and client referral practices and policies in order to determine the extent to which it provides, purports to provide, or represents itself as providing medical care and advice to women in New York. According to the Attorney General, the decision to issue the ***95** subpoena was based on the results of his independent investigation, allegations made before the New York City Council, various news reports, and Evergreen's public statement. He also maintained that the subpoena had been "carefully tailored" to seek information related to the investigation, and that all of the information sought was relevant to the question of whether Evergreen was engaging in the unauthorized practice of medicine.

The Attorney General disputed Evergreen's claim that Executive Law § 63(12) did not authorize issuance of the subpoena because of Evergreen's status as a nonprofit, noncommercial entity. To the contrary, he argued that the statute applies to nonprofit enterprises that may be providing fraudulent or illegal services to the public, and such nonprofit organizations may not use that status as a shield from an inquiry into possible fraud or illegality.

The Attorney General further argued that the subpoena imposed no undue burden on First Amendment activity. Rather, the subpoena sought information that Evergreen made available to the public and which it willingly distributed, and did not regulate, interfere with, influence, or suppress the ability of Evergreen and its staff to express their views or associate with anyone they choose. In any event, the subpoena is proper because it was designed to ensure that Evergreen is not engaged in the unauthorized practice of medicine or otherwise promulgating fraudulent or illegal speech in furtherance of such conduct. Since the First Amendment does not protect fraudulent or illegal speech, his efforts to

determine, via the subpoena, whether illegal activity is taking place are permissible under the First Amendment.

The Attorney General also contended that even if the subpoena is subject to a strict scrutiny standard of review, the subpoena is permissible because it protects a compelling state interest and is narrowly tailored to serve that purpose. Here, the investigation is related to a compelling state interest because there is an adequate factual basis for investigating whether health and safety have been endangered by Evergreen.

The Attorney General additionally submitted an attorney affirmation under seal for in camera review regarding his investigation, which included information obtained as a result of undercover visits to Evergreen's centers.

In reply, Evergreen contended that the Attorney General had failed to sustain his burden of coming forward with a sufficient ***96** factual basis for issuance of the subpoena, especially in this case, where the subpoena implicates the First Amendment, and the Attorney General's burden is significantly higher. Moreover, most of the information demanded by the subpoena is not substantially related to any compelling state interest, and, even if the Attorney General had ****142** a sufficient factual predicate, the subpoena would still have to be limited to discovery concerning the particular activities alleged to constitute unlicensed medical practice and the individuals alleged to have engaged in it. Evergreen concluded by submitting that the Attorney General's broad and sweeping inquiry into its records, bylaws, certificates of incorporation, staff handbooks, educational materials, website, and private contracts is not substantially related to any demonstrated threat to the state interest in prohibiting the practice of medicine without a license.

In an order entered December 19, 2013, the Supreme Court, inter alia, denied the petition. The court found that the Attorney General had statutory authority to issue the subpoena, and had demonstrated a factual basis for its issuance through the submission of the in camera affirmation relating to the investigation of Evergreen's centers, and testimony presented at the City Council hearings. The court rejected Evergreen's First Amendment claims, finding that Evergreen had not demonstrated any way in which the First Amendment right of its staff to freedom of association would be threatened if required to comply with the subpoena, and that the Attorney General had a compelling interest in preventing fraudulent or illegal acts, including practicing medicine without a license. The court further determined that the documents sought by the subpoena were substantially related to the investigation into the possible unauthorized practice of medicine, and that Evergreen had made no showing that the documents are readily available from other sources. Evergreen appeals.

Analysis

[1] The requirements for the issuance of an investigatory subpoena duces tecum are "(1) that the issuing agency has authority to engage in the investigation and issue the subpoena, (2) that there is an authentic factual basis to warrant the investigation, and (3) that the evidence sought is reasonably related to the subject of the inquiry" (*Matter of Abrams v. Thruway Food Market & Shopping Center, Inc.,* 147 A.D.2d 143, 147, 541 N.Y.S.2d 856; citing *Matter of Levin v. Murawski,* 59 N.Y.2d 35, 462 N.Y.S.2d 836, 449 N.E.2d 730, and *Matter of A'Hearn v. Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn.,* 23 N.Y.2d 916, 298 N.Y.S.2d 315, 246 N.E.2d 166).

[2] ***97** At the outset, we hold that the Attorney General was authorized to serve the subpoena on Evergreen pursuant to Executive Law § 63(12) in order to take proof and make a determination as to whether Evergreen is engaged in repeated fraudulent or illegal acts or otherwise demonstrated persistent fraud or illegality in conducting its business. Executive Law § 63(12) authorizes the Attorney General to seek an injunction "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." The statute further provides that "[i]n connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules." If Evergreen is engaged in the unauthorized practice of medicine which endangers members of the public, then it is engaged in illegal acts "in the carrying on, conducting or transaction of business," regardless of whether it is doing so for a commercial purpose or profiting financially. Notably, Executive Law § 63(12) makes no reference to profiting from the illegal conduct, or to commercial transactions. Accordingly, we reject Evergreen's contention that Executive Law § 63(12) is inapplicable because ****143** it is a nonprofit corporation that is not operated for commercial gain.

[3] **[4]** **[5]** Further, the Supreme Court properly found that the Attorney General had an adequate factual basis to support

the issuance of the subpoena. The information forming the factual basis for the issuance of an investigatory subpoena "need not be sufficient to establish fraud or illegality, or even provide probable cause, as long as the futility of the process is not inevitable or obvious" (*Matter of Hogan v. Cuomo,* 67 A.D.3d 1144, 1146, 888 N.Y.S.2d 665; *see Myerson v. Lentini Bros. Moving & Stor. Co.,* 33 N.Y.2d 250, 256–257, 351 N.Y.S.2d 687, 306 N.E.2d 804). To satisfy this requirement, a State agency is not obligated to establish "a strong and probable basis for the investigation, let alone probable cause as that term has been used in criminal law" (*Myerson v. Lentini Bros. Moving & Stor. Co.,* 33 N.Y.2d at 258, 351 N.Y.S.2d 687, 306 N.E.2d 804; *see Matter of Dental Coop. v. Attorney–General of State of N.Y.,* 127 A.D.2d 274, 280, 514 N.Y.S.2d 228). Rather, "[a]ll that is required is that the scope of the subpoena and the basis for its issuance be more than isolated or rare complaints ... lest the powers of investigation ... become potentially instruments of abuse and harassment" (***98** *Myerson v. Lentini Bros. Moving & Stor. Co.,* 33 N.Y.2d at 258, 351 N.Y.S.2d 687, 306 N.E.2d 804). "Moreover, in evaluating the Attorney General's justification for the issuance of a subpoena, there is a presumption that he is acting in good faith" (*Matter of Dental Coop. v. Attorney–General of State of N.Y.,* 127 A.D.2d at 280, 514 N.Y.S.2d 228; *see Matter of Abrams v. Thruway Food Market & Shopping Center, Inc.,* 147 A.D.2d at 147, 541 N.Y.S.2d 856). Here, the materials submitted by the Attorney General in opposition to the petition included transcripts of testimony from the public hearings conducted by the City Council, and an affirmation submitted under seal for in camera review which detailed the evidence uncovered by the Attorney General during his preliminary investigation. The sealed affirmation confirmed that during his preliminary investigation, the Attorney General adduced evidence that Evergreen's centers were set up to look like medical offices, staff members were dressed in scrubs or lab coats, a medical history was taken from clients, diagnoses of pregnancies, ectopic pregnancies, and gestational age were made, and medical advice was given, including false advice. These submissions amply demonstrate that a legitimate factual basis existed for the Attorney General to conduct his investigation and issue the subpoena to determine whether Evergreen is engaged in the unauthorized practice of medicine (*see Matter of Hogan v. Cuomo,* 67 A.D.3d at 1146–1147, 888 N.Y.S.2d 665; *Matter of Roemer v. Cuomo,* 67 A.D.3d 1169, 1171–1172, 888 N.Y.S.2d 669; *Matter of Chassin v. Helaire Nursing Agency, Inc.,* 211 A.D.2d 581, 621 N.Y.S.2d 611).

[6] **[7]** **[8]** Nor should the subpoena be quashed on the ground that the documents sought by the Attorney General are not reasonably related to the subject of the investigation. An application to quash an investigatory subpoena issued by the Attorney General should be granted where the information sought is "utterly irrelevant to any proper investigation" (*Anheuser–Busch, Inc. v. Abrams,* 71 N.Y.2d 327, 331–332, 525 N.Y.S.2d 816, 520 N.E.2d 535). In defending his inquiry, the Attorney General "must show only that the materials sought bear 'a reasonable relation to the subject matter under investigation and to the public purpose to be achieved' " (*id.* at 332, 525 N.Y.S.2d 816, 520 N.E.2d 535, quoting *Carlisle v. Bennett,* 268 N.Y. 212, 217, 197 N.E. 220; *see* ****144** *Virag v. Hynes,* 54 N.Y.2d 437, 442, 446 N.Y.S.2d 196, 430 N.E.2d 1249; *Matter of Goldin v. Greenberg,* 49 N.Y.2d 566, 571–572, 427 N.Y.S.2d 599, 404 N.E.2d 722; *Matter of Hyatt v. State of Cal. Franchise Tax Bd.,* 105 A.D.3d 186, 202, 962 N.Y.S.2d 282).

Here, the documents sought by the Attorney General are reasonably related to the subject of his inquiry into whether Evergreen may be practicing medicine without a license and misleading women into believing that they are being seen by a ***99** medical doctor (*see Matter of Levin v. Murawski,* 59 N.Y.2d at 41, 462 N.Y.S.2d 836, 449 N.E.2d 730). Pursuant to Education Law § 6522, " [o]nly a person licensed or otherwise authorized under this article shall practice medicine or use the title 'physician,' " and pursuant to Education Law § 6521, "[t]he practice of the profession of medicine is defined as diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition." The documents sought, which include documents providing information about the services provided at Evergreen's centers, the education and credentials of Evergreen's staff members, exemplars of its client registration forms, and its acquisition of medical supplies, equipment, and machines, are potentially relevant to the investigation into whether Evergreen is engaged in the unlicensed practice of medicine. Moreover, the fact that the subpoena requires production of a substantial number of documents does not render it invalid, overbroad, or unduly burdensome (*see All–Waste Sys. v. Abrams,* 155 A.D.2d 401, 547 N.Y.S.2d 77). Although Evegreen contends that the subpoena is a "massively intrusive inquisition" into its records, " '[relevancy], and not quantity, is the test of the validity of a subpoena' " (*Matter of American Dental Coop. v. Attorney–General of State of N.Y.,* 127 A.D.2d at 282–283, 514 N.Y.S.2d 228, quoting *Matter of Minuteman Research v. Lefkowitz,* 69 Misc.2d 330, 331, 329 N.Y.S.2d 969 [Sup.Ct.,

N.Y. County]). Accordingly, there is no basis to quash the subpoena on the grounds that the documents sought are irrelevant or that the subpoena is overbroad in scope.

However, this does not end our analysis because Evergreen additionally seeks to quash the subpoena on First Amendment grounds. The public debate over the morality of abortion continually rages on, with each side finding the position of the other untenable (*see Whole Woman's Health v. Hellerstedt,* ––U.S. ––––, 136 S.Ct. 2292, 195 L.Ed.2d 665 [June 27, 2016]). Evergreen argues that the subpoena violates the First Amendment rights of its staff and others seeking to be associated with it. As an ideologically driven organization with strongly held views on this controversial issue, Evergreen expressly declares in its petition that the crisis pregnancy centers it operates in New York City are "dedicated to providing women, free of charge, with alternatives to abortion so that they may keep and love their babies." Evergreen contends that the subpoena, in its entirety, violates the First Amendment by chilling its right to oppose abortion in accordance with religious views, to communicate that opposition, ***100** and to attempt to persuade others toward that point of view. Evergreen further maintains that the right to associate freely and anonymously with others who share that point of view is abridged by compliance with the subject subpoena.

"Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters" (*NAACP* ****145** *v. Alabama ex rel. Patterson,* 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488). Our cherished First Amendment freedoms permit a diversity of thought that remains at the core of our intellectual richness and strengthened by an uninhibited competition of ideas.

[9] There is a danger that subpoenas may be used to intimidate or harass speakers who espouse views with which the government may disagree, and "[a] government investigation should not be allowed to trespass on the principle that 'debate on public issues should be uninhibited, robust, and wide-open' " (*Matter of Parkhouse v. Stringer,* 12 N.Y.3d 660, 668, 884 N.Y.S.2d 216, 912 N.E.2d 48, quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686).

Here, since Evergreen sought, in part, to quash the subpoena on First Amendment grounds, Evergreen had the initial threshold burden to make at least some showing that production of the information sought would impair its First Amendment rights (*see Matter of Full Gospel Tabernacle v. Attorney–General of State of N.Y.,* 142 A.D.2d 489, 493, 536 N.Y.S.2d 201; *St. German of Alaska E. Orthodox Catholic Church v. United States,* 653 F.Supp. 1342, 1346–1347 [S.D.N.Y.]; *see also Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL–CIO,* 72 N.Y.2d 307, 532 N.Y.S.2d 722, 528 N.E.2d 1195). Although the Supreme Court concluded that Evergreen had not demonstrated any way in which the First Amendment right of its staff members to freedom of association would be threatened if required to comply with the subpoena, Evergreen specifically pointed to the fact that the subpoena had already negatively impacted its relationship with Bronx Lebanon Hospital and contended that it will have a chilling effect on its associations with its employees and potential clients. We deem this sufficient under the facts presented to meet Evergreen's initial burden.

Thus, the burden shifted to the Attorney General to show that the subpoena substantially related to a compelling governmental interest (*see Brown v. Socialist Workers '74 Campaign* ***101** *Comm. [Ohio],* 459 U.S. 87, 91–92, 103 S.Ct. 416, 74 L.Ed.2d 250; *Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL–CIO,* 72 N.Y.2d at 312–313, 532 N.Y.S.2d 722, 528 N.E.2d 1195; *Local 1814, Intl. Longshoremen's Assn., AFL–CIO v. Waterfront Commn. of New York Harbor,* 667 F.2d 267, 273 [2d Cir.]). In this regard, the Supreme Court correctly noted that the assertion of First Amendment claims by Evergreen triggers more careful scrutiny. The court also correctly recognized that the Attorney General's office asserted a compelling state interest in preventing and prohibiting fraudulent or illegal acts, including practicing medicine without a license.

[10] However, in order to pass constitutional muster, the governmental action must be narrowly tailored to serve the compelling state interest. Indeed, even where, as here, the Attorney General's purpose in serving the subpoena is found to "be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved" (*Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231).

[11] There is no question that the Attorney General's investigation is of the utmost importance to protecting the health and safety of women. However, it is equally important that such investigation be carried out with respect and sensitivity to the constitutional rights of those involved. ****146** While the subpoena seeks documents that generally bear a reasonable relation to the subject matter of the Attorney General's investigation, the demands are not narrowly tailored to require production of only those documents directly related to Evergreen's alleged unauthorized practice of medicine. Thus, we limit in scope the demands set forth in the subpoena to require the disclosure of only those documents that are substantially related to the Attorney General's legitimate need to gather evidence to determine whether Evergreen has engaged in the unauthorized practice of medicine and which do not unnecessarily intrude on Evergreen's First Amendment right to freedom of association.

More specifically, demand 1, which seeks documents sufficient to show Evergreen's "organizational and corporate structure including the names and addresses of any parent or subsidiary corporation, certificates of incorporation and bylaws," must be limited by requiring the disclosure of only those portions of such documents which pertain to the potential provision of medical or medical-related services. Demand 2 must be limited by requiring the disclosure of information and ***102** documents in response to subsection (e), and, in response to subsection (f), the disclosure of information and documents pertaining only to any medical or medical-related services provided at its centers. Demand 3, which seeks information including the names, credentials, and education of every staff member at each of Evergreen's centers, must be limited by requiring the disclosure of such information only with respect to those staff members who provide medical or medical-related services. Demand 4, which seeks documents including training materials, staff handbooks, and documents concerning referrals of clients to medical, counseling, social or other services, must be limited by requiring the disclosure of only those portions of such documents which pertain to the provision of medical or medical-related services and referrals of clients for medical and medical-related services. Demand 5, which seeks production of exemplars of all registration forms, documents, pamphlets and educational materials provided by clients, must be limited by requiring the disclosure of only those portions of such forms, documents, pamphlets and educational materials as seek medical information from clients and/or pertain to the provision of medical or medical-related services. Demand 6, which seeks documents "sufficient to identify all entities or persons to whom" Evergreen refers clients, must be limited to require the disclosure of documents sufficient to identify all entitles and persons to whom Evergreen refers clients for medical or medical-related services. Demand 7 must be limited by requiring the disclosure of documents sufficient to show records only for the purchase and leasing of any medical or medical-related supplies, equipment, or machines at Evergreen's centers. Demands 8 and 9 must be quashed in their entirety because they seek documents that infringe on Evergreen's First Amendment rights, including materials disseminated on websites, radio, and television and Internet broadcasts, and documents relating to the sources of Evergreen's funding, which is not directly related to Evergreen's alleged unauthorized practice of medicine. Finally, demand 10, which seeks "[c]opies of all written complaints, formal or informal, concerning services provided or performed" by Evergreen, must be limited by requiring the disclosure of only such complaints which pertain to the provision of medical or medical-related services.

To assist in ensuring proper compliance with the subpoena, we direct that Evergreen produce all documents necessary to ***103** comply with demands 1, 2, 3, 4, 5, 6, 7, and ****147** 10 as originally formulated, for an in camera inspection by the Supreme Court, which must then determine which documents pertain to medical or medical-related services, or to medical or medical-related supplies, equipment, or machines. In determining which documents pertain to medical or medical-related services, the Supreme Court must be guided by the definition set forth in Education Law § 6521. Upon completion of the in camera inspection, the Supreme Court must determine which documents, or parts thereof, must be disclosed to the Attorney General in compliance with demands 1, 2, 3, 4, 5, 6, 7, and 10 as limited herein.

Accordingly, the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the petition which was to quash demands 1, 2, 3, 4, 5, 6, 7, and 10, and substituting therefor a provision granting that branch of the petition to the extent of directing Evergreen to produce all documents necessary to comply with those demands, as originally formulated, for an in camera inspection, and otherwise holding that branch of the petition in abeyance pending determination of which of those demands, or parts thereof, if any, shall be quashed, and (2) by deleting the provision thereof denying that branch of the petition which was to quash demands 8 and 9, and substituting therefor a provision granting that branch of the petition; as so modified,

the order is affirmed insofar as appealed from, and the matter is remitted to the Supreme Court, Westchester County, for an in camera inspection of the documents required to be produced in compliance with demands 1, 2, 3, 4, 5, 6, 7, and 10, as originally formulated, and a determination of which documents, or parts thereof, if any, shall be disclosed to the Attorney General in compliance with demands 1, 2, 3, 4, 5, 6, 7, and 10 as limited herein, and thereafter, a determination of which of those demands, or parts thereof, if any, shall be quashed.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the petition which was to quash demands 1, 2, 3, 4, 5, 6, 7, and 10, and substituting therefor a provision granting that branch of the petition to the extent of directing Evergreen to produce all documents necessary to comply with those demands, as originally formulated, for an in camera inspection, and otherwise holding that branch of the petition in abeyance pending ***104** determination of which of those demands, or parts thereof, if any, shall be quashed, and (2) by deleting the provision thereof denying that branch of the petition which was to quash demands 8 and 9, and substituting therefor a provision granting that branch of the petition; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, for an in camera inspection of the documents required to be produced in compliance with demands 1, 2, 3, 4, 5, 6, 7, and 10, as originally formulated, and a determination of which documents, or parts thereof, if any, shall be disclosed to the Attorney General in compliance with demands 1, 2, 3, 4, 5, 6, 7, and 10 as limited herein, and thereafter, a determination of which of those demands, or parts thereof, if any, shall be quashed.

LEVENTHAL, J.P., DUFFY and LASALLE, JJ., concur.

All Citations

153 A.D.3d 87, 54 N.Y.S.3d 135, 2017 N.Y. Slip Op. 05086

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204 A.D.3d 104
Supreme Court, Appellate Division,
Second Department, New York.

Mark FISCH, respondent,

v.

Rachel N. DAVIDSON, appellant.

2021-00155
|
(Index No. 610414/20)
|
Argued—January 6, 2022
|
March 9, 2022

Synopsis

Background: Husband brought action against wife for judgment of divorce that declared the separate property of the parties, equitably distributed the marital assets and debt, and awarded house to husband. Wife filed motion for change of venue, which the Supreme Court, Suffolk County, Marian Rose Tinari, J., granted. Wife appealed.

Holdings: The Supreme Court, Appellate Division, LaSalle, J., held that:

[1] wife demonstrated that parties primarily resided in non-venue county at time action commenced;

[2] parties' seasonal use of house in venue county was not sufficient to establish either spouse's residency in venue; and

[3] time wife spent in house in venue county during COVID-19 pandemic was insufficient to establish wife's residency in venue.

Reversed.

West Headnotes (4)

[1] Divorce Venue

Wife demonstrated that she and husband primarily resided in non-venue county at the time action commenced, supporting change of venue, in divorce action; wife submitted copies of parties' income tax returns listing their address in non-venue county as their residence, parties' voter registration showing that wife was registered to vote in non-venue county, wife's driver license listing her address in non-venue county, motor vehicle records showing that parties' cars were registered in city in non-venue county, and an email from husband to parties' art insurance carrier stating that parties did not have any intention of adding any art to their house within venue. N.Y. CPLR §§ 503(a), 510(1).

[2] Child Custody Physical custody arrangements

Domicile Domicile distinguished from residence

A person may have more than one residence, as in, for example, a joint custody situation or other shared living arrangement.

[3] Divorce Venue

Husband's and wife's seasonal use of house in venue county was not sufficient to establish either spouse's residency in county, supporting change of venue, in divorce action; wife averred that prior to the commencement of the action, the house was only used by the parties on weekends in the summertime, with limited exceptions, and that the only time the parties stayed in the house outside of the summer season was a few days over the Christmas holiday break in one year. N.Y. CPLR §§ 503(a), 510(1).

[4] Divorce Venue

Time wife spent in house in venue county during the COVID-19 pandemic was insufficient to establish wife's residency in county, supporting change of venue, in divorce action; wife planned only to stay at the house temporarily to assist her immunocompromised daughter and newborn grandchild when the COVID-19 pandemic was

at its zenith in city in which husband and wife had their primary residence, which did not indicate that wife had the bona fide intent to retain the venue county as a residence with at least some degree of permanency. N.Y. CPLR §§ 503(a), 510(1).

**86 APPEAL by the defendant, in an action for a divorce and ancillary relief, from an order of the Supreme Court (Marian Rose Tinari, J.), dated December 21, 2020, and entered in Suffolk County. The order denied the defendant's motion pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County.

Attorneys and Law Firms

Bronstein Van Veen LLC, New York, NY (Peter E. Bronstein and Meredith L. Strauss of counsel), for appellant.

Chemtob Moss Forman & Beyda, LLP, New York, NY (Nancy Chemtob, Joshua Forman, and Alexis Wolf of counsel), for respondent.

HECTOR D. LASALLE, P.J., FRANCESCA E. CONNOLLY, ANGELA G. IANNACCI, PAUL WOOTEN, JJ.

OPINION & ORDER

LASALLE, P.J.

*105 *Introduction*

The parties to this divorce action primarily resided in New York County, while maintaining a seasonal second home in Suffolk County. In March 2020, when the COVID–19 pandemic first reached New York City, the defendant retreated to the Suffolk County residence along with her pregnant and immunocompromised daughter and began spending more time there in order to assist the daughter during the pregnancy and after the child's birth. In August 2020, the plaintiff commenced this action for a divorce and ancillary relief in Suffolk County, on the ground that the parties were residents of Suffolk County. The defendant moved pursuant to CPLR 510 and 511 for a change of venue, and the Supreme Court denied the motion.

This case presents the issue of whether sheltering in place in a seasonal home creates a sufficient degree of permanence to establish residency at that location. We hold that it does not under the circumstances of this case. Because the parties' stays in Suffolk County were only seasonal and temporary, we hold that neither of them were residents of Suffolk County at the time of the commencement of the action. Accordingly, the Supreme Court should have granted the defendant's motion *106 pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County.

Factual and Procedural Background

The parties met while attending Columbia Law School and were married in 1985. After graduating law school, they moved to New Jersey, where they raised their three daughters. The defendant ultimately became a Superior Court Judge in Newark, while the plaintiff is a real estate developer with an office in Manhattan as well as a **87 trustee of the Metropolitan Museum of Art and the chairman of that museum's Acquisitions Committee.

Beginning in the late 1990s, the parties rented an apartment on the Upper West Side as a pied-a-terre. In 2010, the parties purchased an apartment at the Beresford, located at 81st Street and Central Park West in Manhattan. After the parties' youngest daughter graduated high school in 2011 and after the defendant retired in 2013, the parties spent increasing amounts of time at the Beresford and less time at their New Jersey residence. Beginning in 2014, the parties filed tax returns showing that they resided in New York City and paid New York City income taxes. In 2014, the parties contracted to buy a second apartment at the Beresford, with the plan of combining the two units into one large duplex apartment, measuring more than 4,700 square feet, with four bedrooms. The cost of that renovation is projected to be more than $8 million. The contract called for title to the second apartment to transfer upon the death of the owner of the second apartment, and the parties closed on the second apartment in 2018. According to the defendant, after the parties separated in April 2019, the plaintiff began renting an apartment near East 79th Street and Fifth Avenue in Manhattan. The parties sold their New Jersey residence in 2020. The entirety of the parties' collection of Old Master paintings, insured at $177 million, hangs at the Beresford apartment or the plaintiff's apartment in New York City, except for one painting that has been consigned for auction.

Meanwhile, in 2012, the parties purchased property in Southampton. In 2016, the parties demolished the existing

house on the property and built a new house that cost more than $4 million. During a portion of the construction, the parties rented another house in Southampton. According to the defendant, the parties only used the Southampton house for summer weekends, with limited exceptions. The defendant explained:

> ***107** "For most summers beginning in 2013, some combination of [the plaintiff], [the defendant], and our three daughters would use the house on weekends. Some weekends the kids went without us. For example, [the plaintiff] always traveled to London for Old Master Week in early July. Some summers, the family used the house less often. In 2016 we did construction on the house and took a summer rental, which I hardly saw as I spent most of that summer in Los Angeles taking care of my father, who had suffered a stroke. In July 2017 our oldest daughter had surgery, resulting in missed weekends. In the summer of 2018, one of our daughters got married and my father suffered another stroke, so again the house was used less often. Until our separation, the only time [the plaintiff] and I stayed in the Southampton house outside of the summer season was a few days over the Christmas holiday break in 2018."

When the COVID–19 pandemic reached New York in March 2020, the defendant and the parties' oldest daughter, Elizabeth, retreated to the Southampton house from their respective apartments in Manhattan. According to the defendant:

> "Elizabeth was pregnant with her first child—our first grandchild—and is immunocompromised due to a medication she takes to treat Crohn's disease. She and I and her husband felt that staying in the house would be safer for her—and, ultimately, for the baby after his birth because he would also be immunocompromised for his first six months until her medication was out of his system—than remaining in the City. Her ****88** husband had been exposed to family members of his who had contracted Covid–19, so after he quarantined for three weeks in their Manhattan apartment, he joined us at the Southampton house. I then left the Southampton house on April 5, and except for spending our last Passover holiday with my other children in our New Jersey home (which has since sold), I remained in my Manhattan apartment from April 5 until May 28, when I returned to Southampton to help Elizabeth who was then in the late stages of pregnancy. Throughout, Elizabeth drove back to Manhattan for all of her doctors' appointments between March and the birth in June.
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> * * *
>
> ***108** "When our daughter went into labor on June 11, I drove her and her husband to Manhattan, where she gave birth. I returned to my New York City apartment and was in the City to help her after the baby was born. I stayed in New York City for about a week and a half. Later, we all returned to Southampton, where our other two daughters and their husbands, having completed a strict two-week quarantine, joined us.
>
> "Despite [the plaintiff's] knowingly false claim that I reside in Southampton, my stay here is so impermanent that [the plaintiff] has thought nothing of booting me out at will. On July 26, [the plaintiff] announced by text that he would be coming to the Southampton house for a week from September 9 through 16. He understood that, in addition to my leaving, my oldest daughter, her husband, their baby, my youngest daughter and her husband would also all have to leave in order to avoid being exposed to him."

On August 11, 2020, the plaintiff commenced this action against the defendant in the Supreme Court, Suffolk County. In the complaint, the plaintiff sought a judgment of divorce that declared the separate property of the parties, equitably distributed the marital assets and debt, and awarded the Southampton house to the plaintiff. On or about September 2, 2020, the defendant served a demand to change the venue of the action to New York County on the ground that Suffolk County was an improper venue.

By notice of motion dated September 10, 2020, the defendant moved pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County. The defendant contended that Suffolk County was an improper venue because the parties' primary, permanent residence was in New York County and that although the parties owned a summer house in Southampton, neither party resided there on the date of the commencement of the action with the requisite degree of permanence. The defendant further contended that Suffolk County would be inconvenient for the testifying witnesses in the case, as none of the witnesses lived in Suffolk County and the assets themselves, except for the vacation house, were all located elsewhere.

The plaintiff opposed the defendant's motion, arguing that the parties did reside at the house in Southampton and that ***109** the defendant failed to demonstrate that the convenience of

material witnesses and the ends of justice would be promoted by a change in venue to New York County.

The Supreme Court denied the defendant's motion to change the venue of the action from Suffolk County to New York County. The court concluded that Suffolk County was a proper venue pursuant to CPLR 503(a) and 510(1) because the defendant was a resident of Suffolk County. The court further concluded that the defendant did not establish her entitlement to a discretionary change of venue pursuant to CPLR 510(3) because she failed to **89 demonstrate that the convenience of material witnesses and the ends of justice would be promoted by the change. The defendant appeals.

Analysis

CPLR 510(1) provides that the court, upon motion, may change the place of trial of an action where "the county designated for that purpose is not a proper county." CPLR 503(a) provides that except where otherwise prescribed by law, "the place of trial shall be in the county in which one of the parties *resided* when it was commenced" (emphasis added).

The requirement that the venue of an action shall be predicated on where a party resided when the action was commenced has been present in the CPLR and its predecessor statute for more than 100 years (*see* Civ Prac Act § 182). However, the term "resided" has never been defined in those statutes. Accordingly, courts applying the statutes have applied the common-law definition of "resided," which has developed over time on a case-by-case basis (*see e.g. Katz v. Siroty,* 62 A.D.2d 1011, 1012, 403 N.Y.S.2d 770; *Hammerman v. Louis Watch Co.,* 7 A.D.2d 817, 818, 181 N.Y.S.2d 65).

The leading Court of Appeals case on the issue of the meaning of "reside" is *Yaniveth R. v. LTD Realty Co.,* 27 N.Y.3d 186, 32 N.Y.S.3d 10, 51 N.E.3d 521, which involved a New York City ordinance requiring landlords to remove lead-based paint in any dwelling unit in which a child six years of age and under "reside[d]" (*id.* at 191, 32 N.Y.S.3d 10, 51 N.E.3d 521 [internal quotation marks omitted]). In that case, the Court of Appeals concluded that a child who did not live in the subject apartment but spent approximately 50 hours per week there with a caregiver did not "reside" in the apartment (*see id.* at 194, 32 N.Y.S.3d 10, 51 N.E.3d 521). In doing so, the Court of Appeals reviewed, among other things, venue cases interpreting CPLR 503(a) and its predecessor, and synthesized from them the following definition of "residence":

> **110 "[r]esidence means living in a particular locality, even if a person does not intend to make that place a fixed and permanent home, i.e., a domicile.... [A] person's 'residence' entails something more than temporary or physical presence, with some degree of permanence and [an] intention to remain. Thus, [a]lthough it is true that a person may have more than one residence[,] ... to consider a place as such, he [or she] must stay there for some length of time and have the bona fide intent to retain the place as a residence with at least some degree of permanency" (*id.* at 193, 32 N.Y.S.3d 10, 51 N.E.3d 521 [emphasis, citations, and internal quotation marks omitted]; *see Dean v. Tower Ins. Co. of N.Y.,* 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143; *Matter of Newcomb's,* 192 N.Y. 238, 84 N.E. 950; *Kelly v. Karsenty,* 117 A.D.3d 912, 986 N.Y.S.2d 227).

This Court has held that "[r]esidence requires more stability than a brief sojourn for business, social or recreational activities" (*Katz v. Siroty,* 62 A.D.2d at 1012, 403 N.Y.S.2d 770). Thus, in *Doe v. Hall,* 36 A.D.3d 651, 830 N.Y.S.2d 178, this Court held that the affidavit of the plaintiff's son, who stated that at the time of the commencement of the action the plaintiff maintained a residence at her son's apartment in Queens County and would "reside" there when she came back to Queens County during holidays and other times, was insufficient to establish that the plaintiff resided in Queens County at the time the action was commenced (*id.* at 652, 830 N.Y.S.2d 178 [internal quotation marks omitted]). Similarly, in *Stern v. Epstein,* 29 A.D.3d 778, 817 N.Y.S.2d 299, this **90 Court held that the plaintiffs' use of their medical office in Kings County to sleep over for convenience a couple of nights a week did not render them residents of Kings County for venue purposes (*see id.* at 779, 817 N.Y.S.2d 299). And in *Katz v. Siroty,* 62 A.D.2d 1011, 403 N.Y.S.2d 770, the plaintiff, whose primary residence was in Scarsdale, retained the exclusive use of a bedroom in his sister and brother-in-law's home in Brooklyn, where he slept between 50 and 100 times per year when he visited his Manhattan law office or when he had to see people in localities such as Patchogue, Long Island (*see id.* at 1011–1012, 403 N.Y.S.2d 770). This Court concluded that the plaintiff's "occasional use of a bedroom in his sister and brother-in-law's home when he transacts business in the New York metropolitan area does not support his contention that he has a second residence in Brooklyn" (*id.* at 1012, 403 N.Y.S.2d 770).

***111** By contrast, in *Kelly v. Karsenty,* 117 A.D.3d 912, 986 N.Y.S.2d 227, this Court held that the plaintiff established that he had a bona fide intent to establish an additional residence in Queens with some degree of permanency by submitting a copy of a three-year lease for a cooperative apartment in Queens, which recited that the apartment was to be occupied by the plaintiff, along with several documents listing the apartment in Queens as his address, including a New York State tax bill, a bank account statement, and a union membership card (*see id.* at 912–913, 986 N.Y.S.2d 227).

This case presents two issues relating to the parties' residence: (1) whether the parties' seasonal use of the Southampton house on weekends prior to March 2020 made them residents of Suffolk County; and (2) whether the defendant's retreat to the Southampton house at the outset of the COVID–19 pandemic made her a resident of Suffolk County. We conclude that neither of these things made the parties residents of Suffolk County.

[1] The defendant clearly established that the parties primarily resided in New York County. The defendant submitted, among other things, copies of: the parties' income tax returns, listing their address in New York County as their residence and reflecting their payment of New York City income taxes; the defendant's voter registration showing that she was registered to vote in New York County; the defendant's driver license listing her address in New York County; motor vehicle records showing that the parties' cars were all registered in New York City or were in the process of having the registration transferred from New Jersey to New York City; an email from the plaintiff to the parties' art insurance carrier stating that the parties did not have any intention of adding any art to the Southampton house; and bank statements listing the Beresford apartment and the plaintiff's Manhattan office as the parties' addresses.

[2] Although a person may have more than one residence, as in, for example, "a joint custody situation or other shared living arrangement" (*Yaniveth R. v. LTD Realty Co.,* 27 N.Y.3d at 194, 32 N.Y.S.3d 10, 51 N.E.3d 521), contrary to the plaintiff's contention, the defendant demonstrated that neither party resided in Suffolk County at the time of the commencement of the action.

[3] With respect to the parties' use of the Southampton house prior to 2020, as the defendant notes, a highly instructive case is *Daley v. Daley,* 257 A.D.2d 593, 684 N.Y.S.2d 272. In that case, the plaintiff moved out of the marital residence on Roosevelt Island ***112** and into another apartment in Manhattan, and commenced an action for a divorce in New York County ****91** (*see id.*). The Supreme Court, New York County, granted the defendant temporary exclusive occupancy of the marital residence, and the plaintiff was granted temporary exclusive occupancy of a house in Cutchogue, Long Island, which was previously used by the parties during the summer (*see id.* at 594, 684 N.Y.S.2d 272). The plaintiff later served a notice discontinuing the New York County action and, immediately thereafter, he commenced a new action for a divorce in Suffolk County (*see id.*). The defendant moved to change the venue of the action to New York County, and this Court affirmed the grant of that motion, explaining that the plaintiff

> "did not provide documentary evidence to support his claim regarding the permanent nature of his residence in Cutchogue, and he admitted that he 'frequently' resided in the Manhattan apartment during the work week. Moreover, we note that the plaintiff seeks exclusive occupancy of the marital residence on Roosevelt Island in this action. The defendant offered documentary evidence to support her contention that the Cutchogue residence was seasonal in nature and that the defendant continued to reside in Manhattan" (*id.*).

This Court further stated that "[i]n addition to the plaintiff's failure to establish that Suffolk County was his residence for venue purposes, we agree with the Supreme Court that the plaintiff's tactic in discontinuing the previous action and commencing this action in Suffolk County amounted to forum shopping" (*id.* at 594–595, 684 N.Y.S.2d 272).

The plaintiff contends that *Daley* "is neither 'Second Department authority' nor does it hold that a seasonal residence is not a basis for venue" because: (1) it has never been cited on the issue of whether a seasonal home is a basis for venue; and (2) it is distinguishable from this case because "the overriding issue in *Daley* was the husband's bad faith tactics and attempts to forum shop." Notwithstanding the fact that *Daley* has not been subsequently cited for the proposition that a seasonal residence is not a basis for venue, that case did in fact hold a seasonal residence was not sufficient to establish a party's residency for venue purposes, at least where the party frequently resided in another location during the workweek (*see id.* at 594, 684 N.Y.S.2d 272). And while this Court in *Daley* cited the plaintiff's bad faith tactics and attempts to forum shop, this ***113** Court indicated that this was an additional, independent ground for granting the defendant's motion to change venue that was separate from its primary conclusion that the plaintiff failed to establish

that Suffolk County was his residence. This Court stated that "*[i]n addition to the plaintiff's failure to establish that Suffolk County was his residence for venue purposes,* we agree with the Supreme Court that the plaintiff's tactic in discontinuing the previous action and commencing this action in Suffolk County amounted to forum shopping" (*id.* at 594–595, 684 N.Y.S.2d 272 [emphasis added]).

Here, in her affidavit submitted in support of her motion, the defendant averred that prior to 2020, the Southampton house was only used by the parties on weekends in the summertime, with limited exceptions, and that the only time the parties stayed in the Southampton house outside of the summer season was a few days over the Christmas holiday break in 2018. The plaintiff's affirmation submitted in opposition to the motion does not contain anything disputing these averments. The plaintiff stated in that affirmation that "[f]rom 2012 until we separated, we split our time between our residences in New Jersey, Manhattan, and Southampton. We used the Southampton Residence during ****92** summers and on other occasions. We have used it extensively in every year since we purchased it." Since it is undisputed that, prior to 2020, the parties only stayed in the Southampton house on weekends in the summer, with limited exceptions, contrary to the plaintiff's contention, neither party resided in Suffolk County at any time prior to 2020 (*see id.* at 594, 684 N.Y.S.2d 272; *see also Doe v. Hall,* 36 A.D.3d at 652, 830 N.Y.S.2d 178; *Stern v. Epstein,* 29 A.D.3d at 779, 817 N.Y.S.2d 299; *Katz v. Siroty,* 62 A.D.2d at 1011–1012, 403 N.Y.S.2d 770).

[4] Further, contrary to the Supreme Court's conclusion, the time the defendant spent in the Southampton house in 2020 during the COVID–19 pandemic was not enough to make her a resident of Suffolk County. In *Morreale v. 105 Page Homeowners Assn., Inc.,* 64 A.D.3d 689, 884 N.Y.S.2d 93, the relevant testimony revealed that on or about December 31, 2005, the plaintiff moved to her son's apartment in Brooklyn from her house in Staten Island after a "diabetic episode," in March or April 2006, she entered into a contract to purchase a house in New Jersey, and on August 8, 2006, three days after commencing the subject action, she "took over" her new house in New Jersey, which she moved into in November 2006 (*id.* at 690, 884 N.Y.S.2d 93 [internal quotation marks omitted]). This Court concluded that the appellants ***114** demonstrated that the plaintiff was only temporarily staying at the Brooklyn apartment at the time she commenced the action without the bona fide intent to retain the place as a residence for some length of time and with some degree of permanency (*see id.*). Similarly, in *Ray–Ollenu v. Kaufman Mgt. Co.,* 107 A.D.3d 476, 969 N.Y.S.2d 444, the Appellate Division, First Department, concluded that the evidence in the record did not demonstrate the plaintiff's intent to reside in Bronx County with some degree of permanency because it showed only that the plaintiff stayed with her mother in Bronx County for a brief period of time while she was having marital problems with her husband. Finally, in *Sibrizzi v. Mount Tom Day School,* 155 A.D.2d 337, 547 N.Y.S.2d 308, the First Department concluded that the plaintiffs' occupancy of a relative's home in the Bronx while their Westchester County home was being renovated indicated a lack of intent to remain in the Bronx (*see id.* at 338, 547 N.Y.S.2d 308).

Here, although the defendant retreated to the Southampton house in March 2020, it is undisputed that the defendant planned only to stay there temporarily to assist her immunocompromised daughter and newborn grandchild when the COVID–19 pandemic was at its zenith in New York City. Under the circumstances of this case, the defendant did not "have the bona fide intent to retain [Suffolk County] as a residence with at least some degree of permanency" (*Yaniveth R. v. LTD Realty Co.,* 27 N.Y.3d at 193, 32 N.Y.S.3d 10, 51 N.E.3d 521 [internal quotation marks omitted]; *see Morreale v. 105 Page Homeowners Assn., Inc.,* 64 A.D.3d at 690, 884 N.Y.S.2d 93; *see also Ray–Ollenu v. Kaufman Mgt. Co.,* 107 A.D.3d 476, 969 N.Y.S.2d 444; *Sibrizzi v. Mount Tom Day School,* 155 A.D.2d at 338, 547 N.Y.S.2d 308).

Accordingly, because Suffolk County was not a proper venue, the Supreme Court should have granted the defendant's motion pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County. In light of our determination, we need not reach the issue of whether the defendant established her entitlement to a discretionary change of venue pursuant to CPLR 510(3) on the ground that the convenience of ****93** material witnesses and the ends of justice would be promoted by such a change.

Conclusion

For the foregoing reasons, the order is reversed, on the law, the defendant's motion pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County is granted, and the Clerk of the Supreme Court, ***115** Suffolk County, is directed to deliver to the Clerk of the Supreme Court, New York County, all papers filed in this action and certified copies of all minutes and entries (*see id.* § 511[d]).

ORDERED that the order is reversed, on the law, with costs, the defendant's motion pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County is granted, and the Clerk of the Supreme Court, Suffolk County, is directed to deliver to the Clerk of the Supreme Court, New York County, all papers filed in this action and certified copies of all minutes and entries (*see id.* § 511[d]).

CONNOLLY, IANNACCI and WOOTEN, JJ., concur.

All Citations

204 A.D.3d 104, 165 N.Y.S.3d 85, 2022 N.Y. Slip Op. 01442

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152 A.D.3d 685
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Sinclair HABERMAN, et al., petitioners/plaintiffs-appellants,
v.
ZONING BOARD OF APPEALS OF the CITY OF LONG BEACH, et al., respondents/defendants,
Rocco Morelli, et al., respondents/defendants-respondents.

July 19, 2017.

Synopsis

Background: Hybrid proceeding pursuant to article 78 was brought to review a city zoning board's revocation of a building permit. The Supreme Court, Nassau County, McCormack, J., granted individual defendants' motion to dismiss a federal civil rights claim, and petitioners appealed.

Holding: The Supreme Court, Appellate Division, held that prior denial of defendants' motion to dismiss federal civil rights claim for failure to plead a cause of action necessarily rejected individual defendants' claims of qualified immunity.

Reversed.

West Headnotes (1)

[1] **Civil Rights** Pleading

Appellate Division's denial of defendants' motion to dismiss federal civil rights claim for failure to plead a cause of action necessarily rejected individual defendants' claims of qualified immunity, regardless of whether dismissal was sought on the ground of qualified immunity or on the ground of insufficiency of the facts alleged. 42 U.S.C.A. § 1983; McKinney's CPLR 3211(a)(7).

Attorneys and Law Firms

****402** Jaspan Schlesinger, LLP, Garden City, NY (Steven R. Schlesinger, Scott Mollen, Thomas R. Newman, and James Edward Pelzer of counsel), for petitioners/plaintiffs-appellants.

Kudman Tratchen Aloe, LLP, New York, NY (Paul H. Aloe and David N. Saponara of counsel), for respondents/defendants-respondents.

RUTH C. BALKIN, J.P., SHERI S. ROMAN, SYLVIA O. HINDS–RADIX, and HECTOR D. LaSALLE, JJ.

Opinion

***685** In a hybrid proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the City of Long Beach dated December 29, 2003, which revoked a building permit previously issued to the petitioners/plaintiffs on August 12, 2003, and action, inter alia, for a judgment declaring that the petitioners/plaintiffs are entitled to the building permit, the petitioners/plaintiffs appeal, as limited by their ***686** brief, from so much of a corrected order of the Supreme Court, Nassau County (McCormack, J.), entered October 2, 2015, as granted that branch of the motion of the defendants Rocco Morelli, Lenny Torres, Marcel Weber, Michael Fina, Stuart Banschick, Lorrain Divone, and Michael Leonetti which was, in effect, to dismiss the sixth cause of action insofar as asserted against them.

ORDERED that the corrected order is reversed insofar as appealed from, on the law, with costs, and that branch of the ****403** motion of the defendants Rocco Morelli, Lenny Torres, Marcel Weber, Michael Fina, Stuart Banschick, Lorrain Divone, and Michael Leonetti which was, in effect, to dismiss the sixth cause of action insofar as asserted against them is denied.

In this long dispute over a building project, the Supreme Court issued an order dated September 13, 2010 (hereinafter the September 2010 order), granting the motion of the respondents/defendants Zoning Board of Appeals of the City of Long Beach, Rocco Morelli, Lenny Torres, Marcel Weber, Michael Fina, Stuart Banschick, Lorraine Divone, Michael Leonetti, the City of Long Beach, and Scott Kemins, as Commissioner of the Department of Buildings of the City

of Long Beach (hereinafter collectively the defendants) to dismiss several of the causes of action alleged in the third amended petition/complaint insofar as asserted against them. As relevant here, the September 2010 order granted that branch of the defendants' motion which was to dismiss the sixth cause of action, which seeks to recover damages against all of the defendants pursuant to 42 U.S.C. § 1983, on two grounds. The court held, first, that the petitioners/plaintiffs (hereinafter the plaintiffs) did not allege sufficient facts to support their claim that the defendants' alleged actions effected a deprivation of their constitutional rights, and, second, that the individual defendants, who were members of the Zoning Board of Appeals of the City of Long Beach, were immune from suit for monetary damages. The plaintiffs took a limited appeal from the September 2010 order, in which they challenged the court's ruling with respect to the sixth cause of action. On that appeal, our disposition regarding the sixth cause of action was as follows: "ORDERED that the order is reversed insofar as appealed from, on the law, and the motion of the [defendants] ... pursuant to CPLR 3211(a)(7) to dismiss the ... sixth cause [ ] of action in the third amended petition/complaint insofar as asserted against them is denied" (*Matter of Haberman v. Zoning Bd. of Appeals of City of Long Beach,* 94 A.D.3d 997, 997–998, 942 N.Y.S.2d 571).

Subsequently, the Supreme Court stated in an order entered ***687** March 27, 2015 (*see Matter of Haberman v. Zoning Bd. of Appeals of City of Long Beach,* Appellate Division Docket No. 2015–03758, decided herewith), that it was "unclear" as to whether this Court's determination of the appeal from the September 2010 order "impacted" the Supreme Court's finding in that order that the defendants Rocco Morelli, Lenny Torres, Marcel Weber, Michael Fina, Stuart Banschick, Lorrain Divone, and Michael Leonetti (hereinafter collectively the individual defendants) had qualified immunity from claims seeking damages under 42 U.S.C. § 1983. In light of its uncertainty about our disposition of the appeal from the September 2010 order, the court granted the individual defendants leave to move to "be let out of the case" as to the fourth and sixth causes of action.

The individual defendants then moved "to be let out of the case" as to the fourth and sixth causes of action insofar as asserted against them. In the corrected order appealed from, the Supreme Court treated the motion as one to dismiss the fourth and sixth causes of action insofar as asserted against the individual defendants, and granted those branches of the motion. With respect to the sixth cause of action, the court viewed the individual defendants' claim of immunity as though it were an independent motion for dismissal, unrelated to the prior motion to dismiss pursuant to CPLR 3211(a)(7). Although the Supreme Court found it unclear as to whether the plaintiffs had appealed the dismissal of the 42 U.S.C. § 1983 claims as against the individual defendants, it concluded that ****404** our reversal of the September 2010 order did not affect the dismissal of the 42 U.S.C. § 1983 claims against the individual defendants on the ground of qualified immunity. The plaintiffs appeal from so much of the corrected order as granted that branch of the individual defendants' motion which was, in effect, to dismiss the sixth cause of action insofar as asserted against them. We reverse the corrected order insofar as appealed from.

Contrary to the individual defendants' contention, the plaintiffs' notice of appeal from the September 2010 order specifically encompassed that part of the order which "granted Defendants' motion to dismiss Count[ ] ... Six." Thus, so much of the September 2010 order as granted that branch of the defendants' motion which was to dismiss the sixth cause of action insofar as asserted against the individual defendants was properly before us on the plaintiffs' appeal from that order. Further, our decision and order on the appeal from the September 2010 order clearly reversed so much of that order ***688** as granted that branch of the defendants' motion which was to dismiss the sixth cause of action insofar as asserted against all of the defendants. The authority under which the individual defendants sought dismissal of the sixth cause of action was CPLR 3211(a)(7). That was the applicable statutory provision, as stated in the defendants' original notice of motion to dismiss, regardless of whether dismissal was sought on the ground of qualified immunity or on the ground of insufficiency of the facts alleged (*see Weinstock v. Sanders,* 144 A.D.3d 1019, 42 N.Y.S.3d 205; *24 Franklin Ave. R.E. Corp. v. Cannella,* 139 A.D.3d 717, 31 N.Y.S.3d 533). In short, our reversal of the September 2010 order insofar as appealed from, and our denial of that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the sixth cause of action insofar as asserted against the defendants, necessarily rejected the individual defendants' claims of qualified immunity. Accordingly, the Supreme Court should have denied that branch of the individual defendants' motion which was, in effect, to dismiss the sixth cause of action insofar as asserted against them.

All Citations

152 A.D.3d 685, 59 N.Y.S.3d 402, 2017 N.Y. Slip Op. 05726

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209 A.D.3d 629
Supreme Court, Appellate Division,
Second Department, New York.

Jerri HANSON, respondent,

v.

HICKSVILLE UNION FREE SCHOOL DISTRICT, appellant, et al., defendant.

2022–03633
|
(Index No. 900371/21)
|
Argued—September 6, 2022
|
October 5, 2022

Synopsis

Background: Former student brought action against school district, alleging school district failed to report cases of suspected child abuse and sought punitive damages. The Supreme Court, Nassau County, Leonard Steinman, J., denied school district's motion to dismiss for failure to state cause of action. School district appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] former teacher was not a "person legally responsible" for former student's care, and

[2] former student failed to state cause of action against school district.

Reversed.

West Headnotes (2)

[1] Infants School authorities and staff

Former teacher, who allegedly sexually abused former student while she attended school, was not a "person legally responsible" for her care, and thus, former student failed to state cause of action against school district under statute governing mandatory reporting of suspected child abuse or maltreatment. N.Y. Social Services Law §§ 413, 420(2).

[2] Infants School authorities and staff

Former student failed to state a cause of action against school for allegedly failing to report former student's abuse by her stepfather under statute governing mandatory reporting of suspected child abuse or maltreatment, where former student failed to allege that school district received information about the alleged abuse at any time after the statute went into effect. N.Y. Social Services Law §§ 413, 420(2).

Attorneys and Law Firms

****328** Guercio & Guercio, LLP, Latham, NY (Anthony J. Fasano and Stephanie A. Denzel of counsel), for appellant.

Harnick & Harnick, New York, NY (Pollack, Pollack, Isaac & DeCicco, LLP [Brian J. Isaac and Paul H. Seidenstock], of counsel), for respondent.

HECTOR D. LASALLE, P.J., ROBERT J. MILLER, LARA J. GENOVESI, LILLIAN WAN, JJ.

DECISION & ORDER

***629** In an action, inter alia, to recover damages arising from the ***630** failure to report cases of suspected child abuse as required by Social Services Law § 413, the defendant Hicksville Union Free School District appeals from an order of the Supreme Court, Nassau County (Leonard D. Steinman, J.), entered April 14, 2022. The order, insofar as appealed from, denied those branches of that defendant's motion which were pursuant to CPLR 3211(a)(7) to dismiss the ninth and tenth causes of action and the demand for punitive damages insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the motion of the defendant Hicksville Union Free School District which were pursuant to CPLR 3211(a)(7) to dismiss the ninth and

tenth causes of action and the demand for punitive damages insofar as asserted against it are granted.

After the enactment of CPLR 214–g, which revived the statute of limitations for certain causes of action involving child sexual abuse, the plaintiff commenced this action against Hicksville Union Free School District (hereinafter the District) and Phillip Bova. The complaint alleges the following facts: Between 1972 and 1977, Bova was an English teacher and guidance counselor at Hicksville Junior High School (hereinafter HJHS). The plaintiff attended HJHS between 1971 and 1973, and Bova was her guidance counselor. Bova "used knowledge of [the plaintiff's] personal life including the abuse she was suffering at the hands of her stepfather which he learned as a result of his position as a guidance counselor to groom her for sexual abuse." Bova sexually abused the plaintiff during the 1972–1973 school year, when the plaintiff attended HJHS, and continued to abuse her during the years 1973 through 1977, when the plaintiff was a student at Hicksville High School. Bova's abuse was known to school administrators, teachers, and staff.

The ninth cause of action in the complaint alleges that the District breached its statutory duty pursuant to Social Services Law § 413 to report suspected child abuse committed by Bova, and the tenth cause of action alleges that both defendants breached their statutory duty pursuant to Social Services Law § 413 to report suspected child abuse committed by the plaintiff's stepfather. For these violations, the complaint seeks compensatory and punitive damages.

The District moved, inter alia, pursuant to CPLR 3211(a)(7) to dismiss the ninth and tenth causes of action and the demand for punitive damages insofar as asserted against it. The Supreme Court denied ****329** those branches of the motion. The District appeals.

***631** Social Services Law § 413, which went into effect on September 1, 1973, provides that certain school officials "are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child" (*id.* § 413[1][a]; *see* L 1973, ch 1039). Social Services Law § 420(2) provides that "[a]ny person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure." For purposes of Social Services Law § 413, an "abused child" means "a child under eighteen years of age and who is defined as an abused child by the family court act" (*id.* § 412[1]). Family Court Act § 1012(e) defines an "abused child" as one harmed by a "parent or other person legally responsible for his [or her] care."

[1] **[2]** The Supreme Court should have granted that branch of the District's motion which was to dismiss the ninth cause of action, alleging that it failed to report suspected child abuse committed by Bova, because Bova was not a "person legally responsible" for the plaintiff's care (*see Matter of Catherine G. v. County of Essex,* 3 N.Y.3d 175, 179–180, 785 N.Y.S.2d 369, 818 N.E.2d 1110; *Matter of Yolanda D.,* 88 N.Y.2d 790, 796, 651 N.Y.S.2d 1, 673 N.E.2d 1228). The court also should have granted that branch of the District's motion which was to dismiss the tenth cause of action, alleging that it failed to report suspected child abuse committed by the plaintiff's stepfather, insofar as asserted against it. The complaint does not contain any allegation that the District received information about abuse committed by the plaintiff's stepfather at any time after the end of the 1972–1973 school year in June 1973, which was months prior to September 1, 1973, the date that Social Services Law § 413 went into effect (*see* L 1973, ch 1039). Finally, as the plaintiff concedes, punitive damages are not available against the District (*see Krohn v. New York City Police Dept.,* 2 N.Y.3d 329, 336, 778 N.Y.S.2d 746, 811 N.E.2d 8; *Dixon v. William Floyd Union Free Sch. Dist.,* 136 A.D.3d 972, 973, 25 N.Y.S.3d 363). Thus, the court should have granted that branch of the District's motion which was to dismiss the demand for punitive damages insofar as asserted against it.

Accordingly, we reverse the order insofar as appealed from and grant the subject branches of the District's motion.

LASALLE, P.J., MILLER, GENOVESI and WAN, JJ., concur.

All Citations

209 A.D.3d 629, 175 N.Y.S.3d 327, 2022 N.Y. Slip Op. 05519

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191 A.D.3d 771
Supreme Court, Appellate Division,
Second Department, New York.

Dora HOWELL, respondent,
v.
CITY OF NEW YORK, et al.,
appellants, et al., defendant.

2018–08688
|
(Index No. 23830/09)
|
Argued—November 13, 2020
|
February 10, 2021

Synopsis

Background: Ex-girlfriend brought action against city and police officers alleging negligent failure to provide police protection and negligent hiring, retention, training, and supervision arising from her being thrown from third-floor apartment window by ex-boyfriend against whom she had a protection order. The Supreme Court, Kings County, Reginald A. Boddie, J., denied defendants' motion for summary judgment. Ex-girlfriend appealed.

[Holding:] The Supreme Court, Appellate Division, Chambers, J., held that ex-girlfriend's injuries were not the result of justifiable reliance on promises of police protection.

Reversed.

West Headnotes (5)

[1] **Municipal Corporations** Nature and grounds of liability

Municipal Corporations Police and fire

Generally, a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection.

[2] **Municipal Corporations** Nature and grounds of liability

When a cause of action alleging negligence is asserted against a municipality, and the municipality is exercising a governmental function, the plaintiff must first demonstrate that the municipality owed a special duty to the injured person.

[3] **Municipal Corporations** Nature and grounds of liability

A municipality's special duty to plaintiff can arise, as would subject the municipality to liability for negligence, where the plaintiff belongs to a class for whose benefit a statute was enacted, or where the municipality voluntarily assumes a duty to the plaintiff beyond what is owed to the public generally.

[4] **Municipal Corporations** Nature and grounds of liability

A municipality will be held to have voluntarily assumed a duty or special relationship with an injured party, as would subject the municipality to liability for negligence, where there is: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

[5] **Municipal Corporations** Police and fire

Public Employment Law enforcement personnel

Injuries that ex-girlfriend received in being thrown from third-floor apartment window by ex-boyfriend against whom she had a protection order were not the result of justifiable reliance

on alleged promises of police protection, and thus, there was no special relationship with ex-girlfriend for which city and police officers could be liable for negligent failure to provide police protection and negligent hiring, retention, training, and supervision, where officers made no promise to arrest ex-boyfriend and officers made only vague assurances that ex-girlfriend would "be okay" and that ex-boyfriend would not be returning to building where both he and ex-girlfriend lived.

Attorneys and Law Firms

***82** James E. Johnson, Corporation Counsel, New York, N.Y. (Fay Ng and Ellen Ravitch of counsel), for appellants.

Rawlins Law, PLLC, White Plains, N.Y. (Gary N. Rawlins of counsel), for respondent.

CHERYL E. CHAMBERS, J.P., HECTOR D. LASALLE, ANGELA G. IANNACCI, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

In an action, inter alia, to recover damages for personal injuries, the defendants City of New York, P.O. Mosely–Lawrence, and P.O. Meran appeal from an order of the Supreme Court, Kings County (Reginald A. Boddie, J.), dated April 27, 2018. The order, in effect, denied that branch of those defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them, and denied, as premature, that branch of those defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is reversed, on the law, with costs, that branch of the motion of the defendants City of New York, P.O. Mosely–Lawrence, and P.O. Meran which was for summary judgment dismissing the complaint insofar as asserted against them is granted, and that branch of those defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them is denied as academic.

In November 2008, the plaintiff was thrown out of a third-story window by Andre Gaskin, who was her former boyfriend and the father of her child. At the time of the incident, the plaintiff had an order of protection against Gaskin. Although the plaintiff and Gaskin were no longer in a relationship, they continued to reside in the same apartment building. The plaintiff lived on the second floor, and Gaskin lived on the third floor.

In the days leading up to the incident, the defendant police officers Mosely–Lawrence and Meran (hereinafter together the officers) responded to several calls placed by the plaintiff in which the plaintiff stated that Gaskin was violating the order of protection.

On the first occasion, the officers assured the plaintiff that Gaskin would "be removed from the premises," that he "won't be returning," and that he would be staying with his uncle. The officers then waited outside the apartment building with Gaskin for the uncle to pick him up and the plaintiff saw Gaskin leave in the uncle's car.

On the second occasion, the plaintiff returned home to find Gaskin inside her apartment. She immediately called the police, and the officers again told the plaintiff they would "remove him from the premises," and that "he would not be coming back." The plaintiff saw the officers walk outside the building with Gaskin and saw Gaskin walk away, rounding the corner.

On the third occasion, Gaskin was back at the plaintiff's apartment, banging on her ***83** door with a pipe and breaking off one of the locks. The plaintiff again called the police, and Gaskin told the officers he had come back to pick up clothes. The officers asked the plaintiff why she did not move or stay somewhere else if this kept happening and threatened to arrest her if she called them again. The officers ordered Gaskin to go to his apartment upstairs and not come to the second floor, and assured the plaintiff that Gaskin would be leaving and that she would "be okay." That night, the plaintiff heard Gaskin stomping around and banging on the floor of his apartment, which was directly above the plaintiff's apartment.

At no time prior to the incident was Gaskin arrested. Also, at no time prior to the incident did the officers tell the plaintiff that they were going to arrest Gaskin.

On the date of the incident, Gaskin repeatedly called the plaintiff's phone. The plaintiff ignored most of his calls but

eventually picked up and told him that she was at a friend's house nearby. Gaskin showed up at the friend's house and walked with the plaintiff back to their apartment building. Once inside, Gaskin dragged the plaintiff upstairs to his apartment and threw her out the third-story window.

The plaintiff commenced this action, inter alia, to recover damages for personal injuries against, among others, the City of New York and the officers (hereinafter collectively the defendants). The plaintiff alleged that the officers negligently failed to protect her, and asserted a cause of action against the City alleging negligent hiring, retention, training, and supervision. After issue was joined but prior to the completion of discovery, the defendants moved pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against them. In opposition, the plaintiff contended that the motion was premature because the defendants had failed to produce the officers for depositions. By order dated April 27, 2018, the Supreme Court, in effect, denied that branch of the motion which was pursuant to CPLR 3211(a)(7) and denied, as premature, that branch of the motion which was for summary judgment. The defendants appeal.

[1] [2] [3] [4] Generally, "a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection" (*Etienne v. New York City Police Dept.*, 37 **A.D.3d** 647, 649, 830 N.Y.S.2d 349). "When a cause of action alleging negligence is asserted against a municipality, and the municipality is exercising a governmental function, the plaintiff must first demonstrate that the municipality owed a special duty to the injured person" (*Axt v. Hyde Park Police Dept.*, 162 **A.D.3d** 728, 730, 80 **N.Y.S.3d** 72; *see Valdez v. City of New York*, 18 N.Y.3d 69, 75, 936 N.Y.S.2d 587, 960 N.E.2d 356). Such a special duty can arise, as relevant here, where the plaintiff belongs to a class for whose benefit a statute was enacted, or where the municipality voluntarily assumes a duty to the plaintiff beyond what is owed to the public generally (*see Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 426, 972 N.Y.S.2d 169, 995 N.E.2d 131). A municipality will be held to have voluntarily assumed a duty or special relationship with a party where there is: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 505 N.E.2d 937).

***84 [5]** Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by establishing that no special relationship existed between them and the plaintiff (*see id.* at 261, 513 N.Y.S.2d 372, 505 N.E.2d 937). Specifically, the defendants established, prima facie, that the officers made no promise to arrest Gaskin, and the plaintiff could not justifiably rely on vague assurances by the officers that she would "be okay" and that Gaskin would not be returning to the building where both he and the plaintiff lived (*see Axt v. Hyde Park Police Dept.*, 162 **A.D.3d** at 730, 80 **N.Y.S.3d** 72).

In opposition to the defendants' prima facie showing, the plaintiff failed to raise a triable issue of fact, demonstrate how additional discovery may lead to relevant evidence, or establish that facts essential to opposing the motion were exclusively within the defendants' knowledge or control (*see* CPLR 3212[f]; *Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 **A.D.3d** 1033, 1034, 83 **N.Y.S.3d** 74). The plaintiff's alternate contention that the defendants violated a statutory duty owed to her is without merit (*see Bawa v. City of New York*, 94 **A.D.3d** 926, 927, 942 N.Y.S.2d **191**).

Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.

In light of our determination, we need not reach the parties' remaining contentions.

CHAMBERS, J.P., LASALLE, IANNACCI and CHRISTOPHER, JJ., concur.

All Citations

191 A.D.3d 771, 142 N.Y.S.3d 81, 2021 N.Y. Slip Op. 00840

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122 A.D.3d 737
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of HP RONKONKOMA, INC., et al., petitioners,

v.

Galen D. KIRKLAND, etc., et al., respondents.

Nov. 12, 2014.

Synopsis

Background: Employers sought review of determination of the Commissioner of the New York State Division of Human Rights that they unlawfully discriminated against employee on basis of sex by subjecting her to hostile work environment and that they retaliated against her, and New York State Division of Human Rights cross-petitioned to enforce determination.

[Holding:] The Supreme Court, Appellate Division, held that substantial evidence supported determination.

Ordered accordingly.

West Headnotes (5)

[1] **Civil Rights** Judicial review and enforcement of administrative decisions

Appellate Division must confirm a determination of the Commissioner of the New York State Division of Human Rights where it is supported by substantial evidence. McKinney's Executive Law § 298.

1 Case that cites this headnote

[2] **Civil Rights** Judicial review and enforcement of administrative decisions

"Substantial evidence," as required for Appellate Division to confirm determination of the Commissioner of the New York State Division of Human Rights, means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. McKinney's Executive Law § 298.

1 Case that cites this headnote

[3] **Civil Rights** Judicial review and enforcement of administrative decisions

A determination by Commissioner of the New York State Division of Human Rights is entitled to considerable deference due to his expertise in evaluating discrimination claims. McKinney's Executive Law § 298.

[4] **Civil Rights** Judicial review and enforcement of administrative decisions

In reviewing determination of Commissioner of the New York State Division of Human Rights, Appellate Division may not weigh the evidence or reject the Commissioner's choice where the evidence is conflicting and room for a choice exists; Appellate Division also may not pass upon the credibility of the witnesses at the administrative hearing. McKinney's Executive Law § 298.

1 Case that cites this headnote

[5] **Civil Rights** Evidence

Substantial evidence supported determination by Commissioner of the New York State Division of Human Rights that employers unlawfully discriminated against employee on basis of sex by subjecting her to a hostile work environment and that they retaliated against her. McKinney's Executive Law §§ 296, 298.

Attorneys and Law Firms

****344** Cartier, Bernstein, Auerbach & Dazzo, P.C., Patchogue, N.Y. (George Edward Dazzo of counsel), for petitioners.

Raymond Nardo, Mineola, N.Y., for respondent Connie Morris.

PETER B. SKELOS, J.P., LEONARD B. AUSTIN, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

***737** Proceeding, in effect, pursuant to Executive Law § 298, to review a determination of the Commissioner of the New York State Division of Human Rights dated September 19, 2011, which adopted the findings and recommendations of an administrative law judge dated June 16, 2011, made after a hearing, determining, inter alia, that the petitioners unlawfully discriminated against the complainant in relation to her employment ***738** on the basis of sex by subjecting her to a hostile work environment and retaliated against her in violation of Executive Law § 296 and awarding her, among other things, compensatory damages in the principal sum of $15,000, and cross petition by the New York State Division of Human Rights pursuant to Executive Law § 298 to enforce the determination.

ADJUDGED that the determination is confirmed, the petition is denied, the proceeding is dismissed on the merits, and the cross petition is granted, with costs to the respondent Connie Morris.

[1] **[2]** This Court must confirm a determination of the Commissioner of the New York State Division of Human Rights (hereinafter the Commissioner) where it is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v. State Div. of Human Rights,* 45 N.Y.2d 176, 179–180, 408 N.Y.S.2d 54, 379 N.E.2d 1183; *Matter of Mack Markowitz Oldsmobile v. State Div. of Human Rights,* 271 A.D.2d 690, 690, 707 N.Y.S.2d 865). Substantial evidence ****345** "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v. State Div. of Human Rights,* 45 N.Y.2d at 180, 408 N.Y.S.2d 54, 379 N.E.2d 1183).

[3] **[4]** The Commissioner's determination is "entitled to considerable deference due to [his] expertise in evaluating discrimination claims" (*Matter of Matteo v. New York State Div. of Human Rights,* 306 A.D.2d 484, 485, 761 N.Y.S.2d 517). Such a determination may not be set aside simply "because the opposite decision would have been reasonable and also sustainable" (*id.* at 485, 761 N.Y.S.2d 517 [internal quotation marks omitted]). This Court "may not weigh the evidence or reject [the Commissioner's] choice where the evidence is conflicting and room for a choice exists" (*Matter of CUNY–Hostos Community Coll. v. State Human Rights Appeal Bd.,* 59 N.Y.2d 69, 75, 463 N.Y.S.2d 173, 449 N.E.2d 1251). This Court also may not pass upon the credibility of the witnesses at the administrative hearing (*see Matter of Berenhaus v. Ward,* 70 N.Y.2d 436, 443, 522 N.Y.S.2d 478, 517 N.E.2d 193; *Matter of Mack Markowitz Oldsmobile v. State Div. of Human Rights,* 271 A.D.2d at 690, 707 N.Y.S.2d 865).

[5] Here, contrary to the petitioners' contention, there is substantial evidence in the record demonstrating that they unlawfully discriminated against the complainant in relation to her employment on the basis of sex by subjecting her to a hostile work environment and retaliated against her in violation of Executive Law § 296 (*see Matter of New York State Div. of Human Rights v. ABS Elecs., Inc.,* 102 A.D.3d 967, 968, 958 N.Y.S.2d 502; *Matter of Murphy v. Kirkland,* 88 A.D.3d 267, 278, 928 N.Y.S.2d 333; *Bianco v. Flushing Hosp. Med. Ctr.,* 54 A.D.3d 304, 305, 863 N.Y.S.2d 453). In addition, the award for mental anguish, which is supported by substantial evidence and reasonably related to the wrongdoing, and is similar ***739** to comparable awards for similar injuries, should not be disturbed (*see Matter of Eastport Assoc., Inc. v. New York State Div. of Human Rights,* 71 A.D.3d 890, 892, 897 N.Y.S.2d 177).

All Citations

122 A.D.3d 737, 996 N.Y.S.2d 343, 2014 N.Y. Slip Op. 07662

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133 A.D.3d 717
Supreme Court, Appellate Division,
Second Department, New York.

Nicollette Ann IACONE, etc.,
et al., plaintiffs-respondents,
v.
Sal PASSANISI, Jr., et al.,
defendants-respondents,
County of Nassau, appellant, et al., defendants.

Nov. 18, 2015.

Synopsis

Background: Motorist who was allegedly injured as result of motor-vehicle accident at intersection brought action against county, alleging that view of oncoming traffic at intersection in which accident occurred was obstructed by sensor station cabinet owned by county and by hedges which county had failed to trim. The Supreme Court, Nassau County, K. Murphy, J., denied county's motion for summary judgment.

[Holding:] The Supreme Court, Appellate Division, held that fact issue as to whether county's placement of sensor station and decision to refrain from trimming hedge were highway safety planning decisions precluded summary judgment.

Affirmed.

West Headnotes (3)

[1] Automobiles Nature and Grounds of Liability

Automobiles Care required as to condition of way in general

A governmental body owes a nondelegable duty to keep its streets in a reasonably safe condition.

5 Cases that cite this headnote

[2] Automobiles Defective plan of construction

A governmental body is accorded qualified immunity from liability arising out of a highway safety planning decision, and such immunity is predicated upon an ability to demonstrate that the relevant discretionary determination by the governmental body was the result of a deliberative decision-making process.

6 Cases that cite this headnote

[3] Judgment Tort cases in general

Genuine issue of material fact as to whether county's placement of sensor station cabinet and its decision to refrain from trimming hedge were highway safety planning decisions resulting from deliberative decision-making process of the type afforded immunity from judicial interference precluded summary judgment as to whether county was entitled to qualified immunity in action, brought by motorist, allegedly injured in accident at intersection, in which it was alleged that view of oncoming traffic at intersection in which accident occurred was obstructed by sensor station cabinet and hedges.

3 Cases that cite this headnote

Attorneys and Law Firms

****584** Carnell T. Foskey, County Attorney, Mineola, N.Y. (Mary J. Nori of counsel), for appellant.

Kalb & Rosenfeld P.C., Commack, N.Y. (John A. Meringolo and Lisa J. Borsella of counsel), for plaintiffs-respondents.

Abamont & Associates (Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y. [Kathleen D. Foley], of counsel), for defendants-respondents.

MARK C. DILLON, J.P., SANDRA L. SGROI, JEFFREY A. COHEN, and HECTOR D. LaSALLE, JJ.

Opinion

***718** In an action to recover damages for personal injuries, etc., the defendant County of Nassau appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (K. Murphy, J.), entered May 31, 2013, as denied that branch of its motion which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against it on the ground that it was entitled to qualified immunity.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs payable to the plaintiffs-respondents and the defendants-respondents appearing separately and filing separate briefs.

The plaintiff Nicollette Ann Iacone was injured as a result of a motor vehicle accident at an intersection in Oceanside, and her parents, on her behalf and individually, thereafter commenced this action against the County of Nassau, among others. The complaint alleged, inter alia, that the view of oncoming traffic at the subject intersection was obstructed by a sensor station cabinet owned by the County and by hedges which the County had failed to trim. The County moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The Supreme Court denied the motion, and the County appeals from so much of the order ****585** as denied that branch of its motion which was based on qualified immunity.

[1] **[2]** A governmental body owes a nondelegable duty to keep its streets in a reasonably safe condition (*see Schuster v. McDonald,* 263 A.D.2d 473, 474, 692 N.Y.S.2d 721). However, a governmental body is accorded a qualified immunity from liability arising out of a highway safety planning decision (*see Poveromo v. Town of Cortlandt,* 127 A.D.3d 835, 837, 6 N.Y.S.3d 617; *Kuhland v. City of New York,* 81 A.D.3d 786, 787, 916 N.Y.S.2d 637; *Schuster v. McDonald,* 263 A.D.2d at 474, 692 N.Y.S.2d 721). Such immunity is predicated upon an ability to demonstrate that the relevant discretionary determination by the governmental body was the result of a deliberative decision-making process (*see Norton v. Village of Endicott,* 280 A.D.2d 853, 855, 720 N.Y.S.2d 412).

[3] Contrary to the County's contention, it did not sustain its prima facie burden on the issue of qualified immunity. The County failed to demonstrate, inter alia, that its placement of the sensor station cabinet and its decision to refrain from trimming the hedge were highway safety planning decisions resulting from a deliberative decision-making process of the type afforded ***719** immunity from judicial interference (*see Hepburn v. Croce,* 295 A.D.2d 475, 477, 744 N.Y.S.2d 458; *Norton v. Village of Endicott,* 280 A.D.2d at 854–855, 720 N.Y.S.2d 412; *Trent v. Town of Riverhead,* 262 A.D.2d 260, 690 N.Y.S.2d 732; *cf. Hannon v. State of New York,* 13 A.D.3d 770, 786 N.Y.S.2d 613; *Monfiston v. Ekelman,* 248 A.D.2d 518, 670 N.Y.S.2d 53). The County's failure to satisfy its prima facie burden required denial of the subject branch of its motion without regard to the sufficiency of the opposition papers (*see Barone v. County of Suffolk,* 85 A.D.3d 836, 837, 925 N.Y.S.2d 614; *Bresciani v. County of Dutchess, N.Y.,* 62 A.D.3d 639, 878 N.Y.S.2d 410).

The County's remaining contentions are without merit.

All Citations

133 A.D.3d 717, 19 N.Y.S.3d 583, 2015 N.Y. Slip Op. 08386

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177 A.D.3d 962
Supreme Court, Appellate Division,
Second Department, New York.

I.T.K., etc., Plaintiff-Respondent,

v.

NASSAU BOCES EDUCATIONAL FOUNDATION, INC., Defendant-Respondent, North Shore Central School District, Appellant, et al., Defendants.

2017–02937
|
(Index No. 605685/16)
|
Argued—September 9, 2019
|
November 27, 2019

Synopsis

Background: Special education student, by her mother, brought action against school district to recover damages for injuries she sustained when she was sexually assaulted by a fellow student at her high school, alleging that the assault resulted from school district's negligent supervision. The Supreme Court, Nassau County, George R. Peck, J., denied school district's motion for summary judgment dismissing the complaint. School district appealed.

[Holding:] The Supreme Court, Appellate Division, held that student's asserted theory that district failed to formulate an appropriate individualized education program for her impermissibly amended her claim.

Reversed.

West Headnotes (6)

[1] Education Duty to supervise students

Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.

[2] Education Duty to supervise students

A school's duty to supervise the students in its charge arises from its physical custody over them.

[3] Appeal and Error In general; adhering to theory pursued below

Special education student's proposed amendment to her claim against school district to assert theory that district failed to formulate an appropriate individualized education program for her was not a technical change, but rather an impermissible substantive change to student's theory of liability, and therefore appellate court was not permitted to consider it in student's action against district to recover damages for injuries she sustained when she was sexually assaulted by a fellow student; only theory of liability asserted in student's notice of claim was negligent supervision, failure to formulate individualized education program was only raised in opposition to district's summary judgment motion, and there was no indication that student sought leave to amend her notice of claim. N.Y. General Municipal Law § 50-e(6).

[4] Municipal Corporations Necessity and purpose

A plaintiff seeking to recover in tort against a municipality must serve a notice of claim to enable authorities to investigate, collect evidence, and evaluate the merits of the claim. N.Y. General Municipal Law § 50-e.

2 Cases that cite this headnote

[5] Municipal Corporations Form and sufficiency

A notice of claim against a municipality must set forth, inter alia, the nature of the claim, and the time, place, and manner in which the claim arose. N.Y. General Municipal Law § 50-e.

1 Case that cites this headnote

[6] **Municipal Corporations** Amendment; new notice or claim

A notice of claim against a municipality may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability. N.Y. General Municipal Law § 50-e(6).

2 Cases that cite this headnote

****727** In an action to recover damages for personal injuries, the defendant North Shore Central School District appeals from an order of the Supreme Court, Nassau County (George R. Peck, J.), entered April 6, 2017. The order, insofar as appealed from, denied the motion of the defendant North Shore Central School District for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

Attorneys and Law Firms

Ahmuty, Demers & McManus, Albertson, N.Y. (Nicholas M. Cardascia and Glenn A. Kaminska of counsel), for appellant.

Dell & Dean, PLLC, Garden City, N.Y. (Michael D. Schultz and Jay Massaro of counsel), for plaintiff-respondent.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale, N.Y. (Kathleen D. Foley of counsel), for defendant-respondent.

CHERYL E. CHAMBERS, J.P., JOSEPH J. MALTESE, HECTOR D. LASALLE, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

***962** ORDERED that the order is reversed insofar as appealed from, on the law, with one bill of costs, and the motion of the defendant North Shore Central School District for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted.

The plaintiff was a special education student in the defendant North Shore Central School District (hereinafter North Shore). In 2015, she enrolled in Iris Wolfson High School through the defendant Nassau Boces Educational Foundation, Inc. In May 2015, the plaintiff allegedly was sexually assaulted by a fellow student in the bathroom at Iris Wolfson High School. The plaintiff, by her mother, served a notice of claim on North Shore, among others, alleging negligent supervision. The plaintiff, by her mother, subsequently commenced this action to recover damages for personal injuries. North Shore moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The Supreme Court denied North Shore's motion, and North Shore appeals. We reverse.

[1] **[2]** "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Williams v. Student Bus Co., Inc.*, 170 A.D.3d 1085, 1086, 96 N.Y.S.3d 345 [internal quotation marks omitted]). "A school's duty to supervise the students in ****728** its charge arises from its physical custody over them" (*id.* at 1086, 96 N.Y.S.3d 345). Here, North Shore demonstrated, prima facie, that it could not be held liable for ***963** negligent supervision. The evidence submitted by North Shore established that it was not affiliated with Iris Wolfson High School and that the plaintiff was not in North Shore's physical custody when she allegedly was sexually assaulted (*see id.*). In response to this prima facie showing, the plaintiff conceded that she was not in North Shore's physical custody at the time of the incident.

[3] To the extent that the plaintiff argues on appeal that North Shore's "responsibility to formulate and implement" an Individualized Education Program (hereinafter IEP) brought her within its "orbit of authority," and, in effect, under its supervision, her contention is without merit (*Begley v. City of New York*, 111 A.D.3d 5, 26, 972 N.Y.S.2d 48 [internal quotation marks omitted]; *see Ferraro v. North Babylon Union Free School Dist.*, 69 A.D.3d 559, 892 N.Y.S.2d 507).

[4] **[5]** **[6]** "A plaintiff seeking to recover in tort against a municipality must serve a notice of claim to enable authorities to investigate, collect evidence and evaluate the merits of the claim" (*Lipani v. Hiawatha Elementary Sch.*, 153 A.D.3d 1247, 1248). "A notice of claim must set forth, inter alia, the nature of the claim, and the time, place, and manner in which the claim arose" (*id.* at 1248, 61 N.Y.S.3d 582). "[A] mistake, omission, irregularity or defect made in good faith in the

notice of claim required to be served by [General Municipal Law § 50–e], not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby" (General Municipal Law § 50–e[6]). Under General Municipal Law § 50–e(6), "[a] notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability" (*Matter of Johnson v. County of Suffolk*, 167 A.D.3d 742, 743, 90 N.Y.S.3d 84 [internal quotation marks omitted]).

We agree with North Shore that the plaintiff may not proceed under the theory that North Shore negligently failed to formulate an appropriate IEP for her, as the plaintiff did not include this theory in her notice of claim. Although North Shore did not raise this argument before the Supreme Court, we may consider it because "it presents an issue of law that appears on the face of the record, and could not have been avoided had it been raised at the proper juncture" (*Brunache v. MV Transp., Inc.*, 151 A.D.3d 1011, 1013, 59 N.Y.S.3d 37). In her notice of claim, the only theory of liability that the plaintiff asserted was negligent supervision. In opposition to North Shore's motion for summary ***964** judgment, the plaintiff contended for the first time that North Shore had negligently failed to formulate an appropriate IEP for her. This was not a technical change, but was an impermissible substantive change to the theory of liability (*see Matter of Johnson v. County of Suffolk*, 167 A.D.3d at 743, 90 N.Y.S.3d 84). Further, there is no indication that the plaintiff sought leave to amend her notice of claim, and in any event, such a "request would have been futile since § 50–e(6) allows good-faith, nonprejudicial technical changes, but not substantive changes in the theory of liability" (*Semprini v. Village of Southampton*, 48 A.D.3d 543, 545, 852 N.Y.S.2d 208).

In light of our determination, we need not reach North Shore's remaining contention.

****729** Accordingly, the Supreme Court should have granted North Shore's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

CHAMBERS, J.P., MALTESE, LASALLE and CHRISTOPHER, JJ., concur.

All Citations

177 A.D.3d 962, 113 N.Y.S.3d 726, 373 Ed. Law Rep. 863, 2019 N.Y. Slip Op. 08557

175 A.D.3d 493
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of J. B., Petitioner,

v.

STATE UNIVERSITY OF NEW YORK, et al., Respondents.

2016–13154
|
Index No. 2509/16
|
Argued—April 8, 2019
|
August 7, 2019

Synopsis

Background: State college student sought judicial review of the decision of college's administrative hearing board to expel student after finding that student committed disciplinary violations in violation of the student code of conduct.

Holdings: The Supreme Court, Appellate Division, held that:

[1] administrative hearing board gave student proper notice of the basis for its decision, and thus did not violate student's due process rights, and

[2] expulsion was not so disproportionate to the offenses to be shocking to one's sense of fairness, and therefore college did not abuse its discretion in expelling student.

Affirmed.

West Headnotes (2)

[1] Constitutional Law Disciplinary proceedings

Education Proceedings and review

State college's administrative hearing board reviewing disciplinary charges against student alleging violations of the student code of conduct gave student proper notice of the basis for its decision to expel student, and thus did not violate student's due process rights, although board failed to provide a statement of its factual findings and evidence upon which it was based, where board's decision included a concise statement of both the evidence relied upon and the specific conduct of student hat constituted the violations. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[2] Education Grounds

State college student's expulsion for alleged violations of the student code of conduct was not so disproportionate to the offenses as to be shocking to one's sense of fairness, and therefore college did not abuse its discretion in expelling student, where student violated code of conduct provisions prohibiting acting in a manner which inflicted physical harm, physical abuse, or injury to any person, threatening, harassing, or intimidating any person, coercing, detaining, or using physical force in a manner which endangered the health or safety of any person, and engaging or attempting to engage in any sexual act toward individual without consent with someone who is physically helpless, unconscious, or otherwise incapacitated or unable to accurately communicate. N.Y. CPLR § 7803(3).

3 Cases that cite this headnote

Attorneys and Law Firms

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Letitia James, Attorney General, New York, N.Y. (Steven C. Wu and Scott A. Eisman of counsel), for respondents.

JOHN M. LEVENTHAL, J.P., HECTOR D. LASALLE, BETSY BARROS, VALERIE BRATHWAITE NELSON, JJ.

DECISION & JUDGMENT

***493** Proceeding pursuant to CPLR article 78 to review a determination of Purchase College, State University of New York, dated ***494** April 7, 2016. The determination upheld a decision of an Administrative Hearing Board of Purchase College, State University of New York, dated March 31, 2016, finding that the petitioner committed disciplinary violations, and expelled the petitioner from the school.

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, with costs.

On January 13, 2016, the petitioner, a student at Purchase College, State University of New York (hereinafter the college), was charged with committing four violations of the student code of conduct: (1) acting in a manner which inflicts physical harm, physical abuse, or injury to any person; (2) threatening, harassing, or intimidating any person, and/or using words which reasonably tend to incite an immediate, violent reaction and are specifically ****53** directed toward another; (3) coercing, detaining, or using physical force in a manner which endangers the health or safety of any person; and (4) engaging or attempting to engage in any sexual act toward any individual without consent with someone who is physically helpless, unconscious, or otherwise incapacitated or unable to accurately communicate.

Following an administrative hearing, in a decision dated March 31, 2016, a college Administrative Hearing Board (hereinafter the hearing board) found that the petitioner committed the charged violations, and recommended that he be expelled from the college. The petitioner appealed the hearing board's decision to the college's Campus Appeals Board (hereinafter appeals board). In a determination dated April 7, 2016, the appeals board upheld the hearing board's decision and imposed the sanction of expulsion from the college. The petitioner subsequently commenced this proceeding pursuant to CPLR article 78 to review the determination, and the Supreme Court, Westchester County, transferred the matter to this Court pursuant to CPLR 7804(g).

[1] We find unpersuasive the petitioner's contention that he was deprived of due process by the alleged failure of the hearing board to support its decision with a statement of factual findings and the evidence upon which it was based. While such a statement must be provided, the hearing board's decision in this case satisfied this requirement by including a concise statement of both the evidence relied upon and the specific conduct of the petitioner that constituted the violations, thereby giving him notice of the basis for the decision (*see Matter of Ferraro v. State Univ. of N.Y. at Purchase Coll.,* 162 A.D.3d 766, 767, 80 N.Y.S.3d 64; ***495** *Matter of Lambraia v. State Univ. of N.Y. at Binghamton,* 135 A.D.3d 1144, 1147, 23 N.Y.S.3d 679).

The determination that the petitioner committed the charged violations was supported by substantial evidence (*see* CPLR 7803[4]; *300 Gramatan Ave. Assoc. v. State Div. of Human Rights,* 45 N.Y.2d 176, 180–181, 408 N.Y.S.2d 54, 379 N.E.2d 1183).

[2] Further, the penalty of expulsion was not so disproportionate to the offenses as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law (*see* CPLR 7803[3]; *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 N.Y.2d 222, 233, 356 N.Y.S.2d 833, 313 N.E.2d 321; *Matter of Weber v. State Univ. of N.Y., Coll. at Cortland,* 150 A.D.3d 1429, 1434, 55 N.Y.S.3d 753).

The petitioner's contention concerning a missing witness adverse inference is not properly before this Court, as it was not raised at the administrative level (*see Matter of Peckham v. Calogero,* 12 N.Y.3d 424, 430, 883 N.Y.S.2d 751, 911 N.E.2d 813; *Matter of Zahav Enters., Inc. v. Martens,* 150 A.D.3d 748, 751, 53 N.Y.S.3d 679). The petitioner's remaining contentions are without merit.

LEVENTHAL, J.P., LASALLE, BARROS and BRATHWAITE NELSON, JJ., concur.

All Citations

175 A.D.3d 493, 109 N.Y.S.3d 51, 370 Ed. Law Rep. 1065, 2019 N.Y. Slip Op. 06083

154 A.D.3d 231
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Amanda Chambers JOHNSON, petitioner,
v.
Margaret PALUMBO, administrator of the City of Poughkeepsie Office of Section 8 Housing, et al., respondents.

Sept. 20, 2017.

Synopsis

Background: Recipient of federal housing assistance payments under Section 8 housing voucher program brought article 78 proceeding petitioning for review of city's determination terminating her subsidy on ground that she had misrepresented number of occupants in her household and failed to request approval to add another household member.

[Holding:] Following transfer, the Supreme Court, Appellate Division held that recipient was entitled to housing protections of Violence Against Women Act (VAWA), precluding her termination from the program.

Petition granted, determination annulled, and matter remitted.

West Headnotes (1)

[1] **Landlord and Tenant** Defenses

Female recipient of federal housing assistant payment under Section 8 voucher program, who had resided in subsidized housing with her five children for ten years, was entitled to housing protections of Violence Against Women Act (VAWA), prohibiting her termination from the program on basis she had misrepresented the number of occupants in her household and failed to request approval to add additional male member; recipient had been subjected to an escalating pattern of stalking, abusive behavior, and domestic violence by her former intimate partner, whose course of abusive and violent conducted against her included his unwanted presence in her apartment, as well as use of her address to satisfy a condition of his parole, to obtain a driver's permit, and for employment purposes. United States Housing Act of 1937, § 8(b)(1), 42 U.S.C.A. § 1437f(b)(1); 34 U.S.C.A. 12291; 42 U.S.C.A. § 14043e–11(b)(2).

1 Case that cites this headnote

Attorneys and Law Firms

****473** Legal Services of the Hudson Valley, Poughkeepsie, NY (Jared L. Gilman and Vinita Kamath of counsel), for petitioner.

McCabe & Mack LLP, Poughkeepsie, NY (David L. Posner and Andrea L. Gellen of counsel), for respondents.

JOHN M. LEVENTHAL, J.P., JOSEPH J. MALTESE, HECTOR D. LaSALLE, VALERIE BRATHWAITE NELSON, JJ.

Opinion

BRATHWAITE NELSON, J.

***233** The petitioner, Amanda Chambers Johnson, lived in an apartment in Poughkeepsie with her five children with the assistance of rent subsidy benefits under the Section 8 Housing Choice Voucher Program (*see* 42 U.S.C. § 1437f[b][1]). On February 11, 2014, she was notified that her benefits under the program were being terminated due to alleged violations of the program rules. After an administrative hearing, the determination to terminate her benefits was confirmed based upon the finding that she was obligated, but failed, to request permission ***234** to add Antwone Jordan–McGill (hereinafter McGill) as an occupant to her subsidized apartment. We consider whether, under these circumstances, the petitioner was entitled to the housing protections of the Violence Against Women Act (hereinafter the VAWA; now 34 U.S.C. 12291 *et seq.*) based upon uncontested hearing evidence establishing that she was subjected to an escalating pattern of stalking and abusive behavior and domestic violence by McGill, a former intimate partner, whose course of abusive and violent conduct against her included his unwanted presence in her apartment. For the

reasons that follow, we conclude that she was entitled to the housing protections of the VAWA, which prohibited her termination from the program on this ground (*see* 42 U.S.C. § 14043e–11[b][2]).

I. *Factual and Procedural Background*

The respondent City of Poughkeepsie Office of Section 8 Housing (hereinafter the Agency) administers the federally funded Section 8 Housing Choice Voucher ****474** Program, which provides rent subsidies to low-income tenants (*see* 42 U.S.C. § 1437f). The petitioner had been a participant in the program for approximately 10 years and had resided with her children in Poughkeepsie at a particular apartment (hereinafter the contract unit) with the assistance of the program for approximately 7 years. Through a "Notice of Termination" letter dated February 11, 2014, the Agency notified the petitioner that it had decided to terminate her program assistance on the ground that she had violated the Housing and Urban Development (hereinafter HUD) Rules and Regulations. Specifically, the notice alleged that during the Section 8 recertification process on November 12, 2013, the petitioner had failed to fully disclose her household composition and all of the income attributable to her household, and had failed to request the Agency's approval to add another family member as an occupant to the contract unit. It further alleged that the Agency had learned that McGill had lived with the petitioner at the contract unit from June 2012 until December 2013, at which time he was arrested. It is undisputed that McGill remained incarcerated from the date of that arrest throughout these proceedings. The notice further advised the petitioner that if she did not agree with the decision to terminate her participation in the program, she had the right to request an "informal hearing" in accordance with 24 CFR 982.555 of the HUD Rules and Regulations. Federal regulations governing the ***235** Housing Choice Voucher Program require that, prior to the termination of housing assistance payments under an outstanding housing assistance payments contract, the participant be given the opportunity for an informal hearing to determine whether the agency's decision to terminate assistance is in accordance with the law (*see* 24 CFR 982.555[a]).

The petitioner requested such a hearing, which was held on March 19, 2014. In accordance with the governing rules and regulations, the Agency and the petitioner were each given the opportunity to present evidence (*see* 24 CFR 982.555[e][5]), and the hearing officer allowed each to submit a written summation to assist with his determination. The Agency presented the testimony of one of its housing program assistants and the testimony of a private investigator hired by the Agency, as well as documentary evidence. The program assistant testified that his boss had received an anonymous phone call from a person reporting that someone was living at the contract unit with the petitioner. Although the program assistant did not know when that anonymous phone call was received, the investigator testified that McGill was already incarcerated on charges stemming from his December 2013 arrest when she received the matter to investigate. The investigator further testified that because McGill was incarcerated, she did not conduct any "investigation or personal surveillance" of the contract unit. Her investigation consisted solely of gathering documents by submitting Freedom of Information Law (FOIL) requests to various governmental agencies. Through this investigation, she obtained copies of, among other things, McGill's pay stubs, his driver's permit application, and records of his parole home visits by New York State Department of Corrections and Community Supervision parole officers, all of which listed the contract unit as McGill's address. The parole records also indicated that McGill's parole officer had some form of contact with McGill at the contract unit during some visits made between June 2012 and December 2013. In addition to these documents, the Agency submitted a Domestic Incident Report dated December 19, 2013, completed by a police officer, which reported an incident, ****475** described more fully by the petitioner in her testimony at the hearing, in which McGill pursued the petitioner to a police station parking lot, where he punched her twice in the face before being arrested. The Domestic Incident Report indicated that the parties did not live together, but it also listed the contract unit as the address for both the ***236** petitioner and McGill. Based on this documentary evidence establishing that McGill had used the contract unit as his address, the Agency asserted that McGill was residing at the contract unit and the petitioner's housing assistance benefits were properly terminated because she failed to request Agency approval to add him as an additional occupant to the unit and disclose his income during the recertification process, despite signing documents on November 12, 2013, which contained the relevant rules obligating her to do so.

The petitioner testified at the hearing and submitted a number of documents. She took the position that McGill did not live with her at the contract unit and that the evidence submitted by the Agency indicating that McGill was residing there existed as a result of domestic violence and stalking. In her testimony, the petitioner described an escalating pattern of stalking and abusive behavior and domestic violence

by McGill that culminated in the December 2013 incident leading to his arrest. The petitioner testified as follows. In June 2012, she permitted McGill, who was then a friend, to use the contract unit address for purposes of registering for parole; however, this was meant to be temporary and at no point did he actually live in the contract unit. In about July 2012, she and McGill entered into an intimate relationship, she "immediately" became pregnant, and McGill began to act controlling and domineering, eventually starting to threaten, intimidate, and harass her. He wanted the petitioner to have an abortion and threatened to "give [her] an abortion, if [she] wouldn't go and get one." McGill "just went from one person to a totally different person." At first, the petitioner told him to leave her alone, that she did not "believe in abortion," and he would not need to be part of the baby's life. After that, McGill "became terrifying." He started asking the petitioner for keys to her apartment. She told him "no," but, against her wishes, McGill took a spare set of keys, which the petitioner had kept for her children. McGill would disappear for periods of time and then suddenly reappear. He began entering the petitioner's home at will, "whenever he felt like it," and told her that he would never give her back her keys.

McGill began to call the petitioner "over, and over, and over," 30 to 40 times in succession, until she would answer the phone, including times when she was at work. If the petitioner did not answer when McGill called, he would either find her or wait for her at her home and smash her cell phone. He smashed her ***237** cell phone on four occasions between October 2012 and June 2013. The petitioner became "truly terrified" of McGill, who often would "go at [her]," spit in her face, scream at her, and threaten her.

The petitioner testified that beyond the day he asked to use her address, McGill did not ask her permission for anything. The petitioner was not aware that McGill had used the contract unit address with his employer. His pay stubs did not come to her apartment. Nor was she aware that he had used the contract unit address when he applied for a driver's permit. She became aware of this fact when the permit was delivered to her apartment. She gave the permit to McGill and did not question him about it because she was scared of him. The petitioner maintained that from the time period of June 2012 ****476** through December 2013, although McGill used the keys he took to enter her apartment 48 to 100 times, he stayed overnight in her apartment at most 20 times. At the time, he told her that he was living with his brother, but since his incarceration in December 2013, the petitioner heard that he had been living with other women. The petitioner explained how she would contact McGill when his parole officer came to her apartment to conduct a home visit. If the visit was unannounced, she would rush to call McGill before the parole officer did because if McGill did not hear from the petitioner first, he would say that she was "trying to set him up." He would threaten, "You're gonna dig yourself a hole, and nobody's gonna find you." According to the petitioner, McGill would "just go off" if he heard something he did not like. As a result, she tried to "play nice," and did not confront him regarding his continued use of her address with his parole officer, his unauthorized access to her home, or his unauthorized use of her address on his driver's permit. The petitioner testified that McGill was "just a very wicked individual and [she] truly could not have done anything different than what [she] did to survive." When pressed on cross-examination to explain why she did not seek an order of protection prior to December 2013 or try to stop McGill from accessing her apartment sooner, the petitioner replied, "I know it's hard to understand. You never think that someone will control you ... But when you are in that situation, it's a totally different world ... When you are scared of somebody and you have five kids to take care of, to get ready for ***238** school, to got to work, to put on a smile every single day, it changes the dynamic of things that become important." The petitioner felt that McGill's use of her address and the taking of her keys was a means for him to control, abuse, and manipulate her.

McGill's threats escalated into physical violence on December 19, 2013, when the incident resulting in his arrest occurred. The petitioner testified that she decided to get her keys back from McGill that day because her son was turning 15, and she realized that she "just could not do it anymore, being scared all the time" and having her children witness McGill's abusive and domineering behavior toward her. The petitioner and her cousin drove, in the petitioner's vehicle, to McGill's workplace at the time of his lunch break. The petitioner falsely told McGill that she could not find her keys, that representatives from the Agency were at the contract unit, and that she needed to get the spare set of keys from him so that she could let them into the apartment to conduct an inspection. McGill handed her the keys, but she was shaking. The petitioner turned to walk away, and McGill said, "Wait a minute ... What are you doing?" The petitioner got into her vehicle and her cousin started to drive away. McGill got into his vehicle and pursued. He called the petitioner on her cell phone and told her to pull over. The petitioner refused and said, "I just can't take it anymore. I can't live like this anymore. Just leave me alone." McGill sped up and repeatedly told the

petitioner to "pull over. I've got something for you." He tried to cut off the petitioner's vehicle, but the petitioner's cousin was able to drive to a police station. At the police station, the petitioner exited her vehicle. McGill exited his vehicle, approached the petitioner, and accused her of having "tricked him." Before the petitioner could respond, McGill punched her in the face, chipping her tooth. He punched her again in the face before police officers intervened and arrested McGill. In addition to the above testimony, the petitioner submitted into evidence police department Domestic Incident Reports, criminal complaints, a Criminal Court order ****477** of protection, a family offense petition, and a Family Court order of protection. These documents pertained to the December 19, 2013, incident, as well as subsequent violations of the orders of protection. Asked why the Domestic Incident Report listed McGill's address as being at the contract unit, the petitioner testified that the police used the address listed on McGill's driver's permit.

***239** After the hearing, both the Agency and petitioner submitted written summations to the hearing officer. In its summation, the Agency affirmatively argued that it had not terminated the petitioner's housing benefits in violation of the VAWA because at the time the petitioner's benefits were terminated, it was aware only of the December 2013 incident of domestic violence, and its allegation of unauthorized occupancy stemmed from McGill's occupancy from June 2012 to December 2012. The Agency also cited the petitioner's failure to report, prior to the hearing, that she was a victim of domestic violence as a basis for rejecting her testimony, and denying her the protection of the statute. In her written summation, the petitioner contended that she was entitled to the protection of the VAWA because, to the extent that McGill lived in the contract unit, he did so because she feared him and was " scared of what would happen if she changed the status quo."

In a decision dated March 25, 2014, the hearing officer confirmed the Agency's termination of the petitioner's participation in the Section 8 Housing Choice Voucher Program. The hearing officer found undisputed the facts that McGill had used the contract address for the purposes of satisfying a condition of his parole, to obtain a driver's permit, and for employment purposes, and that McGill assaulted the petitioner on December 19, 2013, and had since been incarcerated. Based on the parole records, which indicated that a parole officer had contact with McGill at the contract unit during certain early morning and late evening visits, the hearing officer rejected the petitioner's testimony that McGill did not reside at the contract unit, and found that McGill had resided with the petitioner "at least for some period." He therefore found, by a preponderance of the evidence, that the petitioner had failed to request permission to add a family member as required by the HUD Rules and Regulations. The hearing officer stated that the petitioner bore the burden of proving "first, that she was a victim of domestic violence and second, that her actions were as a result of or related to that violence." Although he did not discredit the petitioner's testimony of the nature of her relationship with McGill and how McGill came to possess keys to the contract unit and use it as his address, the hearing officer nonetheless concluded that there was no evidence of violence or fear in June of 2012, and even were there evidence of violence that early, he "fail[ed] to see how that fear would excuse the [petitioner from] requesting to add another family ***240** member." Consequently, the hearing officer found no basis to apply the VAWA in this case.

The petitioner thereafter commenced this CPLR article 78 proceeding in the Supreme Court seeking review of the determination, arguing, among other things, that the hearing officer erred as a matter of law in concluding that the VAWA did not prevent her tenancy from being terminated. In an order entered October 1, 2014, the Supreme Court transferred the proceeding to this Court upon finding that one of the issues raised in the petition was whether the determination was supported by substantial evidence (*see* CPLR 7804[g]).

****478** II. *Discussion*

Originally enacted in 1994, one of the VAWA's purposes was to provide greater protections to victims of domestic violence (*see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, Tit. IV, 108 stat. 1796 [42 U.S.C. § 13701 Note]). In 2005, it was re-authorized and expanded to include, among other things, protection for victims of domestic violence who receive publicly assisted housing benefits, including participants of the Section 8 Housing Choice Voucher Program (*see* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, Tit. VI, 119 stat. 2960 [42 U.S.C. § 13701 Note]; 42 U.S.C. § 14043e *et seq.*). In expanding the VAWA to encompass certain public housing programs, Congress acknowledged that "[t]here is a strong link between domestic violence and homelessness," and "[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence" (42 U.S.C. § 14043e[1], [3]). Domestic violence

has caused shelter populations to increase because of the scarcity of housing (*see* Mireya Navarro, *Homeless, Because They Are Abused at Home,* N.Y. Times, Nov. 11, 2014, § A at 1, col. 0). The purpose of the VAWA, as applied to public housing, is to reduce domestic violence and stalking, among other things, and to prevent homelessness (*see* 42 U.S.C. § 14043e–1). To that end, the VAWA provides that, in general,

> "An applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, ***241** dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy" (42 U.S.C. § 14043e–11[b][1]).

As relevant here, the VAWA specifically provides that an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking, shall not be construed as a serious or repeated lease violation, or good cause for terminating assistance to the victim (*see* 42 U.S.C. § 14043e–11[b][2] [A], [B]).

Notwithstanding the above, even if a tenant has established that he or she is a victim under the VAWA, a public housing authority may terminate assistance on other independent grounds. In that regard, the VAWA does not limit the ability of a public housing authority to terminate assistance for a lease violation unrelated to domestic violence, dating violence, or stalking, provided that the public housing authority does not subject an individual who has been the victim of such violence to a more demanding standard than other tenants (*see* 42 U.S.C. § 14043e–11[b][3][C][ii]; *see also* 24 CFR 5.2005[d][2][1]).

Here, the hearing officer upheld the termination of the petitioner's participation in the Housing Choice Voucher Program on the ground that McGill resided with the petitioner, therefore she was obligated to request permission to add him as an occupant of the unit, and her failure to request such approval was a violation of her obligations under the program warranting termination of her participation in the program. ****479** The regulations governing the Section 8 Housing Choice Voucher Program authorize, but do not require, a public housing agency to terminate program assistance for a participant if the participant violates any obligations under the program (*see* 24 CFR 982.552 [c] [2][i]). The petitioner's obligations under the program included the duty to request the Agency's written approval to add any other family member to the contract unit. The petitioner signed a form on November 12, 2013, acknowledging that violating this obligation was grounds for termination ***242** of her housing assistance. We note that although the hearing officer suggested in his determination that the petitioner was obligated to seek the subject approval as early as June 2012, the Agency's notice of termination identified the November 12, 2013, recertification process and the documents that the petitioner signed at that time as the basis of the petitioner's alleged violation. Consequently, it is the petitioner's failure to seek approval to add McGill as an occupant at that point in time that is at issue (*see generally* 24 CFR 982.555[e][2]). In this proceeding pursuant to CPLR article 78, we accept, as we must, the hearing officer's factual determination that McGill resided with the petitioner "at least for some period" (*see Matter of Berenhaus v. Ward,* 70 N.Y.2d 436, 443, 522 N.Y.S.2d 478, 517 N.E.2d 193; *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 N.Y.2d 222, 230, 356 N.Y.S.2d 833, 313 N.E.2d 321). However, we find that the hearing officer erred in his legal conclusion that the petitioner was not entitled to the protections of the VAWA.

As noted above, the VAWA provides that incidents of actual or threatened domestic violence or stalking shall not be construed as good cause for terminating assistance under a covered housing program (*see* 42 U.S.C. § 14043e–11[b][2] [B]). The VAWA defines "domestic violence" as felony or misdemeanor crimes of violence committed by, among others, a current or former intimate partner of the victim, a person with whom the victim shares a child in common, or a person who is cohabiting with or has cohabitated with the victim as an intimate partner (*see* 42 U.S.C. § 13925[a][8]; *see also* 24 CFR 5.2003). It defines "stalking" to mean engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for her safety or the safety of others, or suffer substantial emotional distress (*see* 42 U.S.C. § 13925[a][30]; *see also* 24 CFR 5.2003).

The petitioner's testimony established that throughout her relationship with McGill, which spanned from July 2012 through December 2013, McGill threatened, intimidated, harassed, and physically assaulted her. This unrefuted testimony established incidents of domestic violence and a course of conduct by McGill directed at the petitioner that would cause a reasonable person to fear for her safety or suffer substantial emotional distress. Moreover, his presence at her home and continued access to the contract unit was

an integral part of ***243** the intimidation. There was no evidence presented at the hearing from which the hearing officer could conclude that the petitioner voluntarily gave McGill permission to reside at the contract unit from June 2012 through December 2013, or that his ultimate residency there "for some period of time" was unrelated to the domestic violence he perpetrated upon her (*cf. Hammond v. Akron Metropolitan Housing Authority,* 2011–Ohio–2635, 2011 WL 2175801 [9th Dist.]). Indeed, the hearing officer did not make such findings. Instead, he concluded that any fear experienced by the petitioner did not excuse her from requesting to add McGill as an occupant ****480** of the contract unit. This conclusion reflects a misinterpretation of the statute. The VAWA seeks to provide greater protections to victims of violence and intimidation perpetrated by an intimate partner. Here, in light of the uncontested evidence that McGill's presence in and access to the contract unit was the result of conduct that constitutes domestic violence and stalking as defined by the VAWA, it would be unreasonable and inconsistent with the purpose of the statute to require the petitioner to seek permission to add McGill as an occupant of the unit. Indeed, requiring the petitioner to do so would effectively require her to legitimize his access to the contract unit by making him an established part of her household, thus giving him greater power and control over her. The hearing officer's failure to recognize that McGill's presence in and access to the contract unit was the result of domestic violence did not take into account the dynamics of domestic violence where the victim very often fails to report the abuser to the police, medical professionals when being treated for injuries inflicted by a batterer, or even to her family (*see Nicholson v. Williams,* 203 F.Supp.2d 153 [E.D.N.Y.], *affd. in part sub nom. Nicholson v. Scoppetta,* 344 F.3d 154 [2d Cir.]). To uphold a conclusion that the petitioner violated her obligation under the Section 8 Housing Choice Voucher Program by failing to seek permission to add McGill as an occupant would place her in the untenable position of having to either choose between becoming more deeply embroiled in an abusive situation by legitimizing his presence in the contract unit, or facing the loss of the housing assistance benefits she relies upon for herself and her five children. This is a choice that a domestic violence victim should not have to make (*see Nicholson v. Williams,* 203 F.Supp.2d 153, *affd. in part sub nom. Nicholson v. Scoppetta,* 344 F.3d 154; *see also Nicholson v. Scoppetta,* 3 N.Y.3d 357, 787 N.Y.S.2d 196, 820 N.E.2d 840), ***244** and we decline to read the VAWA in such a way, which is plainly inconsistent with its salutary purposes (*see generally* 42 U.S.C. § 14043e–1).

We also reject the Agency's contention that the petitioner is not entitled to the protection of the VAWA because she did not report that she was a victim of domestic violence prior to the informal hearing, and did not provide third-party documentation to corroborate her testimony. As to the timeliness of the petitioner's assertion, no statutory or regulatory provisions dictate when and how a tenant must assert her right to protections under the VAWA (*cf.* 42 U.S.C. § 14043e–11; 24 CFR 5.2005). Furthermore, the petitioner had no cause to assert the protections of the VAWA until she received the notice of termination from the Agency, which directed her to request an informal hearing if she disagreed with the decision to terminate her participation in the program. As to the petitioner's burden of proof, the VAWA places no burden of proof in the first instance on a person seeking the protections of the VAWA. If a tenant of covered housing represents that she is "entitled to protection under [the VAWA]" (42 U.S.C. § 14043e–11[c][1]), documentation is not required (*see* 42 U.S.C. § 14043e–11[c][5]; *see also* 24 CFR 5.2007[b][3]). Nonetheless, the public housing agency may, in its discretion, request that the tenant submit a form of documentation described in the statute (*see* 42 U.S.C. § 14043e–11[c][1]; *see also* 24 CFR 5.2007[a] [1]). However, it cannot deny relief for protection under the VAWA unless it has provided the individual with a written request for such documentation and the individual has failed to provide documentation within the specified time (*see* 42 U.S.C. § 14043e–11[c][1], [2]; *see also* 24 CFR 5.2007[a]). Here, the Agency ****481** never made a written request for documentation which would have prompted the petitioner's obligation to provide such documentation (*see* 42 U.S.C. § 14043e–11[c][2]; *see also* 24 CFR 5.2007[a][2]).

In any event, the petitioner's testimony at the informal hearing was sufficient to establish that she was entitled to the protections of the VAWA (*see* 42 U.S.C. § 14043e–11). Where the public housing agency has made a written request for documentation, the tenant may submit any one of the specified forms of documentation "at the discretion of the ***245** tenant" (24 CFR 5.2007[b][1]; *see* 42 U.S.C. § 14043e–11[c]). The choices include a HUD–approved certification form, which may be based solely on the personal signed attestation of the victim (*see* 42 U.S.C. § 14043e–11[c][3] [A]; 24 CFR 5.2007[b][1][i]), and, at the discretion of the housing agency, "a statement or other evidence provided by an applicant or tenant" (42 U.S.C. § 14043e–11[c][3][D]; *see* 24 CFR 5.2007[b][1][iv]). "[A]s long as the victim provides a HUD–approved certification form, third-party documentation, a verbal statement, or other corroborating

evidence, the victim is statutorily entitled to [the] protections [of the VAWA]" (HUD Programs: Violence Against Women Act Conforming Amendments, 75 Fed Reg 66246–01, 66251 [2010]). Here, because the Agency never made a written request for documentation, there was no occasion for the petitioner to respond accordingly. The question of the VAWA's application arose in the nature of the informal hearing where the petitioner testified as detailed above, under oath. Moreover, her sworn hearing testimony, which provided far more detail than called for by the HUD-approved certification form, was sufficient to document the occurrences of domestic violence and stalking perpetrated against her by McGill (*cf.* 24 CFR 5.2007), and established that she was statutorily entitled to the protections of the VAWA. Contrary to the Agency's contention, no third-party documentation of the petitioner's account was necessary.

Finally, although not determinative of the legal issue before us, we note that under the HUD rules and regulations, "[c]overed housing providers are encouraged to undertake whatever actions permissible and feasible under their respective programs to assist individuals residing in their units who are victims of domestic violence, dating violence, sexual assault, or stalking to remain in their units or other units under the covered housing program" (24 CFR 5.2009[c]). Here, the Agency's investigation, which was prompted by an unidentified anonymous caller, did not commence until after the December 19, 2013, assault resulting in McGill's arrest. By the time the Agency decided to terminate the petitioner's participation in the program, McGill had been incarcerated for nearly two months for assaulting the petitioner, and plainly was no longer living in the contract unit. McGill's continuing acts of harassment, intimidation, and domestic violence against the petitioner were well documented before the Agency. Under the circumstances, ***246** the Agency's determination to exercise its discretion in a way that would result in the petitioner's loss of her unit was inconsistent with the VAWA.

In sum, we find that the hearing officer's determination was affected by an error of law and rendered in violation of the VAWA (*see* 42 U.S.C. § 14043–11 [b] [1], [2]; CPLR 7803[3]). The petitioner's alleged violation of the program rules was her failure to seek Agency approval to add McGill as an occupant to the contract unit. However, the unrefuted evidence at the informal hearing established that McGill's residency at the contract unit was a result of the intimidation, harassment, and domestic violence that he carried out against ****482** the petitioner. The petitioner did not willingly allow McGill's very limited residency in her apartment. Adding McGill as an occupant to the contract unit would have increased McGill's control over the petitioner and furthered the fear-inducing course of conduct which he had directed at her. On the record presented, we are persuaded that the termination of the petitioner's participation in the program and McGill's abusive and violent conduct against the petitioner are inextricably intertwined. Under these circumstances, we hold, as a matter of law, that the petitioner was entitled to the housing protections of the VAWA, which prohibited the Agency from terminating her participation in the program on this ground.

In light of our determination, we need not reach the petitioner's remaining contentions, including the substantial evidence issue.

Accordingly, the petition is granted, the determination is annulled, and the matter is remitted to the respondents to reinstate the petitioner's participation in the Section 8 Housing Choice Voucher Program retroactive to March 25, 2014.

ADJUDGED that the petition is granted, on the law, without costs or disbursements, the determination is annulled, and the matter is remitted to the respondents to reinstate the petitioner's participation in the Section 8 Housing Choice Voucher Program retroactive to March 25, 2014.

All Citations

154 A.D.3d 231, 60 N.Y.S.3d 472, 2017 N.Y. Slip Op. 06534

Footnotes

1 We note that some of the relevant HUD regulations were amended in November 2016 in a manner that affected the internal numeration of some of the regulations cited to herein. Because the amendments did not affect the substance of the regulations insofar as they relate to this proceeding, we cite to the current version of the regulations.

End of Document

191 A.D.3d 676
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Timothy JULIAN, appellant,

v.

FIRE DEPARTMENT OF the CITY OF NEW YORK, et al., respondents.

2018–04255
|
(Index No. 1279/17)
|
Submitted—November 23, 2020
|
February 3, 2021

Attorneys and Law Firms

The Law Office of Jeffrey L. Goldberg, P.C., Port Washington, NY, for appellant.

James E. Johnson, Corporation Counsel, New York, NY (Deborah A. Brenner and Tahirih M. Sandrieh of counsel), for respondents.

MARK C. DILLON, J.P., CHERYL E. CHAMBERS, HECTOR D. LASALLE, ANGELA G. IANNACCI, JJ.

***717** DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review (1) a determination of the Fire Department of the City of New York, dated October 25, 2013, denying the petitioner's request for a promotion to the rank of Lieutenant, and (2) a determination of the New York State Division of Human Rights, dated January 30, 2017, dismissing the petitioner's discrimination complaint, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Kings County (Richard Velasquez, J.), dated January 8, 2018. The order and judgment, insofar as appealed from, denied the petition and, in effect, dismissed the proceeding.

ORDERED that the order and judgment is affirmed insofar as appealed from, with costs.

In October 2013, the petitioner, who had been employed as a firefighter with the respondent Fire Department of the City of New York (hereinafter the FDNY) since 1998, was informed that he was denied a promotion to the rank of Lieutenant. The petitioner subsequently retired in October 2015. On September 6, 2016, the petitioner filed a complaint with the respondent New York State Division of Human Rights (hereinafter the DHR) against the FDNY, alleging that the FDNY had discriminated against him in 2013 on the basis of age and disability. On January 30, 2017, the DHR dismissed the petitioner's complaint as untimely, since it was not filed within one year after the alleged unlawful discriminatory practice, as required by Executive Law § 297(5). The petitioner thereafter commenced this proceeding pursuant to CPLR article 78 to review DHR's determination, as well as FDNY's earlier denial of his request for a promotion. By order and judgment dated January 8, 2018, the Supreme Court, inter alia, denied the petition and, in effect, dismissed the proceeding. The petitioner appeals.

"In a CPLR article 78 proceeding to review a determination of an administrative agency, the standard of judicial review is whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (*Matter of Wilson v. New York City Dept. of Hous. Preserv. & Dev.,* 145 A.D.3d 905, 907, 44 N.Y.S.3d 135; *see* CPLR 7803[3]). Courts must "examine whether the action taken by the agency has a rational basis, and will overturn that action only where it is taken without sound basis in reason or regard to the facts" (*Matter of JP & Assoc. Corp. v. New York State Div. of Hous. & Community Renewal,* 122 A.D.3d 739, 739, 996 N.Y.S.2d 633 [internal quotation marks omitted]).

Under Executive Law § 297(5), "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." "The provision that a complaint 'must' be filed within one year after the discriminatory practice has occurred is in the nature of a statute of limitations and, thus, is mandatory" (*Matter of Murphy v. Kirkland,* 88 A.D.3d 267, 273, 928 N.Y.S.2d 333, quoting Executive Law § 297[5]).

Contrary to the petitioner's contention, the Supreme Court properly determined that the DHR's determination to dismiss the petitioner's complaint as untimely was not arbitrary and capricious and had a rational basis. Similarly, the court properly ***718** dismissed this CPLR article 78 proceeding as to the FDNY, since it was commenced more than four

months after the FDNY's final determination not to promote him, which the parties do not dispute occurred in late 2013 (*see* CPLR 217; *Matter of Carter v. State of N.Y., Exec. Dept., Div. of Parole,* 95 N.Y.2d 267, 270, 716 N.Y.S.2d 364, 739 N.E.2d 730).

The petitioner's remaining contentions are without merit.

Accordingly, we affirm the order and judgment insofar appealed from.

DILLON, J.P., CHAMBERS, LASALLE and IANNACCI, JJ., concur.

All Citations

191 A.D.3d 676, 137 N.Y.S.3d 716 (Mem), 2021 N.Y. Slip Op. 00563

163 A.D.3d 818
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Andriana LEWIS, appellant,
v.
NEW YORK STATE DIVISION OF HUMAN RIGHTS, et al., respondents.

2017–03105
|
(Index No. 15156/15)
|
Argued—April 5, 2018
|
July 18, 2018

Synopsis

Background: After Division of Human Rights (DHR) dismissed former employee's complaint alleging that her former employer unlawfully discriminated and retaliated against her, former employee brought Article 78 proceeding for review of that determination. The Supreme Court, Queens County, Carmen R. Velasquez, J., denied the petition and dismissed the proceeding. Former employee appealed.

[Holding:] The Supreme Court, Appellate Division, held that DHR's determination was neither arbitrary and capricious nor lacked a rational basis.

Affirmed.

West Headnotes (5)

[1] **Civil Rights** Judicial review and enforcement of administrative decisions

Where the New York State Division of Human Rights renders a determination of no probable cause without holding a hearing on an employment discrimination complaint, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacking a rational basis.

4 Cases that cite this headnote

[2] **Civil Rights** Judicial review and enforcement of administrative decisions

Determinations of New York State Division of Human Rights (DHR) are entitled to considerable deference given its expertise in evaluating discrimination claims.

2 Cases that cite this headnote

[3] **Civil Rights** Charges and investigations

New York State Division of Human Rights has broad discretion in conducting its investigations of complaints of employment discrimination. N.Y. Comp. Codes R. & Regs. tit. 9, § 465.6.

[4] **Civil Rights** Charges and investigations

Civil Rights Hearing, determination, and relief; costs and fees

New York State Division of Human Rights (DHR) conducted an adequate investigation of former employee's complaint that was neither abbreviated nor one-sided, and thus DHR's determination was neither arbitrary and capricious nor lacked a rational basis; former employee was afforded a full and fair opportunity to present her claim and supporting submissions, and to rebut her former employer's submissions in opposition to her complaint.

4 Cases that cite this headnote

[5] **Civil Rights** Hearing, determination, and relief; costs and fees

Prior administrative determination regarding an application by former employee for unemployment insurance benefits did not preclude New York State Division of Human Rights' (DHR) determination finding no probable cause to believe that employer unlawfully discriminated or retaliated against petitioner. N.Y. Labor Law § 623(2).

2 Cases that cite this headnote

Attorneys and Law Firms

****486** Glass Krakower LLP, New York, N.Y. (Bryan D. Glass of counsel), for appellant.

Martin Clearwater & Bell LLP, New York, N.Y. (Barbara D. Goldberg and Gregory B. Reilly of counsel), for respondent Jamaica Hospital Nursing Home.

WILLIAM F. MASTRO, J.P., REINALDO E. RIVERA, LEONARD B. AUSTIN, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***819** In a proceeding pursuant to CPLR article 78 to review a determination of the respondent New York State Division of Human Rights dated October 28, 2015, the petitioner appeals from a judgment of the Supreme Court, Queens County (Carmen R. Velasquez, J.), entered February 14, 2017. The judgment denied the petition ****487** and dismissed the proceeding on the merits.

ORDERED that the judgment is affirmed, with costs.

In May 2015, the petitioner filed a complaint with the New York State Division of Human Rights (hereinafter the DHR) against her former employer, the respondent Jamaica Hospital Nursing Home (hereinafter JHNH), alleging that JHNH unlawfully discriminated and retaliated against her. In a determination dated October 28, 2015, the DHR dismissed the complaint, finding no probable cause to believe that JHNH unlawfully discriminated or retaliated against the petitioner. The petitioner subsequently commenced this proceeding pursuant to CPLR article 78 to review the DHR's determination. The Supreme Court denied the petition and dismissed the proceeding on the merits. The petitioner appeals, and we affirm.

[1] **[2]** **[3]** Where, as in this case, the DHR renders a determination of no probable cause without holding a hearing, the proper standard of review is whether the determination was arbitrary and capricious or lacked a rational basis (*see Matter of Pastor v. Partnership for Children's Rights,* 159 A.D.3d 910, 911, 70 N.Y.S.3d 65; *Matter of Steinberg–Fisher v. North Shore Towers Apts., Inc.,* 149 A.D.3d 848, 850, 51 N.Y.S.3d 585; *Matter of Gordon v. New York State Div. of Human Rights,* 126 A.D.3d 697, 698, 2 N.Y.S.3d 368). The DHR's determination is entitled to considerable deference given its expertise in evaluating discrimination claims (*see Matter of Baird v. New York State Div. of Human Rights,* 100 A.D.3d 880, 881, 954 N.Y.S.2d 213; *Matter of Camp v. New York State Div. of Human Rights,* 300 A.D.2d 481, 482, 751 N.Y.S.2d 564). Moreover, the DHR has broad discretion in conducting its investigations (*see* 9 NYCRR 465.6; *Matter of Sahni v. Foster,* 145 A.D.3d 733, 734, 42 N.Y.S.3d 343; *Matter of Cappuccia v. New York State Div. of Human Rights,* 140 A.D.3d 750, 751, 30 N.Y.S.3d 892; *Matter of Vora v. New York State Div. of Human Rights,* 103 A.D.3d 739, 959 N.Y.S.2d 535).

[4] **[5]** Here, contrary to the petitioner's contention, the record demonstrates that the DHR conducted an adequate investigation of her complaint that was neither abbreviated nor one-sided. The petitioner was afforded a full and fair opportunity to present her claim and supporting submissions, and to rebut the submissions of JHNH in opposition to her complaint (*see* ***820** *generally Matter of Baird v. New York State Div. of Human Rights,* 100 A.D.3d at 881, 954 N.Y.S.2d 213; *Matter of Orosz v. New York State Div. of Human Rights,* 88 A.D.3d 798, 798–799, 930 N.Y.S.2d 288; *Matter of Maltsev v. New York State Div. of Human Rights,* 31 A.D.3d 641, 817 N.Y.S.2d 906; *Lee v. New York State Human Rights Appeal Bd.,* 111 A.D.2d 748, 749, 490 N.Y.S.2d 242). Furthermore, contrary to the petitioner's contention, a prior administrative determination regarding an application by the petitioner for unemployment insurance benefits did not preclude the determination at issue herein (*see* Labor Law § 623[2]; *Matter of Strong v. New York City Dept. of Educ.,* 62 A.D.3d 592, 593, 880 N.Y.S.2d 39; *Wooten v. New York City Dept. of Gen. Servs.,* 207 A.D.2d 754, 617 N.Y.S.2d 3). Since the record demonstrates that the DHR's determination was neither arbitrary and capricious nor lacked a rational basis, the Supreme Court properly denied the petition and dismissed the proceeding on the merits (*see Matter of Pastor v. Partnership for Children's Rights,* 159 A.D.3d at 911, 70 N.Y.S.3d 65; *Matter of Sahni v. Foster,* 145 A.D.3d at 734, 42 N.Y.S.3d 343; *Matter of Cappuccia v. New York State Div. of Human Rights,* 140 A.D.3d at 751, 30 N.Y.S.3d 892).

MASTRO, J.P., RIVERA, AUSTIN and LASALLE, JJ., concur.

All Citations

163 A.D.3d 818, 81 N.Y.S.3d 485, 2018 N.Y. Slip Op. 05309

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141 A.D.3d 95
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Michael
MASULLO, appellant,
v.
CITY OF MOUNT
VERNON, et al., respondents.

June 1, 2016.

Synopsis

Background: Firefighter, who had been receiving permanent disability retirement benefits for four years, brought article 78 proceeding to review determination of city fire commissioner which adopted the recommendation of a hearing officer denying firefighter's application for benefits subsequent to his retirement. The Supreme Court, Robert A. Neary, J., determined that firefighter was obligated to submit an application for benefits, affirmed eligibility review process, and transferred proceeding. Firefighter appealed.

Holdings: The Supreme Court, Appellate Division, LaSalle, J., held that:

[1] as a matter of first impression, a municipality is not authorized to terminate previously awarded permanent disability retirement benefits or require the submission of a formal application for such benefits after the firefighter has retired, and

[2] city was without authority to require firefighter to submit to application and eligibility processes.

Judgment vacated, petition granted, and remitted.

West Headnotes (4)

[1] **Municipal Corporations** Revocation, suspension, or termination

Public Employment Disability benefits

A municipality is not authorized to terminate previously awarded permanent disability retirement benefits or require the submission of a formal application for such benefits after the firefighter has retired, as this essentially amounts to an improper reconsideration of an award of benefits based on improved medical condition. McKinney's General Municipal Law § 207–a(2).

[2] **Constitutional Law** Compensation, pensions, and benefits

Municipal Corporations Revocation, suspension, or termination

The right of a disabled firefighter to receive permanent disability retirement payments is a property interest giving rise to procedural due process protection, under the Fourteenth Amendment, before those payments are terminated. U.S.C.A. Const.Amend. 14; McKinney's General Municipal Law § 207–a.

1 Case that cites this headnote

[3] **Municipal Corporations** Disability pension or compensation

Public Employment Firefighters

The permanent disability retirement benefits afforded firefighters are remedial in nature and, thus, the statute is to be liberally construed in their favor. McKinney's General Municipal Law § 207–a(2).

[4] **Municipal Corporations** Proceedings to Obtain Pensions or Benefits

Public Employment Disability pensions and disability retirement in general

Absent any evidence that permanent disability retirement benefit payments were actually erroneously made, city was without authority to require firefighter to submit to application and eligibility processes adopted by city subsequent to retirement, and after city had already paid firefighter benefits for over four years; city's subsequent final determination denying firefighter's application for benefits

was impermissibly based on improved medical condition. McKinney's General Municipal Law § 207–a(2).

Attorneys and Law Firms

**607 Bartlett, McDonough & Monaghan, LLP, White Plains, N.Y. (Patricia D'Alvia **608 and Warren J. Roth of counsel), for appellant.

Coughlin & Gerhart, LLP, Binghamton, N.Y. (Paul J. Sweeney and Edward O. Sweeney of counsel), for respondents.

WILLIAM F. MASTRO, J.P., CHERYL E. CHAMBERS, SHERI S. ROMAN, and HECTOR D. LaSALLE, JJ.

Opinion

LaSALLE, J.

[1] *97 General Municipal Law § 207–a(2) guarantees the payment of benefits to a firefighter who is permanently disabled in the line of duty, including the continued payment of the firefighter's regular salary until the mandatory retirement age, less certain amounts received from other sources (hereinafter Section 207–a[2] benefits). This proceeding presents an issue of first impression for this Court: whether the provisions of General Municipal Law § 207–a(2) authorize a municipality to terminate permanent disability retirement benefits previously awarded to a firefighter pursuant to that subsection, and require the firefighter to submit a formal application for those benefits pursuant to an application procedure that was adopted by the municipality subsequent to the firefighter's retirement. We hold that a municipality is not authorized to terminate such previously awarded Section 207–a(2) benefits or require the submission of a formal application for such benefits after the firefighter has retired, as this essentially amounts to an improper reconsideration of an award of benefits based on improved medical condition, a procedure which is not authorized by General Municipal Law § 207–a(2) (*see Matter of McGowan v. Fairview Fire Dist.,* 51 A.D.3d 796, 858 N.Y.S.2d 278).

I. *Facts*

The petitioner was employed as a firefighter for the City of Mount Vernon Fire Department (hereinafter the fire department) beginning in January 1990. On November 16, 1991, the petitioner was on top of an aerial ladder attached to a ladder truck when the truck flipped on its side, and he fell from a height of about 60 feet. After a hospital stay of about one month, and approximately one year of working light duty, he returned to full duty as a firefighter. The City of Mount Vernon designated the petitioner as eligible to receive benefits pursuant to General Municipal Law § 207–a(1) (hereinafter Section 207–a [1] benefits) for his temporary disability, and paid his full salary until he returned to full duty, as well as all of his medical bills in connection with the injuries he sustained in that accident. After another accident in 1996, the City again designated the petitioner as eligible to receive Section 207–a(1) benefits, and paid all of his medical bills in connection with the *98 injuries he sustained in that accident. On August 19, 2000, the petitioner was again injured when a ceiling collapsed onto him while he was fighting a fire. That was his last day of work, as a firefighter or otherwise. Shortly thereafter, the petitioner again began receiving Section 207–a(1) benefits, including payment of medical bills in connection with the injuries that he sustained in connection with that incident.

In April 2004, the New York State Comptroller awarded the petitioner both an accidental disability retirement allowance pursuant to the Retirement and Social Security Law § 363, and a performance-of-duty disability retirement allowance pursuant to Retirement and Social Security Law § 363–c. The petitioner simultaneously retired from the fire department and, in accordance with General Municipal Law § 207–a(2), the City commenced paying the petitioner Section 207–a(2) benefits, consisting of the difference between his regular salary **609 and those allowances, despite the fact that, as of April 2004, the City had not adopted an application procedure for firefighters to request and receive Section 207–a(2) benefits.

An application procedure was adopted and implemented sometime after the petitioner's retirement. The petitioner nonetheless continued to receive Section 207–a(2) benefits from the City through 2008. On February 21, 2008, Deputy Fire Commissioner Deborah Norman advised the petitioner by letter that the City had recently reviewed his eligibility to receive Section 207–a(2) benefits and determined that there was no record that he had ever requested or applied for those benefits. Norman further advised the petitioner that, "in the absence of a request or application for [Section] 207–a(2)

benefits," she had determined that the petitioner had been erroneously paid these benefits up to that date. She directed the City to immediately cease paying the petitioner Section 207–a(2) benefits, and included an application form with the letter should the petitioner wish to apply for those benefits.

On February 29, 2008, the petitioner's attorney wrote to the City and fire department and expressed his view that the petitioner was entitled to continue receiving Section 207–a(2) benefits. Counsel maintained that by paying the petitioner these benefits for more than four years, the City had made a de facto determination that the petitioner was entitled to receive Section 207–a(2) benefits and, in effect, had concluded that the petitioner became permanently disabled as a consequence of his several on-duty accidents. Thereafter, on March ***99** 12, 2008, the City agreed to resume paying Section 207–a(2) benefits to the petitioner, but only on the condition that he submit an application in full compliance with the recently implemented application process. The petitioner completed an application and, on July 14, 2008, he submitted to an independent medical examination. The doctor who conducted the examination did not find any pathology that would represent a causally related disability, and determined that there was nothing which would prevent the petitioner from returning to full-duty status.

On October 2, 2008, the fire department notified the petitioner that his application for Section 207–a(2) benefits had been denied based on the doctor's report and the City's determination that any current injury or disability that the petitioner may have had was not incurred during the performance of his duties, and that he was not permanently disabled from carrying out his full duties as a result of a causally related injury or disability. The petitioner requested a hearing and a redetermination of the fire department's determination. On February 13, 2009, the City terminated payments of the petitioner's Section 207–a(2) benefits. After a hearing that concluded in October 2011, a hearing officer appointed by the City issued a decision dated August 16, 2012, recommending that the denial of the petitioner's application for Section 207–a(2) benefits be upheld. Thereafter, Fire Commissioner James D. Gleason (hereinafter the Commissioner) issued a final determination dated September 17, 2012, accepting the hearing officer's recommendation. The petitioner then commenced this CPLR article 78 proceeding against the City and the Fire Department (hereinafter together the City), seeking to review the determinations of the hearing officer and the Commissioner. The petitioner alleged, inter alia, that the City lacked authority to terminate his previously awarded Section 207–a(2) benefits and that, in any event, the determinations were not supported by substantial evidence.

****610** In an order dated May 13, 2013, the Supreme Court concluded that the City had the authority to terminate the petitioner's benefits because it was engaged in an initial eligibility determination, and not a redetermination of eligibility based on the petitioner's allegedly improved medical condition. In support of this conclusion, the court reasoned that the City had never made a conscious initial decision to make benefit payments to the petitioner, as it had made no finding of ***100** eligibility prior to the commencement of payments. The court held that in the absence of an application by the petitioner, any payments that were made to him were made in error, and that the erroneous payments made by the City could not be viewed as constituting a determination that was binding upon it. The court found that, "under these highly unusual circumstances," the City was entitled to conduct a review process to determine the petitioner's initial eligibility for Section 207–a(2) benefits. Accordingly, the court determined, in essence, that the petitioner was obligated to submit an application for benefits in the manner prescribed by the City, and that the eligibility review process imposed by the City was not improper. Finally, the court determined that the remaining issues concerned questions of whether the determinations were supported by substantial evidence, and thus, transferred those issues to this Court pursuant to CPLR 7804(g).

The petitioner appeals from so much of the order as determined that he was obligated to submit the application in the manner prescribed by the City and that the eligibility review process imposed by the City was not improper. Initially, we note that the appeal from this portion of the order must be dismissed on the ground that no appeal lies as of right from an intermediate order in a proceeding pursuant to CPLR article 78 (*see* CPLR 5701[b][1]). Although we may grant leave to appeal, it is unnecessary to do so because the portion of the order appealed from may be properly reviewed upon the transfer of the substantial evidence question to this Court (*see* CPLR 7804[g]; *Matter of Desmone v. Blum,* 99 A.D.2d 170, 201–202, 473 N.Y.S.2d 196). Here, since the petition raised a substantial evidence question, and the remaining points raised by the petitioner that were determined by the Supreme Court were not objections that could have terminated the proceeding within the meaning of CPLR 7804(g), the Supreme Court should have transferred the entire proceeding to this Court (*see Matter of Garvey v. Sullivan,* 129 A.D.3d 1078, 1081,

13 N.Y.S.3d 159; *Matter of Gonzalez v. Mulligan,* 45 A.D.3d 841, 842, 845 N.Y.S.2d 761; *Matter of Sureway Towing, Inc. v. Martinez,* 8 A.D.3d 490, 779 N.Y.S.2d 109). Accordingly, we vacate that portion of the order which determined that the petitioner was obligated to submit the application in the manner prescribed by the City and that the eligibility review process imposed by the City was not improper, dismiss the appeal therefrom, and consider de novo all of the issues raised in the petition.

***101** II. *General Municipal Law § 207–a*

[2] **[3]** General Municipal Law § 207–a addresses the payment of salary and expenses of firefighters with injuries or illnesses incurred in the performance of their duties. "[T]he right of a disabled firefighter to receive General Municipal Law § 207–a disability payments is a property interest giving rise to procedural due process protection, under the Fourteenth Amendment, before those payments are terminated" (*Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL–CIO v. City of Cohoes,* 94 N.Y.2d 686, 691, 709 N.Y.S.2d 481, 731 N.E.2d 137). The benefits afforded firefighters pursuant to ****611** this section are remedial in nature and, thus, the statute is to be liberally construed in their favor (*see Matter of Klonowski v. Department of Fire of City of Auburn,* 58 N.Y.2d 398, 403, 461 N.Y.S.2d 756, 448 N.E.2d 423; *Matter of McGowan v. Fairview Fire Dist.,* 51 A.D.3d at 798, 858 N.Y.S.2d 278).

General Municipal Law § 207–a(2) provides, in relevant part, that:

> "[p]ayment of the full amount of regular salary or wages, as provided by subdivision one of this section, shall be discontinued with respect to any fireman who is permanently disabled as a result of an injury or sickness incurred or resulting from the performance of his duties if such fireman is granted an accidental disability retirement allowance pursuant to section three hundred sixty-three of the retirement and social security law, a retirement for disability incurred in performance of duty allowance pursuant to section three hundred sixty-three-c of the retirement and social security law or similar accidental disability pension provided by the pension fund of which he is a member; provided, however, that in any such case such fireman shall continue to receive from the municipality or fire district by which he is employed, until such time as he shall have attained the mandatory service retirement age applicable to him or shall have attained the age or performed the period of service specified by applicable law for the termination of his service, the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages. Any payment made by a municipal corporation or fire district pursuant to the provisions of this subdivision ***102** shall be deemed to have been made for a valid and lawful public purpose."

[4] Here, the petitioner's hearing testimony and documentary evidence established that the petitioner began receiving Section 207–a(2) benefits after he was awarded retirement disability allowances in April 2004, and that the Section 207–a(2) benefit payments continued each year after his retirement until February 13, 2009. The petitioner further testified that he was never notified at the time of his retirement that he needed to submit an application to the City to receive Section 207–a(2) benefits, and that no part of the contract governing his employment with the City required that he complete or submit an application to receive Section 207–a(2) benefits. The record also established that, by letter dated February 21, 2008, Deputy Fire Commissioner Deborah Norman advised the petitioner that the City had only recently reviewed his eligibility to receive these benefits, and had determined that there was no record of him having applied for the benefits. Norman determined that "in the absence of a request or application for [Section] 207–a(2) benefits," the petitioner had been erroneously paid these benefits, and directed the City to cease all future payments to him.

Absent from the record, however, is any proof to support the City's allegation that the petitioner's Section 207–a(2) benefits were indeed paid in error. There is no evidence in the record that at the time the petitioner was awarded his retirement disability benefits, which included the Section 207–a(2) benefits, there were any application processes or procedures in place for a firefighter to receive Section 207–a(2) benefits. There is no proof to support the City's suggestion that, had the petitioner submitted some formal application for those benefits in 2004, the application would have been denied at that time. The plain language of the statute provides that "[a]ny payment made by a municipal corporation or fire district pursuant to the ****612** provisions of this subdivision shall be deemed to have been made for a valid and lawful public purpose" (General Municipal Law § 207–a[2]) and, here, the record demonstrates that the petitioner was paid these benefits for more than four years. Accordingly, absent any evidence that the payments were actually erroneously made, the City's payment of benefits to the petitioner demonstrated that he was found eligible for the benefit payment.

In *Matter of McGowan v. Fairview Fire Dist.*, 51 A.D.3d 796, 858 N.Y.S.2d 278, we addressed the question of whether a fire district ***103** was authorized to review a firefighter's medical condition for the purpose of determining whether it had improved to such an extent that the firefighter was no longer entitled to supplemental benefits pursuant to General Municipal Law § 207–a(2). We held that, because there was an express provision in General Municipal Law § 207–a(1) that authorized municipalities to terminate benefits paid under that subsection upon a finding of improved medical condition, the absence of a similar provision in General Municipal Law § 207–a(2) supported the conclusion that the Legislature did not intend to authorize municipalities to terminate benefits paid under that subsection on the basis of improved medical condition. Accordingly, the fire district in *McGowan* was without authority to terminate the firefighter's Section 207–a(2) benefits on that basis.

In applying these principles to the facts of this case, we conclude that the City was without authority to require the petitioner to submit to the application and eligibility processes adopted by the City subsequent to the petitioner's retirement, and after the City had already paid the petitioner his Section 207–a(2) benefits for over four years. In doing so, the City essentially was reviewing the petitioner's medical condition for the purpose of determining whether it had improved since the time he first began receiving those benefits. Moreover, the City's subsequent final determination dated September 17, 2012, denying the petitioner's application for Section 207–a(2) benefits can only be viewed as a determination based on the petitioner's improved medical condition, which we have previously determined is not allowed in the context of those benefits (*see Matter of McGowan v. Fairview Fire Dist.*, 51 A.D.3d 796, 858 N.Y.S.2d 278).

The City's contention that it was engaged in an initial eligibility determination, and not a redetermination, is without merit. The record is devoid of any evidence that at the time the petitioner retired on disability, any application process or procedure existed to determine his eligibility to receive Section 207–a(2) benefits. The petitioner received his disability retirement allowances under the Retirement and Social Security Law and retired from the fire department, and the City thereafter unilaterally began paying the petitioner the difference between his regular salary and his disability retirement allowances, in accordance with General Municipal Law § 207–a(2), and continued to do so for over four years. Under these ***104** specific facts, the City was without authority to require the petitioner to submit to the newly formulated application procedure, and thereafter terminate his Section 207–a(2) benefits.

In light of our determination, the parties' remaining contentions either have been rendered academic or are otherwise without merit.

Accordingly, the appeal is dismissed, as no appeal lies as of right from an intermediate order in a proceeding pursuant to CPLR article 78 (*see* CPLR 5701 [b][1]), and we decline to grant leave to appeal in light of our determination herein, so much of the order as determined that the petitioner was obligated to ****613** submit an application for benefits pursuant to General Municipal Law § 207–a(2) in the manner prescribed by the City of Mount Vernon and City of Mount Vernon Fire Department, and that the eligibility review process imposed by the City of Mount Vernon and City of Mount Vernon Fire Department was not improper, is vacated, the petition is granted, on the law, the determination is annulled, and the matter is remitted to the Supreme Court, Westchester County, for the purpose of directing the City of Mount Vernon to reinstate the petitioner's benefits pursuant to General Municipal Law § 207–a(2), to calculate the amount due and owing to the petitioner retroactive to February 13, 2009, plus statutory interest, and for the entry of an appropriate money judgment thereafter.

ORDERED that the appeal is dismissed, as no appeal lies as of right from an intermediate order in a proceeding pursuant to CPLR article 78 (*see* CPLR 5701 [b][1]), and we decline to grant leave to appeal in light of our determination herein; and it is further,

ORDERED that so much of the order as determined that the petitioner was obligated to submit an application for benefits pursuant to General Municipal Law § 207–a(2) in the manner prescribed by the City of Mount Vernon and City of Mount Vernon Fire Department, and that the eligibility review process imposed by the City of Mount Vernon and City of Mount Vernon Fire Department was not improper, is vacated; and it is further,

ADJUDGED that the petition is granted, on the law, the determination is annulled, and the matter is remitted to the Supreme Court, Westchester County, for the purpose of directing ***105** the City of Mount Vernon to reinstate the petitioner's benefits pursuant to General Municipal Law § 207–a(2), to calculate the amount due and owing to the

petitioner retroactive to February 13, 2009, plus statutory interest, and for the entry of an appropriate money judgment thereafter; and it is further,

ORDERED that one bill of costs is awarded to the petitioner.

MASTRO, J.P., CHAMBERS and ROMAN, JJ., concur.

All Citations

141 A.D.3d 95, 31 N.Y.S.3d 607, 2016 N.Y. Slip Op. 04225

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167 A.D.3d 27
Supreme Court, Appellate Division,
Second Department, New York.

In the MATTER OF KEANU S. (Anonymous), appellant.

2017–07313
|
Docket Nos. D-15224-15/16A, D-10564-16
|
Argued—October 12, 2017
|
October 17, 2018

Synopsis

Background: Immigrant child moved for issuance of an order declaring him dependent on the Family Court so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (SIJS). The Family Court, Robert I. Caloras, J., denied the motion, and child appealed.

[Holding:] The Supreme Court, Appellate Division, Rivera, J.P., held that child was not an intended beneficiary of SIJS provisions.

Affirmed.

Barros, J., filed dissenting opinion.

West Headnotes (4)

[1] Aliens, Immigration, and Citizenship Special immigrants

Infants Judgment or order; conclusiveness, operation, and effect

Immigrant child's placement in the custody of the Commissioner of Social Services by virtue of his juvenile delinquency adjudication was insufficient to constitute a "dependency" upon the Family Court, and thus, child was not an intended beneficiary of the special immigrant juvenile status (SIJS) provisions; child was not placed in the custody of the Commissioner of Social Services due to his status as an abused, neglected, or abandoned child, but instead, was placed in the custody of the Commissioner of Social Services after committing acts that, if committed by an adult, would have constituted serious crimes, which resulted in painful and terrible consequences to his victims. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(27)(J).

[2] Aliens, Immigration, and Citizenship Special immigrants

The impetus behind the enactment of the special immigrant juvenile status (SIJS) scheme is to protect a child who is abused, abandoned, or neglected and to provide him or her with an expedited immigration process. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(27)(J)(i).

[3] Aliens, Immigration, and Citizenship Special immigrants

Intended beneficiaries of the special immigrant juvenile status (SIJS) provisions are those juveniles for whom it was created, namely abandoned, neglected, or abused children. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(27)(J)(i).

[4] Infants Placement or custody in general

Placement of a child in the "custody" of the Commissioner of Social Services in a juvenile delinquency proceeding is not the same as a "custody" determination in the context of a child custody proceeding.

****523** APPEAL by Keanu S., in a proceeding pursuant to Family Court Act article 3, from an order of the Family Court (Robert I. Caloras J.), dated June 7, 2017, and entered in Queens County. The order denied the renewed motion of

Keanu S. for the issuance of an order declaring that he is dependent on the Family Court and making specific findings so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J).

Attorneys and Law Firms

The Legal Aid Society, New York, N.Y. (Tamara A. Steckler and Marcia Egger of counsel), for appellant.

REINALDO E. RIVERA, J.P., SHERI S. ROMAN, HECTOR D. LASALLE, BETSY BARROS, JJ.

OPINION & ORDER

RIVERA, J.P.

***28** On the instant appeal, this Court is presented with the issue of whether the Family Court properly denied the renewed motion of Keanu S. (hereinafter the child) for the issuance of an order declaring that he is dependent on the Family Court and making specific findings so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J). Specifically, the Family Court rejected the child's contention that he was dependent upon a juvenile court, within the meaning of 8 USC § 1101(a)(27)(J)(i), by virtue of his placement in the custody of the Commissioner of Social Services of the City of New York following his adjudication as a juvenile delinquent. For the reasons that follow, we agree with the Family Court's determination and conclude that such a placement does not satisfy the requirement of dependency under the statute.

I. *The Juvenile Delinquency Acts*

On April 22, 2015, the child, while a high school student, punched another student in the face, causing serious injuries, ***29** which included two jaw fractures. For these acts, on July 28, 2015, the presentment agency filed a juvenile delinquency petition, charging the child with committing acts which, if committed by an adult, would constitute the crimes of assault in the second and third degrees. In an order of disposition dated November 2, 2015, the Family Court adjudicated the child a juvenile delinquent and placed him on probation for a period of 12 months.

On January 29, 2016, while under probation supervision, the child and three others punched and kicked another victim, causing serious injuries to the victim, including a laceration on his forehead, and took that victim's jacket, which contained his cell phone. The child was charged, inter alia, with committing acts, which if committed ****524** by an adult, would constitute the crimes of assault in the second degree and robbery in the second degree.

On May 19, 2016, the Department of Probation filed a petition alleging that based on the incident on January 29, 2016, and his failure to attend school regularly, the child willfully violated the terms of his probation.

In June 2016, the Family Court remanded the child to the Administration for Children's Services of the City of New York for detention pending further proceedings.

In an order dated July 13, 2016, the Family Court vacated the order of disposition dated November 2, 2015, and placed the child in the custody of the Commissioner of Social Services of the City of New York for a period of 12 months in "non-secure placement."

II. *Motion for Order of Specific Findings*

On March 10, 2017, the child moved for the issuance of an order making the requisite declaration and specific findings so as to enable him to petition for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101(a)(27)(J).

In a supporting affidavit, the child averred that he was born in Jamaica in May 2000. The child stated that he was 16 years old and unmarried. The child indicated that he lived with his father in Jamaica after the mother "left the home when I was a baby," and was raised by his aunts and his father. According to the child, the father was murdered when the child was 11 years old. The child stated that "[t]he people that cause[d] my father's death also threatened to hurt me." The child came to the United States when he was 12 years old. In addition, he ***30** stated that he had no contact with the mother since she left the family and he did not know where she lived.

The child indicated that, at the time of his motion, he lived in a facility run by Sheltering Arms Child and Family Services, "an organization contracted to provide services by the New York City Administration for Children's Services," due to his adjudication as a juvenile delinquent. Further, he stated that his placement was to continue until December 2, 2017. The child contended that "[t]he only family that has taken care of me lives in the United States," and that he believed he would be "in danger" if he returned to Jamaica.

In a supporting affirmation, the attorney for the child argued that the dependency requirement of 8 UCS § 1101(a)(27)(J)(i) should be deemed satisfied by the child's placement in the custody of the Commissioner of Social Services of the City of New York.

In an order dated March 20, 2017, the Family Court denied the motion, with leave to renew, upon the submission of additional papers. Thereafter, the child made a renewed motion.

III. *The Order Appealed From*

In an order dated June 7, 2017, the Family Court denied the child's renewed motion, stating, in pertinent part:

> "This court declines to adopt [the child's] position, and finds that a placement in a juvenile delinquency matter does not satisfy the dependency requirement necessary for a SIJS finding....
>
> "First, there exists no Appellate authority in this State to support a finding that a juvenile delinquency proceeding constitutes a dependency upon the Family Court for [specific] findings in a SIJS matter. Second, such determination would circumvent the legislative intent behind the SIJS statute, and would not ****525** further the underlying policies or legislative intent of the SIJS statute. Expanding SIJS status to include juvenile delinquency matters would put this court in the untenable position of rewarding immigrant children for committing acts, which if done by an adult, would constitute a crime under the Penal Law. A reward not available to a law abiding immigrant child, and an intent this court is not willing to ascribe to Congress.
>
> ***31** "Significantly, under the Illegal Immigration Reform and Immigrant Responsibility Act an adult who is not a U.S. citizen and pleads guilty to certain criminal offenses may be subject to mandatory deportation. Moreover, Criminal Procedure Law § 220.50(7) mandates that a court advise non-citizen defendants of the deportation consequences of his or her plea to a felony offense. It is inconceivable that Congress would seek to deport an adult criminal, yet give special immigrant status to a juvenile delinquent. This court finds that to grant [the child's] request, simply because he is under this court's placement order, would disparage the very laudable intent of 8 [USC §] 1101(a)(27)([J]). Clearly, the facts and circumstances of [the child's] history do not fit within the legislative scheme of the SIJS statute, which is concerned with providing special protection to immigrant children who have experienced maltreatment in their families. [The child's] placement in a non-secure facility stemmed from his admission to an assault in the second degree. Granting a SIJS finding to [the child] is not only contrary to the intent of the SIJS statute, but also does not promote the legislative intent behind Article 3 of the Family Court which did not envision respondents deriving a benefit from their bad acts. For these reasons, this court declines to expand the definition of dependency upon the court for a SIJS finding to include juvenile delinquency placements" (citations omitted).

IV. *Legal Analysis*

The legislative history of SIJS was set forth by this Court in *Matter of Hei Ting C.*, 109 A.D.3d 100, 102–103, 969 N.Y.S.2d 150. Briefly, in 1990, Congress created SIJS to address the issue of undocumented and unaccompanied children (*see id.* at 102, 969 N.Y.S.2d 150). "As originally enacted, this legislation defined an eligible immigrant as being one who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster-care" (*id.* at 102–103, 969 N.Y.S.2d 150 [internal quotation marks omitted]). The legislation also required a determination by the court that it would not be in the immigrant's best interests to return to his or her native ***32** country (*see id.* at 103, 969 N.Y.S.2d 150). In 1997, Congress added the further requirement that the juvenile court find the child dependent upon the court "due to abuse, neglect, or abandonment," which limited the beneficiaries of the provision "to those juveniles for whom it was created" (*id.* [internal quotation marks omitted]).

In 2008, Congress again amended the SIJS provisions by removing the requirement that the child be deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and replacing it with a requirement that the juvenile court find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (*id.* [internal quotation marks omitted]). Following the 2008 amendments, the United States Department of Homeland Security issued a memorandum explaining, inter alia, that the new language added to the definition ****526** of "Special Immigrant Juvenile" meant that "a petition filed by an alien on whose behalf a juvenile court appointed a guardian may now be eligible" (*id.*, citing Memorandum by Donald Neufeld and Pearl Chang, *Trafficking Victims Protection Reauthorization*

Act of 2008: Special Immigrant Juvenile Status Provisions [Mar. 24, 2009]).

Accordingly, pursuant to 8 USC § 1101(a)(27)(J), as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Pub. L. 110–457, 122 U.S. Stat. 5044), and 8 CFR 204.11, a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law (*see* 8 USC § 1101[a][27][J][i]; *Matter of Castellanos v. Recarte,* 142 A.D.3d 552, 553, 36 N.Y.S.3d 217; *Matter of Marisol N.H.,* 115 A.D.3d 185, 188, 979 N.Y.S.2d 643; *Matter of Maria P.E.A. v. Sergio A.G.G.,* 111 A.D.3d 619, 620, 975 N.Y.S.2d 85), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence (*see* 8 USC § 1101[a][27][J][ii]; 8 CFR 204.11[c][6]; *Matter of Maria P.E.A. v. Sergio A.G.G.,* 111 A.D.3d at 620, 975 N.Y.S.2d 85; *Matter of Trudy–Ann W. v. Joan W.,* 73 A.D.3d 793, 795, 901 N.Y.S.2d 296).

[1] On this appeal, the child urges this Court to find that he has been legally committed to, or placed under the custody of, an ***33** individual appointed by a state or juvenile court for SIJS purposes by virtue of his juvenile delinquency adjudication. This Court declines to do so. We agree with the Family Court that the dependency requirement has not been satisfied herein.

The SIJS scheme has laudable purposes, worthy goals, and lofty ideals. This immigration relief affords a pathway to lawful permanent residency and citizenship to undocumented children (*see Matter of Castellanos v. Recarte,* 142 A.D.3d at 553, 36 N.Y.S.3d 217). It is an important piece of legislation that advances much-needed support and special protections to vulnerable persons. However, this reform has requirements that cannot be obviated or circumvented.

[2] **[3]** "[T]he impetus behind the enactment of the SIJS scheme is to protect a child who is abused, abandoned, or neglected and to provide him or her with an expedited immigration process" (*Matter of Hei Ting C.,* 109 AD3d at 106, 969 N.Y.S.2d 150). As previously observed by this Court, intended beneficiaries of the SIJS provisions are " 'those juveniles for whom it was created, namely abandoned, neglected, or abused children' " (*Matter of Marcelina M.-G. v. Israel S.,* 112 A.D.3d 100, 108, 973 N.Y.S.2d 714, quoting HR Rep 105–405, 105th Cong, 1st Sess at 130, reprinted in 1997 U.S.Code Cong & Admin News at 2941, 2954; *see Matter of Fifo v. Fifo,* 127 A.D.3d 748, 750–751, 6 N.Y.S.3d 562; *Matter of Hei Ting C.,* 109 A.D.3d at 103, 969 N.Y.S.2d 150). Applications for SIJS specific findings have generally been granted where dependency upon the court was established by way of guardianship, adoption, or custody (*see Matter of Hei Ting C.,* 109 A.D.3d at 106, 969 N.Y.S.2d 150). In addition, this Court has recognized that, under proper circumstances, a child involved in a family offense proceeding involving allegations of abuse or neglect may properly be the subject of such a ****527** determination as an intended beneficiary of the SIJS provisions (*see Matter of Fifo v. Fifo,* 127 A.D.3d at 751, 6 N.Y.S.3d 562).

We hold that the child herein is *not* an intended beneficiary of the SIJS provisions. He was not placed in the custody of the Commissioner of Social Services due to his status as an abused, neglected, or abandoned child. Instead, he was placed in the custody of the Commissioner of Social Services after committing acts which, if committed by an adult, would have constituted serious crimes. His violent acts and misconduct have resulted in painful and terrible consequences to his victims. In fact, even while under probation, his encounters with the law persisted. In effect, the child attempts to utilize his wrongdoings and the resultant juvenile delinquency adjudication as a ***34** conduit or a vehicle to meet the dependency requirement for SIJS. Such a determination is in conflict with the primary intent of Congress in enacting the SIJS scheme, namely, to protect abused, neglected, and abandoned immigrant children. We cannot fathom that Congress envisioned, intended, or proposed that a child could satisfy this requirement by committing acts which, if committed by adults, would constitute crimes, so as to warrant a court's involvement or the legal commitment to an individual appointed by a state or juvenile court. To hold otherwise would mean that similarly situated children who do not resort to committing such acts, but rather, abide by rules, would not meet the dependency requirement for the issuance of an order making specific findings that would allow them to apply to the United States Citizenship and Immigration Services for SIJS.

Turning to the contentions of our dissenting colleague, we respectfully disagree that the dependency requirement was satisfied and take this opportunity to clarify certain points asserted in the dissenting opinion.

First, contrary to the dissent's assertion, we do not rely upon "dicta" adopted from *Matter of Hei Ting C.,* 109 A.D.3d 100, 969 N.Y.S.2d 150 in support of our holding herein. *Matter of Hei Ting C.,* wherein this Court discussed at length the dependency requirement of 8 USC § 1101(a)(27)(J)(i), is binding authority and precedent. We rely upon the disposition and instruction delineated in that case, as we must as a court of precedent (*see generally People v. Garvin,* 30 N.Y.3d 174, 185, 88 N.E.3d 319 [under the doctrine of stare decisis, "common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (internal quotation marks omitted)]).

Second, to the extent that the dissent discusses opinions from lower courts (*see e.g. Matter of Jose H.,* 54 Misc.3d 324, 40 N.Y.S.3d 710 [Sup. Ct., Nassau County]; *Matter of Mario S.,* 38 Misc.3d 444, 954 N.Y.S.2d 843 [Fam. Ct., Queens County]), as well as cases rendered by Minnesota and California courts (*see e.g. In re Guardianship of Guaman,* 879 N.W.2d 668 [Minn. Ct. App.]; *In re Israel O.,* 233 Cal. App. 4th 279, 182 Cal.Rptr.3d 548; *Leslie H. v. Superior Court,* 224 Cal. App. 4th 340, 168 Cal.Rptr.3d 729), which may hold otherwise, we decline to adopt the holdings in those cases.

[4] Third, certain provisions of the Family Court Act addressing dispositional orders in juvenile delinquency proceedings (*see* ***35** *e.g.* Family Ct. Act §§ 352.1, 352.2), which are referred to by the dissent, are not relevant to the issue at hand, which involves SIJS. On a similar note, contrary to the dissent's suggestion, the placement of a child in the "custody" of the Commissioner ****528** of Social Services in a juvenile delinquency proceeding is not the same as a "custody" determination in the context of a child custody proceeding pursuant to Family Court Act article 6.

Fourth, we have not engaged in any "strained" analysis, as posited by the dissent. "In interpreting a statute, 'our primary consideration is to discern and give effect to the Legislature's intention' " (*People v. Silburn,* 31 N.Y.3d 144, 155, 74 N.Y.S.3d 781, 98 N.E.3d 696, quoting *Matter of Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities,* 19 N.Y.3d 106, 120, 945 N.Y.S.2d 613, 968 N.E.2d 967). That is exactly what we have done here.

This Court has previously affirmed orders denying motions for specific findings so as to enable children to petition for SIJS where one of the requirements has not been established (*see e.g. Matter of Goran S.,* 152 A.D.3d 698, 58 N.Y.S.3d 553; *Matter of Amsi H.D.O. [Maria L.R.—Cesiah O.D.],* 152 A.D.3d 524, 58 N.Y.S.3d 493; *Matter of Oscar J.L.J. [Segundo R.L.T.],* 151 A.D.3d 969, 54 N.Y.S.3d 308; *Matter of Christian P.S.-A. [Humberto R.S.-B.—Laura S.A.-C.],* 148 A.D.3d 1032, 49 N.Y.S.3d 546; *Matter of Hei Ting C.,* 109 A.D.3d at 102, 969 N.Y.S.2d 150). Where, as here, the dependency requirement, which is a prerequisite for the issuance of an order making a declaration and specific findings so as to enable a child to petition for SIJS is lacking, a denial is similarly warranted.

The child's remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, we agree with the Family Court's determination to deny the child's renewed motion, and the order is affirmed.

ROMAN and LASALLE, JJ., concur.
ORDERED that the order is affirmed, without costs or disbursements.

BARROS, J., dissents, and votes to reverse the order, on the law, and grant the child's renewed motion for the issuance of an order declaring that the child is dependent on the Family Court and making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J), with the following memorandum:
The majority's conclusion that an abused, neglected, or abandoned child who is placed in the custody of the Commissioner of Social Services by a juvenile court due to a juvenile delinquency adjudication ***36** is not a dependent child within the meaning of 8 USC § 1101(a)(27)(J)(i) is not supported by the plain language and intent of the statute, and disregards federal immigration policy as reflected in the United States Citizenship and Immigration Services manual, and state policy as reflected in the Family Court Act.

Notably, two thoroughly written and well-reasoned opinions from this State analyzing the federal statute, 8 USC § 1101(a)(27)(J), and the Family Court Act on this issue have concluded that children who are given custodial placements as a result of juvenile delinquency proceedings meet the dependency requirement of 8 USC § 1101(a)(27)(J) (*see Matter of Jose*

H., 54 Misc.3d 324, 40 N.Y.S.3d 710 [Sup. Ct., Nassau County]; *Matter of Mario S.,* 38 Misc.3d 444, 954 N.Y.S.2d 843 [Fam. Ct., Queens County]). Appellate courts in other states have, likewise, recognized that the federal statute expressly contemplates that children who are placed in the custody of a state agency or department as a result of juvenile delinquency proceedings meet the dependency requirement (*see* ****529** *In re Guardianship of Guaman,* 879 N.W.2d 668, 672 [Minn. Ct. App.] ["The relevant federal statute expressly contemplates the entry of such findings when an immigrant has been declared dependent on a juvenile court (as in child-protection proceedings), has been placed in the custody of a state agency or department (*as in juvenile delinquency proceedings*), or has been placed in the custody of an individual or entity by a state or juvenile court (as in guardianship proceedings)" (emphasis added; internal quotation marks omitted)]; *In re Israel O.,* 233 Cal. App. 4th 279, 282–283, 182 Cal.Rptr.3d 548, 549–550; *Leslie H. v. Superior Court,* 224 Cal. App. 4th 340, 168 Cal.Rptr.3d 729; *In re: K.O.-T.,* 2017 WL 6032588, 2017 Md.App. LEXIS 1206 [Md. Ct. Spec. App., Dec. 6, 2017, No.2047]). While these authorities do not constitute binding precedent, they are certainly persuasive. For the reasons that follow, I would reverse the order appealed from, and grant the child's renewed motion for an order declaring that the child is dependent on the Family Court and making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services (hereinafter USCIS) for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101(a)(27)(J).

I. *Plain Meaning*

"The text of a statute is the clearest indicator of legislative intent" (*Matter of Avella v. City of New York,* 29 N.Y.3d 425, 434, 80 N.E.3d 982 ***37** [internal quotation marks omitted]). Where the statutory language is unambiguous, we are bound to give effect to its plain meaning, and we may not resort to extrinsic evidence to discover legislative intent (*see Makinen v. City of New York,* 30 N.Y.3d 81, 85, 64 N.Y.S.3d 622, 86 N.E.3d 514). The same principles of statutory construction apply to interpreting federal legislation enacted by Congress (*see Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, Dept. of Labor,* 519 U.S. 248, 255, 117 S.Ct. 796, 136 L.Ed.2d 736; *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 240–241, 109 S.Ct. 1026, 103 L.Ed.2d 290; *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442).

A child establishes that he or she is dependent upon the juvenile court under 8 USC § 1101(a)(27)(J) when he or she "has been declared dependent on a juvenile court" or when such juvenile court "has legally committed to, or placed [such child] under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court" (8 USC § 1101[a][27][J][i]).

Here, the recognized "juvenile court" in New York State is the Family Court (*see Matter of Hei Ting C.,* 109 A.D.3d 100, 105, 969 N.Y.S.2d 150). Thus, in determining whether the child meets the dependency requirement of the statute, we must inquire whether the child has been "declared" dependent upon the Family Court, or whether the Family Court has legally committed or placed the child under the custody of an agency or department of a state, or an individual or entity appointed by a state or the Family Court (*see* 8 USC § 1101[a][27][J]). In *Matter of Hei Ting C.,* this Court held that "[a] child becomes dependent upon a juvenile court when the court accepts jurisdiction over the custody of that child" (109 A.D.3d at 106, 969 N.Y.S.2d 150). Thus, here, the child became dependent upon the Family Court when the court accepted jurisdiction over his custody, and placed him with the Commissioner of Social Services.

The statute, on its face, does not exempt children whose juvenile court custodial placements are the result of juvenile delinquency ****530** adjudications. The majority's holding improperly engrafts an exception into the statute "under the guise of creative interpretation or construction not consistent with the plain and ordinary usage and meaning of the statutory language" (*id.* at 107, 969 N.Y.S.2d 150; *see Bender v. Jamaica Hospital,* 40 N.Y.2d 560, 388 N.Y.S.2d 269, 356 N.E.2d 1228; McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 76, Comment ["The function of the courts is to enforce statutes, not to usurp the power of legislation, and to interpret a statute where there is no need for interpretation, to conjecture about or to add to or ***38** subtract from words having a definite meaning, or to engraft exceptions where none exist are trespasses by a court upon the legislative domain"]).

II. *Federal Immigration Policy*

My colleagues in the majority disregard the plain meaning of the statute because they cannot "fathom that Congress envisioned, intended, or proposed that a child could satisfy this [dependency] requirement by committing acts which, if committed by adults, would constitute crimes, so as to

warrant a court's involvement or a legal commitment to an individual appointed by a state or juvenile court." However, the majority's speculation as to Congressional intent finds no support in the legislative history, or the publications of the federal agency charged with interpreting and implementing the statute.

The ultimate determination of whether to grant SIJS to a particular juvenile rests with USCIS and its parent agency, the Department of Homeland Security (*see Matter of Nelson A.G.-L. [Maria Y.G.S.],* 157 A.D.3d 789, 69 N.Y.S.3d 344). USCIS publishes an online manual setting forth its immigration polices (*see USCIS Policy Manual,* available at *www.uscis.gov/policymanual/HTML/PolicyManual.html* [last accessed Oct. 15, 2018]). Under Volume 7, Part F, Chapter 7, entitled "Special Immigrant Juveniles," the manual provides that "[f]indings of juvenile delinquency are not considered criminal convictions for purposes of immigration law"; however, such findings may be "part of a discretionary analysis" in which USCIS will consider such findings on a "case-by-case basis based on the totality of the evidence to determine whether a favorable exercise of discretion is warranted" (*see USCIS Policy Manual,* Ch. 7, available at *www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartF-Chapter7.html* [last accessed Oct. 15, 2018]).

Notably, the manual recognizes that state courts meeting the definition of a "qualifying juvenile court proceeding" include "delinquency courts" (*see USCIS Policy Manual,* Ch. 3, available at *www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter3.html#S-A* [last accessed Oct. 15, 2018]). If, as asserted by the majority, Congress intended to ***39** exclude children adjudicated juvenile delinquents from obtaining SIJS, then it would defy logic for USCIS to include "delinquency courts" in the class of state courts that meet the definition of a qualifying juvenile court proceeding, and for USCIS to consider juvenile delinquency findings in making its ultimate determination on a child's SIJS application.

"[T]he impetus behind the enactment of the SIJS scheme is to protect a child who is abused, abandoned, or neglected and to provide him or her with an expedited immigration process" (*Matter of Hei Ting C.,* 109 A.D.3d at 106, 969 N.Y.S.2d 150). "The requirement that a child be dependent upon the juvenile court or, alternatively, committed to the custody of an individual appointed by a state or juvenile court, ensures that the process is not employed inappropriately by children who ****531** have sufficient family support and stability to pursue permanent residency in the United States through other ... procedures" (*id.*) Thus, the SIJS scheme is not undermined by granting specific findings orders to abused, neglected, or abandoned children over whose custody the Family Court has accepted jurisdiction, regardless of whether such jurisdiction was acquired in a juvenile delinquency proceeding or some other Family Court proceeding.

While the majority opinion is concerned about rewarding the child's misconduct by granting him a specific findings order, it overlooks, or disregards, that a specific findings order is not an award of SIJS. The Family Court does not make an immigration determination when it makes the requisite specific findings. Those findings merely allow the eligible child to apply to USCIS for an immigration determination. While the nature and seriousness of a child's misconduct may be a concern to USCIS for the purpose of making its ultimate determination on the SIJS application, it has no bearing on our determination, as the State court, on the child's eligibility to apply.

The majority's conclusion that the granting of a specific findings order to a child adjudicated a juvenile delinquent would deprive a "similarly situated" rule-abiding child of such order is unfounded, since there is no limit to the number of specific findings orders that may be issued by the Family Court.

III. *Equating Juvenile Delinquency with Criminal Conviction*

Federal law does not treat children adjudicated as juvenile delinquents as criminal convicts, even for purposes of immigration ***40** (*see UCIS Policy Manual,* Ch. 7, available at *www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartF-Chapter7.html* [last accessed Oct. 15, 2018]). Moreover, it is a well-established State policy that we do not equate children adjudicated as juvenile delinquents with adults convicted of crimes. The basis of a delinquency finding is not the commission of a criminal act, but rather the commission of an act "that would [be] a crime if committed by an adult" (Family Ct. Act § 301.2[1]; *see Matter of Jose H.,* 54 Misc.3d at 332, 40 N.Y.S.3d 710). The use of the phrase "that would be a crime if committed by an adult" is not mere semantics, but reflects a strong policy "to protect young persons who have violated the criminal statutes of this State from acquiring the stigma that accompanies a

criminal conviction" (*People v. Gray,* 84 N.Y.2d 709, 713, 622 N.Y.S.2d 223, 646 N.E.2d 444) and "ensure[s] that a juvenile delinquency adjudication is not treated as a crime" (*Green v. Montgomery,* 95 N.Y.2d 693, 697, 723 N.Y.S.2d 744, 746 N.E.2d 1036).

Despite this well-established policy in both federal and state law to not equate children adjudicated as juvenile delinquents with adults convicted of crimes, the Family Court nonetheless stated that "[i]t is inconceivable that Congress would seek to deport an adult criminal, yet give special immigrant status to a juvenile delinquent." In determining whether, as a matter of statutory construction, the child meets the dependency requirement of the SIJS statute, the majority gives significant weight to the seriousness of the child's misconduct and the "painful and terrible consequences to his victims." Such considerations play no role in our determination whether to grant a specific findings order, but may play a role in the ultimate determination by USCIS to grant SIJS (*see Matter of Nelson A.G.-L. [Maria Y.G.S.],* 157 A.D.3d at 790, 69 N.Y.S.3d 344; *Matter of Enis A.C.M. [Blanca E.M.—Carlos V.C.P.],* 152 A.D.3d 690, 692, 59 N.Y.S.3d 396). The majority has, in effect, created ****532** an immigration consequence to the juvenile delinquency adjudications of abused, neglected, or abandoned children.

Even more troubling, the Court's holding not only bars the child from obtaining a specific findings order, but is so broad that it would preclude neglected, abused, or abandoned children who have committed much less serious misconduct, including graffiti (*see Matter of Oscar G.,* 83 A.D.3d 468, 921 N.Y.S.2d 46), ***41** or marijuana possession (*see Matter of Michael I.,* 309 A.D.2d 598, 765 N.Y.S.2d 615 [possession of marijuana cigar]), from obtaining a specific findings order. Children who are abused, neglected, or abandoned are presumed to not have sufficient familial support or stability (*see Matter of Hei Ting C.,* 109 A.D.3d at 106, 969 N.Y.S.2d 150), and, as a result, may become the subject of Family Court proceedings by reason of their misconduct. The misconduct of these children does not make them any less vulnerable than other abused, neglected, or abandoned children over whom the Family Court exercises jurisdiction for custody. The child's misconduct provides the occasion for the Family Court to intervene and protect the child, as well as the public. It is not, however, an occasion for the Family Court to impose an immigration consequence upon them.

IV. *"Custody" in Juvenile Delinquency Proceedings*

Contrary to the majority's strained analysis, the placement of a child in the custody of the Commissioner of Social Services as a result of a juvenile delinquency adjudication is considered to be a custody determination under the Family Court Act.

"The overriding intent of the juvenile delinquency article is to empower [the] Family Court to intervene and positively impact the lives of troubled young people while protecting the public" (*Matter of Robert J.,* 2 N.Y.3d 339, 346, 778 N.Y.S.2d 763, 811 N.E.2d 25). In the disposition phase of juvenile delinquency proceedings, the Family Court's placement options, as well as the factors that the court must consider in making an appropriate disposition, illustrate how children given placement as a result of a juvenile delinquency adjudication are dependent on the Family Court in the same way as children given placement as a result of other Family Court proceedings.

Upon adjudicating a child a juvenile delinquent, the Family Court must enter a dispositional order setting forth whether the juvenile requires "supervision, treatment, or confinement" (Family Ct. Act § 352.1). "In determining an appropriate order the court shall consider the needs and best interests of the respondent as well as the need for protection of the community" (Family Ct. Act § 352.2[2][a]). Family Court Act § 352.2 supplies the Family Court with "a broad array of options," including placement of the child in his or her own home, in foster care, or in a juvenile facility (*see Matter of Jose H.,* 54 Misc.3d at 333, 40 N.Y.S.3d 710). The law generally requires that the court impose the least restrictive placement consistent with the best interests of the child and the safety and needs of the community ***42** (*see* Family Ct. Act § 352.2[2]; *Matter of Jose H.,* 54 Misc.3d at 333, 40 N.Y.S.3d 710).

Significantly, in making a dispositional order, the Family Court must consider circumstances impacting the child's living situation, including whether the juvenile's parents abused, neglected, or subjected the child to other "aggravating circumstances" as defined in Family Court Act § 301.2 (*see* Family Ct. Act § 352.2[2][c]). Thus, in the dispositional phase, the Family Court is charged with looking not only at what the child has done, i.e., the conduct that would be a crime if committed by an ****533** adult, but also what has been done to the child, i.e., evidence of neglect, abuse, or abandonment.

Therefore, the Family Court is authorized to, and often does, make custody determinations in the dispositional phase of juvenile delinquency proceedings. When the Family Court

has exercised its jurisdiction and made such placements, as here, the child is considered to be "dependent" on the Family Court for the purpose of SIJS (*see Matter of Hei Ting C.,* 109 A.D.3d at 106, 969 N.Y.S.2d 150).

The case relied upon by the majority as binding precedent, *Matter of Hei Ting C.,* does not support its holding, and is factually inapposite. There, parents were disputing their respective financial obligations toward their children. There was no issue of guardianship or custody over the children (*see id.* at 107, 969 N.Y.S.2d 150), and "no need for intervention by the Family Court to ensure that the [children] were placed in a safe and appropriate custody, guardianship, or foster care situation" (*id.* at 106, 969 N.Y.S.2d 150). In contrast, here, the Family Court committed the child's custody to the Commissioner of Social Services. In so doing, the Family Court necessarily determined that the child required intervention to ensure, inter alia, that the child was placed in a safe and appropriate situation.

V. *Independent Factual Review*

Based upon our independent factual review, I would conclude that the child meets all of the remaining requirements for a specific findings order. Reunification of the child with one or two parents is not viable because the father was murdered in Jamaica, and the mother abandoned him. The record establishes that, given the circumstances involving the murder of the child's father in Jamaica, the child's lack of familial support in Jamaica, and the child's familial support in this country, it would not be in the child's best interests to be returned to Jamaica. It is undisputed that the child was under 21 years ***43** old and unmarried at the time of his renewed motion. Since the child meets all of the requirements for a specific findings order, I vote to reverse the order appealed from, and grant the renewed motion (*see e.g. Matter of Nelson A.G.-L. [Maria Y.G.S.],* 157 A.D.3d at 790–791, 69 N.Y.S.3d 344; *Matter of Enis A.C.M. [Blanca E.M.—Carlos V.C.P.],* 152 A.D.3d at 692, 59 N.Y.S.3d 396), and thus, leave the ultimate determination of whether the child should be granted SIJS to the appropriate federal agency, USCIS.

VI. *Summary*

The order appealed from should be reversed. The plain language of the federal statute (8 USC § 1101[a][27][J]), in conjunction with this State's Family Court Act, establishes that the child meets the dependency requirement. Exercising our independent factual review power, I would grant the child's renewed motion for a specific findings order.

All Citations

167 A.D.3d 27, 86 N.Y.S.3d 522, 2018 N.Y. Slip Op. 06918

New York Official Reports

198 A.D.3d 654, 156 N.Y.S.3d 52, 2021 N.Y. Slip Op. 05340

**1 In the Matter of Maria Martucci, Respondent,

v

Biagio Nerone, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2020-07766, 2020-07767, F-4383-15
October 6, 2021

CITE TITLE AS: Matter of Martucci v Nerone

HEADNOTE

Parent, Child and Family
Support
Father's Willful Violation of Child Support Order—Orders of Commitment Appropriate Sanction

Yasmin Daley Duncan, Brooklyn, NY, for appellant.
Orrick, Herrington & Sutcliffe, LLP, New York, NY (Rene Kathawala of counsel), for respondent.

In a proceeding pursuant to Family Court Act article 4, the father appeals from (1) an order of commitment of the Family Court, Richmond County (Gregory Gliedman, J.), dated September 10, 2020, and (2) an order of commitment of the same court dated October 8, 2020. The order of commitment dated September 10, 2020, committed the father to the custody of the New York City Department of Correction for a period of two months. The order of commitment dated October 8, 2020, committed the father to the custody of the New York City Department of Correction for a period of 60 days, and retained a purge amount that was set in an order of disposition of the same court dated March 16, 2020.

Ordered that the orders of commitment are affirmed, without costs or disbursements.

Biagio Nerone (hereinafter the father) and Maria Martucci (hereinafter the mother) have a son. By order dated January 23, 2018, the father was directed to pay the sum of $400 weekly as child support (hereinafter the support order). By summons and petition dated October 22, 2019, the mother commenced the instant proceeding pursuant to Family Court Act article 4, alleging, inter alia, that the father had willfully violated the support order.

Following a hearing, in an order of disposition dated March 16, 2020 (hereinafter the order of disposition), the Family Court adjudicated the father in willful contempt of the support order and directed that the father be remanded to jail for a period of two months unless he purged himself of contempt by the payment of the sum of $12,000 on or before June 26, 2020. The father appealed from the order of disposition.

In a decision and order dated March 31, 2021, this Court determined that the Family Court correctly found that the father had willfully violated the support order (*see Matter of Martucci v Nerone*, 192 AD3d 1107 [2021]). However, this Court modified the order of disposition by, inter alia, deleting the provision thereof permitting the father to purge himself of his contempt by paying the mother the sum of $12,000, and substituting therefor a provision permitting the father to purge himself of his contempt by paying the mother the sum of $500 (*see id.*).

*655 In the meantime, in an order of commitment dated September 10, 2020, the Family Court committed the father to the custody of the New York City Department of Correction for a **2 period of two months. Further, in an order of commitment dated October 8, 2020, the court committed the father to the custody of the New York City Department of Correction for a period of 60 days, and specified "[t]he $12,000 purge amount remains in place." The father appeals from these two orders of commitment.

Initially, we note that in an order dated January 28, 2021, the Family Court stayed enforcement of so much of the orders of commitment as committed the father to the custody of the New York City Department of Correction, and adjourned this matter to May 3, 2021, stating that at that time it would "assess the propriety of lifting the stay." In a decision and order on motion dated March 19, 2021, this Court denied that branch of the mother's cross motion which was to dismiss the appeals on the ground that they had been rendered academic by the order of the Family Court dated January 28, 2021. Inasmuch as the record does not establish the current status of the stay as set forth in the order dated January 28, 2021, the appeals from so much of the orders of commitment as committed the

father to the custody of the New York City Department of Correction are not academic.

"Where, as here, 'a willful violation of an order of support is found, the determination as to the appropriate sanction lies within the Family Court's discretion' " (*Matter of Cameron v King*, 160 AD3d 945, 947 [2018], quoting *Matter of Sullivan v Kilkenny*, 141 AD3d 533, 535 [2016]; *see Matter of Nickel v Nickel*, 172 AD3d 1210, 1212 [2019]). Pursuant to Family Court Act § 454 (3) (a), the Family Court has the authority to "commit the respondent to jail for a term not to exceed six months." Under the circumstances herein, the court did not improvidently exercise its discretion in directing that the father be remanded to jail unless he purged himself of his contempt (*see Matter of Sullivan v Kilkenny*, 141 AD3d at 535; *Matter of Rube v Tornheim*, 82 AD3d 1246, 1246 [2011]; *Matter of Gorsky v Kessler*, 79 AD3d 746, 747 [2010]). Moreover, contrary to the father's contention, neither the existence of the COVID-19 pandemic nor his alleged health issues warrant reversal of the orders of commitment (*see generally People ex rel. Ferro v Brann*, 183 AD3d 758 [2020]). LaSalle, P.J., Rivera, Duffy and Ford, JJ., concur.

197 A.D.3d 645
Supreme Court, Appellate Division,
Second Department, New York.

In the MATTER OF TYLER L. (Anonymous), appellant.

2019–10246
|
(Docket No. D-1582-19)
|
Argued—March 30, 2021
|
August 18, 2021

Synopsis

Background: Juvenile was adjudicated a juvenile delinquent in the Family Court, Kings County, Susan Quirk, J., for committing act which, if committed by an adult, would have constituted the crime of endangering the welfare of a child, and placed on probation for a period of 12 months. Juvenile appealed.

[Holding:] The Supreme Court, Appellate Division, held that juvenile's waiver of his *Miranda* rights was voluntary, knowing, and intelligent.

Affirmed.

Barros, J., filed opinion concurring in part and dissenting in part, in which Wooten, J., concurred.

West Headnotes (3)

[1] Infants Warnings and counsel; waivers

Juvenile's waiver of his *Miranda* rights was voluntary, knowing, and intelligent, while under interrogation for committing acts which, if committed by an adult, would have constituted the crime of endangering the welfare of a child; juvenile and his grandfather were brought into an interview room, *Miranda* warnings for juveniles were read in a manner that was clear and deliberate and written copies were given to juvenile and grandfather, and although expert witness noted that juvenile had an IQ of 74 and was in the "borderline range" for certain verbal comprehension, perceptual reasoning, reading comprehension, and expressive vocabulary tests, expert also stated that juvenile had basic comprehension and understanding of *Miranda* rights consistent with other 15-year-olds of comparable abilities. U.S. Const. Amend. 5.

[2] Infants Warnings and counsel; waivers

Presentment agency in juvenile delinquency proceeding must prove voluntary, knowing, and intelligent waiver of privilege against self-incrimination for custodial statements to be admissible. U.S. Const. Amend. 5.

[3] Criminal Law Right to remain silent

Criminal Law Counsel

Whether a defendant knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined upon an inquiry into the totality of the circumstances surrounding the interrogation, including the defendant's age, experience, education, background, and intelligence, and whether he or she has the capacity to understand the warnings given him or her, the nature of his or her Fifth Amendment rights, and the consequences of waiving those rights. U.S. Const. Amend. 5.

Attorneys and Law Firms

Janet E. Sabel, New York, N.Y. (Dawne A. Mitchell and Raymond E. Rogers of counsel), for appellant.

Georgia M. Pestana, Corporation Counsel, New York, N.Y. (Ingrid R. Gustafson and Jessica Miller of counsel), for respondent.

HECTOR D. LASALLE, P.J., MARK C. DILLON, LEONARD B. AUSTIN, BETSY BARROS, PAUL WOOTEN, JJ.

DECISION & ORDER

***645** In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Tyler L. appeals from an order of disposition of the Family Court, Kings County (Susan Quirk, J.), dated August 5, 2019. The order of disposition, upon an order of ****748** fact-finding of the same court also dated August 5, 2019, made upon the admission of Tyler L., finding that he committed acts which, if committed by an adult, would have constituted the crime of endangering the welfare of a child, adjudicated him a juvenile delinquent and placed him on probation for a period of 12 months. The appeal brings up for review the denial, after a hearing, of the motion of Tyler L. to suppress his statements to law enforcement officials.

ORDERED that the appeal from so much of the order of disposition as placed Tyler L. on probation for a period of 12 months is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The appeal from so much of the order of disposition as placed the appellant on probation for a period of 12 months has been rendered academic, as the period of probation has expired (*see Matter of Connor C.,* 188 A.D.3d 1040, 1041, 132 N.Y.S.3d 659; *Matter of Majesty S.,* 167 A.D.3d 629, 629, 89 N.Y.S.3d 230). However, the appeal from so much of the order of disposition as adjudicated the appellant a juvenile delinquent has not been rendered academic, as there may be collateral consequences resulting from the adjudication of delinquency (*see Matter of Majesty S.,* 167 A.D.3d at 629, 89 N.Y.S.3d 230; *Matter of Dzahiah W.,* 152 A.D.3d 612, 613, 58 N.Y.S.3d 159).

In this juvenile delinquency proceeding, the Presentment Agency filed a petition alleging that the appellant, who was then 15 years old, committed acts which, if committed by an adult, would have constituted the crimes of attempted sexual abuse in the first degree, two counts of attempted sexual abuse ***646** in the second degree, and endangering the welfare of a minor, with respect to his 11–year–old sister. Upon arrest, the appellant was interviewed by law enforcement officials in the presence of his grandfather. During the 35–minute interview, which was videotaped, the appellant made certain incriminating statements.

The appellant moved to suppress his statements to law enforcement officials. After a hearing, the Family Court denied the appellant's motion. Thereafter, upon the appellant's admission, the court found that the appellant had committed acts which, if committed by an adult, would have constituted the crime of endangering the welfare of a child. The court thereupon adjudicated the appellant a juvenile delinquent and placed him on probation for a period of 12 months.

[1] **[2]** **[3]** The Family Court properly denied the appellant's motion to suppress his statements to law enforcement officials. The Presentment Agency must prove a voluntary, knowing, and intelligent waiver of the privilege against self-incrimination for custodial statements to be admissible (*see People v. Cleverin,* 140 A.D.3d 1080, 1081, 34 N.Y.S.3d 136). "Whether a defendant knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined upon an inquiry into the totality of the circumstances surrounding the interrogation, including the defendant's age, experience, education, background, and intelligence, and ... whether he [or she] has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights" (*id.* at 1081, 34 N.Y.S.3d 136 [citations and internal quotation marks omitted]).

Here, the videotape shows that the appellant and his grandfather were brought into an interview room of a police precinct, where *Miranda* warnings (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) for juveniles were read and ****749** written copies of the warnings were given to the appellant and his grandfather. The videotape also shows that, while the written *Miranda* form was never signed, both the appellant and his grandfather waived the appellant's *Miranda* rights after the rights had been read. Contrary to the characterization of our dissenting colleagues, the *Miranda* warnings were not read in a "pro forma" manner (dissenting op at 752). The videotape demonstrates that the *Miranda* warnings were read in a manner that was clear and deliberate, and that the appellant and his grandfather understood those rights and voluntarily waived them.

We disagree with our dissenting colleagues' characterization ***647** of the opinion of the appellant's expert as uncontroverted. While the appellant's expert in juvenile forensic psychology noted in his report that the appellant tested as having an IQ of 74 and was in the "borderline range" of certain verbal comprehension, perceptual reasoning,

reading comprehension, and expressive vocabulary tests, the appellant's expert also stated that the appellant had a basic comprehension and understanding of *Miranda* rights at the time of his testing consistent with other 15–year–old adolescents of comparable abilities. The conclusion of the appellant's expert that the appellant could not have made an intelligent, knowing, and voluntary waiver of his *Miranda* rights during police questioning was undermined by evidence of the appellant's completion of a test that required answers to 189 written questions in 20 minutes. Additionally, the expert acknowledged that a 2015 individualized education plan document rated the appellant as a "strong reader" and indicated that the appellant could "retell a story and is able to answer questions based on his reading." Thus, the Family Court's determination that the appellant's *Miranda* waiver was voluntary, knowing, and intelligent was supported by the evidence and will not be disturbed (*see Matter of James W.,* 130 A.D.2d 753, 753, 516 N.Y.S.2d 48). The absence of a signed waiver form requires no different result (*see People v. Aveni,* 100 A.D.3d 228, 236, 953 N.Y.S.2d 55), particularly as, in this instance, the waiver of *Miranda* rights by the appellant and his grandfather is evidenced by the videotape. Moreover, the *Miranda* waiver is not rendered infirm by virtue of any familial relationship that the grandfather had with the appellant's sister (*see Matter of Kevin R.,* 80 A.D.3d 439, 439, 914 N.Y.S.2d 143; *Matter of James OO,* 234 A.D.2d 822, 823, 652 N.Y.S.2d 783).

In addition, the hearing evidence demonstrated that the delay in commencing the interrogation was satisfactorily explained as attributable primarily to the transportation of the appellant from his school to the Brooklyn Child Abuse Squad, the delayed appearance of the appellant's guardian, and the efforts made to ensure that the interrogation was recorded by audiovisual equipment (*see Matter of Amber B.,* 76 A.D.3d 475, 476, 907 N.Y.S.2d 182; *Matter of Rafael S.,* 16 A.D.3d 246, 246–247, 791 N.Y.S.2d 115). The hearing evidence also demonstrated that the interrogation occurred inside of a designated juvenile room after the appellant, in the presence of his grandfather, was given the proper *Miranda* warnings, and they indicated on videotape that they understood those rights (*see Matter of Dashawn R.,* 120 A.D.3d 1250, 1250–1251, 992 N.Y.S.2d 122).

Further, the appellant's statements were not rendered involuntary ***648** by the conduct of law enforcement officials during the interrogation. Under the totality of the circumstances, including the means employed and the vulnerability of the appellant, the hearing evidence demonstrated that the appellant's will was not overborne (*see People v. Thomas,* 22 N.Y.3d 629, 642, 985 N.Y.S.2d 193, 8 N.E.3d 308; ****750** *People v. Black,* 172 A.D.3d 895, 896, 100 N.Y.S.3d 77; *People v. Gordon,* 74 A.D.3d 1090, 902 N.Y.S.2d 386).

Accordingly, we affirm the order of disposition insofar as reviewed.

LASALLE, P.J., DILLON and AUSTIN, JJ., concur.

BARROS, J., concurs in part and dissents in part, and votes to dismiss the appeal from so much of the order of disposition as placed Tyler L. on probation for a period of 12 months, reverse the order of disposition insofar as reviewed, on the law and the facts, grant the motion of Tyler L. to suppress his statements to law enforcement officials, vacate the order of fact-finding, dismiss the petition, and remit the matter to the Family Court, Kings County, for the purpose of entering an order pursuant to Family Court Act § 375.1, with the following memorandum, in which WOOTEN, J., concurs.

The issue that divides this panel is whether the Presentment Agency established, beyond a reasonable doubt, that the appellant, who was 15 years old with documented subnormal intelligence, voluntarily, knowingly, and intelligently waived his *Miranda* rights (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) before giving statements to law enforcement officials during a custodial interrogation. Contrary to the majority's determination, I conclude that the Presentment Agency failed to meet its burden, and, therefore, the appellant's motion to suppress his statements should have been granted.

"Whether a [person] knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined upon an inquiry into the totality of the circumstances surrounding the interrogation, including the defendant's age, experience, education, background, and intelligence, and ... whether he [or she] has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights" (*People v. Cleverin,* 140 A.D.3d 1080, 1081, 34 N.Y.S.3d 136 [citations and internal quotation marks omitted]; *see People v. Santos,* 112 A.D.3d 757, 758, 976 N.Y.S.2d 565).

"Where a person of subnormal intelligence is involved, close scrutiny must be made of the circumstances of the asserted waiver" (*People v. Cleverin,* 140 A.D.3d at 1081, 34 N.Y.S.3d 136 [internal quotation marks omitted]; *see People v. Williams,* 62 N.Y.2d 285, 289, 476 N.Y.S.2d 788, 465 N.E.2d 327). Under such circumstances, it must be established that ***649** the person with subnormal intelligence understood the immediate meaning of the warnings, that is, that he or she grasped that he or she did not have to speak to the interrogator; that any statement might be used to his or her disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued (*see People v. Williams,* 62 N.Y.2d at 289, 476 N.Y.S.2d 788, 465 N.E.2d 327; *People v. Cleverin,* 140 A.D.3d at 1082, 34 N.Y.S.3d 136).

"[O]ver and beyond the ordinary constitutional safeguards provided for adults subjected to questioning, [law enforcement officials] must exercise greater care to ensure that the rights of youthful suspects are vigilantly observed" (*People v. Hall,* 125 A.D.2d 698, 701, 509 N.Y.S.2d 881; *see Matter of Jimmy D.,* 15 N.Y.3d 417, 421, 912 N.Y.S.2d 537, 938 N.E.2d 970).

At the suppression hearing, the appellant presented the testimony of a forensic psychologist, who tested the intellectual abilities and functioning of the appellant, evaluated the appellant's understanding of the *Miranda* warnings given to him, and conducted a review of the appellant's educational records. The expert found, inter ****751** alia, that the appellant, then 15 years old and in the ninth grade, had a borderline low IQ with overall difficulties in his reading and listening comprehension. The appellant was found to have reading comprehension at a fifth-grade level and listening comprehension at a fourth-grade level. The expert's findings were confirmed by the appellant's educational records evincing that the appellant was reading at a fourth-grade level. The expert's testing revealed that the appellant had a full scale IQ of 74, correlating with overall intellectual abilities in the *fourth* percentile. The expert related that the appellant's educational records had previously found the appellant to be in the "Extremely Low" range with an even lower full scale IQ of 69.

The expert's uncontradicted opinion was that the appellant had "fundamental problems" in understanding and comprehending *Miranda* rights. Specifically, the appellant believed that he had to waive his right to remain silent in order to find out what the detectives were questioning him about. The appellant did not understand what it meant for a statement to be "used against him." Further, he did not understand the role of an attorney in the context of an interrogation.

Given the appellant's young age, low IQ scores, and limited intellectual functioning, there are serious doubts about the appellant's ability to knowingly and intelligently waive his *Miranda* rights under the circumstances (*see People v. Patillo,* 185 A.D.3d 46, 126 N.Y.S.3d 127; *People v. Cleverin,* 140 A.D.3d 1080, 34 N.Y.S.3d 136). Notably, ***650** the Presentment Agency did not introduce any expert testimony contradicting the conclusions reached by the appellant's expert forensic psychologist (*cf. People v. Cleverin,* 140 A.D.3d 1080, 34 N.Y.S.3d 136). The conclusions of the appellant's expert were confirmed by the appellant's educational records showing that he had been selected for an individualized education plan (hereinafter IEP) and had consistently been evaluated as having intellectual disabilities, including a low IQ with reading, listening, and comprehension difficulties.

The Presentment Agency's reliance upon selected findings in the report of appellant's expert, while ignoring the expert's other findings, analysis, and ultimate conclusions, does not undermine the substance of the expert's opinion. The Presentment Agency never called an expert forensic psychologist to render an opinion as to the significance of those findings that the Presentment Agency relies upon to support its argument that the appellant validly waived his *Miranda* rights. Moreover, it is unclear how the fact that the appellant gave unidentified responses to a specific number of unidentified questions within a certain period of time during the forensic examination bears any relevance to the issue of whether the appellant had the ability to comprehend the *Miranda* warnings under the circumstances. The forensic examination itself, including the questions and the appellant's responses, are not even in the record. Further, that the appellant was described as a "strong reader" in a single report from a 2015 IEP has only marginal significance given that the IEP records indicated that the appellant, who was in ninth grade, was reading at a fourth-grade level. Indeed, the fact that the appellant was in an IEP program suggests that he had educational disabilities consistent with the analysis and conclusions of the appellant's expert.

Although the appellant's grandfather, who was his guardian, was present during the interrogation, the grandfather had a conflict of interest since he was also the guardian of the alleged victim, the appellant's sister. Although such a conflict

is ****752** not disqualifying, it is a factor to be considered in evaluating the totality of the circumstances as to the voluntariness of a waiver (*see Matter of Kevin R.,* 80 A.D.3d 439, 914 N.Y.S.2d 143).

The videotaped interrogation evinces that the appellant's grandfather provided no advice or assistance in any way during the *Miranda* warnings or throughout the interrogation. To the extent the grandfather participated at all during the interrogation, he made a comment that was intended to assist the law enforcement officers' attempts to deceive the appellant into ***651** making a self-incriminating statement, which further highlighted the grandfather's conflict of interest.

Further, it is undisputed that the appellant was arrested at school instead of his home, placed in handcuffs during intervals prior to the interrogation, separated from a guardian for hours between his arrest and the interrogation, and unable to privately consult with his grandfather before the interrogation. At the interrogation, the appellant was seated in the corner of a very small interrogation room next to his grandfather and directly across from two police interrogators.

The videotaped interrogation shows that the juvenile *Miranda* form was verbally recited in a pro forma manner. Although the law enforcement officials directed the appellant and his grandfather to write "yes" or "no" and add their initials on the *Miranda* form, the unsigned *Miranda* form was pulled away immediately after receiving perfunctory "yes" responses from the appellant and his grandfather. Thus, the appellant's verbal "yes" responses to the *Miranda* warnings in no way demonstrated his comprehension of the *Miranda* rights or a voluntary waiver of them (*see People v. Patillo,* 185 A.D.3d at 50, 126 N.Y.S.3d 127).

Given the totality of the circumstances, including the appellant's young age and subnormal intelligence, as well as the high-pressured atmosphere created by law enforcement officials, the Presentment Agency failed to meet its burden of establishing, beyond a reasonable doubt, that the appellant voluntarily, knowingly, and intelligently waived his *Miranda* rights. Accordingly, the Family Court should have granted the appellant's motion to suppress his statements to law enforcement officials.

Since the appellant has already served his probationary term, no purpose would be served by remitting the matter for a new fact-finding hearing, and, therefore, I vote to dismiss the petition (*see People v. Hightower,* 18 N.Y.3d 249, 253, 938 N.Y.S.2d 500, 961 N.E.2d 1111; *People v. Dreyden,* 15 N.Y.3d 100, 104, 905 N.Y.S.2d 542, 931 N.E.2d 526; *Matter of Peter C.,* 220 A.D.2d 584, 585, 632 N.Y.S.2d 612).

In light of the foregoing, the appellant's remaining contentions need not be reached.

All Citations

197 A.D.3d 645, 150 N.Y.S.3d 747, 2021 N.Y. Slip Op. 04713

145 A.D.3d 680
Supreme Court, Appellate Division,
Second Department, New York.

MONROE EQUITIES, LLC, appellant,

v.

STATE of New York, respondent.

Dec. 7, 2016.

Synopsis

Background: Landowner brought action against the State, alleging that the application of the watershed regulations constituted a per se taking that required compensation under the Takings Clause. The Court of Claims, Stephen J. Mignano, J., denied landowner's motion for summary judgment and granted summary judgment in favor of the State. Landowner appealed.

[Holding:] The Supreme Court, Appellate Division, held that right to install septic system was never part of the bundle of rights that landowner acquired with title to undeveloped property, and thus, application of the watershed regulations to landowner's subdivision application did not constitute a taking of landowner's property.

Affirmed.

West Headnotes (4)

[1] **Eminent Domain** Nature and source of power

Eminent Domain Necessity of making compensation in general

The Takings Clause is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. U.S.C.A. Const.Amend. 5.

[2] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

In determining whether regulatory action will be deemed a per se taking under the Fifth Amendment, the complete elimination of a property's value is the determinative factor. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[3] **Eminent Domain** Environmental Protection

Right to install septic system was never part of the bundle of rights that landowner acquired with title to undeveloped property, and thus, application of watershed regulations, which prohibited the placement of subsurface sewage disposal system within 300 feet of lake, to landowner's subdivision application did not constitute a taking of landowner's property; landowner acquired title to property 85 years after watershed regulations first went into effect, regulations were inhered in the title itself, and landowner's parcel was once joined with abutting lands that were split into separate parcels. U.S.C.A. Const.Amend. 5; 10 NYCRR 133.11(d)(4)(v).

2 Cases that cite this headnote

[4] **Eminent Domain** Property and Rights Subject of Compensation

A threshold inquiry in any regulatory takings claim is whether the proscribed use was part of the landowner's title to begin with. U.S.C.A. Const.Amend. 5.

Attorneys and Law Firms

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Eric T. Schneiderman, Attorney General, New York, NY (Steven C. Wu and ****104** Valeria Figueredo of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., ROBERT J. MILLER, HECTOR D. LaSALLE, and VALERIE BRATHWAITE NELSON, JJ.

Opinion

***680** Appeal by the claimant from an order of the Court of Claims (Stephen J. Mignano, J.) dated August 25, 2014. The order, insofar as appealed from, denied the claimant's motion for summary judgment on the issue of liability and, upon searching the record, awarded the defendant summary judgment dismissing the claim.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In 2005, the claimant acquired title to an undeveloped 16.81–acre parcel of real property in the Village and Town of Monroe, designated as Tax Map Section 37, Block 1, Lot 26.2. The ***681** property is in the RR 1.5 ac zoning district, for which permissible uses include, "Single Family detached dwellings on lots of 3 or more acres in size." In 2006, the claimant applied for approval to develop the property by subdividing it into three lots and then constructing a single-family dwelling on each lot. The proposal included installation of a septic system for each of the three dwellings. The property is located within the Lake Mombasha watershed, and is subject to watershed protection regulations promulgated on November 9, 1920, by the New York State Department of Health (hereinafter the DOH) pursuant to article 11 of the Public Health Law. As relevant here, the watershed regulations prohibit the placement of a subsurface sewage disposal system within 300 feet of Lake Mombasha (*see* 10 NYCRR 133.11[d][4][v]). The claimant's subdivision application was denied by the Town Planning Board in November 2008 because the necessary septic systems would violate the watershed regulations.

Since 2009, the claimant has commenced various actions against the State of New York (hereinafter the defendant) challenging the application of the regulations to its property. On a prior appeal, this Court affirmed an order of the Supreme Court granting that branch of the defendant's motion which was to dismiss the claimant's complaint seeking a judgment declaring that the watershed regulations constituted an unconstitutional taking as applied to its property, on the ground that the Supreme Court lacked subject matter jurisdiction over the claim (*see Monroe Equities, LLC v. New York State,* 111 A.D.3d 803, 976 N.Y.S.2d 98).

In August 2012, the claimant filed the instant claim against the defendant in the Court of Claims to recover damages in the sum of $1,000,000, contending that the application of the watershed regulations constituted a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 requiring compensation under the Takings Clause of the United States Constitution because the claimant was deprived of all economically beneficial use of its property. The claimant then moved for summary judgment on the issue of liability, and the defendant cross-moved to dismiss the claim on the grounds that the claim was untimely and that it failed to state a viable claim since the claimant was barred from offering the expert proof necessary to sustain its claim at trial.

In the order appealed from, the Court of Claims denied the claimant's motion and, upon searching the record, awarded summary judgment to the defendant dismissing the claim on the ground that "the facts and circumstances presented in this ***682** matter demonstrate that nothing was taken from claimant to which he had an 'of right' ****105** entitlement at the time of purchase" and, therefore, no taking had occurred under *Lucas*. As to the defendant's cross motion, the court denied that branch of the cross motion which was to dismiss the claim as untimely, and found it unnecessary to reach the other branch of the cross motion in light of its determination on the merits. The claimant appeals, arguing that the court erred in concluding that there was no per se taking under *Lucas*.

[1] The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment (*see Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979), provides that private property shall not "be taken for public use, without just compensation" (U.S. Constitution Amendment V). The Takings Clause "is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking" (*First English Evangelical Lutheran Church v. City of Los Angeles,* 482 U.S. 304, 305, 107 S.Ct. 2378, 96 L.Ed.2d 250 [emphases in original]). In addition to physical takings, the United States Supreme Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster —and that such 'regulatory takings' may be compensable under the Fifth Amendment" (*Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876; *see*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322).

The United States Supreme Court has "generally eschewed" any set formula for identifying regulatory takings, choosing instead to engage in " 'essentially ad hoc, factual inquiries' " considering a number of factors (*Lucas v. South Carolina Coastal Council,* 505 U.S. at 1015, 112 S.Ct. 2886, quoting *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631). However, it has recognized two categories of regulatory action that will be deemed per se takings for Fifth Amendment purposes, without the need to engage in case-specific inquiries: (1) regulations that compel the property owner to suffer a permanent physical invasion of the property, and (2) regulations that completely deprive an owner of "all economically beneficial us [e]" of the property (*Lucas v. South Carolina Coastal Council,* 505 U.S. at 1019, 112 S.Ct. 2886; *see Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 538, 125 S.Ct. 2074, 161 L.Ed.2d 876).

[2] The instant claim asserts that the State's watershed regulations have deprived the claimant of all economically beneficial use of the property at issue and thus there has been a categorical ***683** or per se taking within the meaning of *Lucas*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798. In the *Lucas* context, the complete elimination of a property's value is the determinative factor (*see Lucas v. South Carolina Coastal Council,* 505 U.S. at 1017, 112 S.Ct. 2886; *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. at 539, 125 S.Ct. 2074). Here, in support of its motion for summary judgment, the claimant failed to establish, prima facie, that the subject property has suffered a complete elimination of value as a result of the watershed regulations (*cf. Adrian v. Town of Yorktown,* 83 A.D.3d 746, 747, 920 N.Y.S.2d 411; *Matter of Friedenburg v. New York State Dept. of Envtl. Conservation,* 3 A.D.3d 86, 93, 767 N.Y.S.2d 451). Accordingly, the Court of Claims properly denied the claimant's motion.

[3] **[4]** Furthermore, the Court of Claims did not improvidently exercise its discretion in searching the record on the ****106** claimant's motion and awarding summary judgment to the defendant dismissing the claim on the ground that the record established that no taking had occurred (*see* CPLR 3212 [b]). A threshold inquiry in any regulatory takings claim is whether the proscribed use was part of the landowner's title to begin with (*see Lucas v. South Carolina Coastal Council,* 505 U.S. at 1027, 112 S.Ct. 2886; *Matter of Gazza v. New York State Dept. of Envtl. Conservation,* 89 N.Y.2d 603, 613–614, 657 N.Y.S.2d 555, 679 N.E.2d 1035). Courts have long recognized that a property interest must exist before it may be "taken" (*United States v. Willow River Power Co.,* 324 U.S. 499, 502–503, 65 S.Ct. 761, 89 L.Ed. 1101; *see Matter of Gazza v. New York State Dept. of Envtl. Conservation,* 89 N.Y.2d at 613, 657 N.Y.S.2d 555, 679 N.E.2d 1035). Here, the record establishes that the claimant never possessed the right to install a septic system on its property, and the watershed regulations "inhere[d] in the title itself" and were part of the "background principles of the State's law of property" long before the claimant acquired title (*Lucas v. South Carolina Coastal Council,* 505 U.S. at 1029, 112 S.Ct. 2886; *see Soon Duck Kim v. City of New York,* 90 N.Y.2d 1, 5–8, 659 N.Y.S.2d 145, 681 N.E.2d 312).

The claimant acquired title to the subject parcel of land in 2005, 85 years after the watershed regulations first went into effect. Furthermore, in opposition to the claimant's motion, the defendant submitted evidence that the claimant's parcel was once joined with abutting lands that were split into separate parcels in 1989. Thus, the right to install a septic system was never part of the "bundle of rights" the claimant acquired with title to the property and the claimant cannot succeed on its takings claim (*see Soon Duck Kim v. City of New York,* 90 N.Y.2d 1, 659 N.Y.S.2d 145, 681 N.E.2d 312; *Matter of Gazza v. New York State Dept. of Envtl. Conservation,* 89 N.Y.2d 603, 657 N.Y.S.2d 555, 679 N.E.2d 1035).

Contrary to the claimant's contention, the United States ***684** Supreme Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 does not compel a contrary result. In *Palazzolo,* the Supreme Court declined to adopt a blanket rule that purchasers with notice have no compensation right when a claim becomes ripe and it expressly stated that a regulatory takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction" (*id.* at 609). Nevertheless, the Court emphasized that it had "no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title" (*id.* at 629–630). Resolution of the instant claim does not rely upon application of a blanket rule. As discussed above, the record establishes that the right to install a septic system was never part of the bundle of rights acquired by the claimant.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Court of Claims properly denied the claimant's motion for summary judgment and, upon searching the record, awarded the defendant summary judgment dismissing the claim.

All Citations

145 A.D.3d 680, 43 N.Y.S.3d 103, 2016 N.Y. Slip Op. 08206

177 A.D.3d 893
Supreme Court, Appellate Division,
Second Department, New York.

NEW YORK STATE DIVISION OF HUMAN RIGHTS, Respondent,
v.
TOWN OF OYSTER BAY, et al., Appellants, et al., Defendants.

2016–11995
|
(Index No. 608105/15)
|
Argued—September 9, 2019
|
November 20, 2019

Synopsis

Background: Division of Human Rights brought action against town and housing partnership for violations of Human Rights Law, alleging restrictions on sale of housing units to existing residents and their relatives perpetuated racial segregation. The Supreme Court, Nassau County, Arthur M. Diamond, J., denied defendants' motions to dismiss. Defendants appealed.

[Holding:] The Supreme Court, Appellate Division, held that town and housing partnership were not parties that could be directly liable for discrimination in provision or advertisement of housing.

Affirmed as modified.

West Headnotes (3)

[1] Pretrial Procedure Sufficiency and effect

To succeed on a motion to dismiss based upon documentary evidence, the documentary evidence must utterly refute the plaintiff's factual allegations and conclusively establish a defense as a matter of law. N.Y. CPLR § 3211(a)(1).

[2] Pretrial Procedure Availability of relief under any state of facts provable

Pretrial Procedure Construction of pleadings

Pretrial Procedure Presumptions and burden of proof

On a motion to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. N.Y. CPLR § 3211(a)(7).

1 Case that cites this headnote

[3] Civil Rights Persons Protected, Persons Liable, and Parties

Town and housing partnership were not within statutorily-enumerated categories of parties who could be held directly liable for discrimination in sale, rental, lease, or other provision of housing accommodation, discrimination in terms and conditions of sale of housing accommodation, or printing and circulating statements and using applications directly or indirectly expressing housing discrimination in violation of Human Rights Law, where town and housing partnership were not owners, lessees, sub-lessees, assignees, or managing agents with respect to housing accommodations. N.Y. Executive Law §§ 296(2-a), 296(5)(a).

Attorneys and Law Firms

****154** Covington & Burling LLP, New York, N.Y. (Christian J. Pistilli of counsel), for appellant Town of Oyster Bay.

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Robert A. Goldstein, Bronx, N.Y. (Jacqueline L. Spratt of counsel), for respondent.

CHERYL E. CHAMBERS, J.P., JOSEPH J. MALTESE, HECTOR D. LASALLE, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

***893** In an action to remedy alleged violations of Executive Law § 296 for discrimination on the basis of race and color, the defendants Town of Oyster Bay and Long Island Housing Partnership, Inc., separately appeal from an order of the Supreme Court, Nassau County (Arthur M. Diamond, J.), entered November 28, 2016. The order, insofar as appealed from by the defendant Town of Oyster Bay, denied those branches of that defendant's motion which were pursuant to CPLR 3211(a) to dismiss the first, second, third, fourth, and sixth causes of action and so much of the fifth cause of action as alleged discrimination on the basis of disparate treatment insofar as asserted against it. The order, insofar as appealed from by the defendant Long Island Housing Partnership, Inc., denied that defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it.

ORDERED that the order is modified, on the law, by deleting the provisions thereof denying those branches of the separate motions of the defendants Town of Oyster Bay and Long Island Housing Partnership, Inc., which were pursuant to CPLR 3211(a)(7) to dismiss the first, second, third, and sixth causes of action insofar as asserted against each of them, and substituting therefor a provision granting those branches of those motions; as so modified, the order is affirmed insofar as appealed from, with one bill of costs payable to the defendants Town of Oyster Bay and Long Island Housing Partnership, Inc.

The plaintiff commenced this action alleging that the defendants, in violation of article 15 of the Executive Law (the Human Rights Law), engaged in discrimination on the basis of race and color by means of the defendant Town of Oyster Bay's Next Generation and Golden Age housing programs. The plaintiff alleged that those programs perpetuated segregation in the Town by effectively restricting the sale of housing units under those programs to existing residents of the Town and their parents or children.

The plaintiff, which sought to remedy the alleged violations, asserted six causes of action, alleging: (1) discrimination in the sale, rental, or lease or in otherwise denying or withholding of ***894** a housing accommodation in violation of Executive Law § 296(2–a)(a) and (5)(a)(1); (2) discrimination in the terms and conditions of the sale of a housing accommodation in violation of Executive Law § 296(2–a)(b) and (5)(a)(2); (3) printing and circulating statements, advertisements, or publications and using applications directly or indirectly expressing discrimination in violation of Executive Law § 296(2–a)(c–1) and (5)(a)(3); (4) refusing ****155** to sell or trade, or otherwise discriminating, and willfully doing acts which enable persons to refuse to sell, trade, or otherwise discriminate based upon race and color in violation of Executive Law § 296(13); (5) aiding, abetting, inciting, and compelling acts of discrimination in violation of Executive Law § 296(6); and (6) representing that a change in the racial and color composition of the area will result in undesirable consequences in order to induce real estate transactions in violation of Executive Law § 296(3)(b).

The Town and the defendant Long Island Housing Partnership, Inc. (hereinafter LIHP), separately appeal from an order of the Supreme Court which, inter alia, denied their separate motions pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against each of them.

[1] To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations and conclusively establish a defense as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *Leon v. Martinez,* 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511). We agree with the Supreme Court's determination to deny that branch of LIHP's motion which was pursuant to CPLR 3211(a)(1), as the documents submitted did not utterly refute the plaintiff's allegations and conclusively establish a defense as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d at 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *Leon v. Martinez,* 84 N.Y.2d at 88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

[2] On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Connolly v. Long Is. Power Auth.,* 30 N.Y.3d

719, 728, 70 N.Y.S.3d 909, 94 N.E.3d 471; *Leon v. Martinez,* 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

Executive Law § 296(2–a) and (5)(a) specifically set forth the categories of actors which may be held liable for engaging in the unlawful discriminatory practices that are defined within the statute (*see Griffin v. Sirva, Inc.,* 29 N.Y.3d 174, 181, 54 N.Y.S.3d 360, 76 N.E.3d 1063). Executive Law § 296(2–a) identifies those actors as "the owner, ***895** lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations." Executive Law § 296(5)(a) identifies those actors as "the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof."

[3] Here, inasmuch as the Town and LIHP are not within the categories of actors set forth in Executive Law § 296(2–a) and(5)(a), the Supreme Court should have granted those branches of their separate motions which were pursuant to CPLR 3211(a)(7) to dismiss the first, second, and third causes of action insofar as asserted against each of them. However, the Town's and LIHP's liability for allegedly aiding and abetting violations of Executive Law § 296(2–a) and (5)(a) was properly pleaded in the plaintiff's fifth cause of action, alleging violations of Executive Law § 296(6), and thus, we agree with the court's denial of dismissal of that ****156** cause of action insofar as asserted against the Town and LIHP.

We agree with the Supreme Court's denial of those branches of the motions of the Town and LIHP which were pursuant to CPLR 3211(a)(7) to dismiss the plaintiff's fourth cause of action insofar as asserted against each of them, as the complaint sufficiently pleaded a cause of action under Executive Law § 296(13) (*see Holly v. Pennysaver Corp.,* 98 A.D.2d 570, 571, 471 N.Y.S.2d 611; *Harvey v. NYRAC, Inc.,* 813 F. Supp. 206, 206 [E.D. N.Y.]; *cf. Scott v. Massachusetts Mut. Life Ins. Co.,* 86 N.Y.2d 429, 436–437, 633 N.Y.S.2d 754, 657 N.E.2d 769).

The plaintiff concedes that dismissal of the sixth cause of action insofar as asserted against the Town and LIHP should have been directed pursuant to CPLR 3211(a)(7) (*see* Executive Law § 296[3][b]).

Contrary to the contentions of the Town and LIHP, the complaint can be fairly read to assert claims of both intentional and disparate impact discrimination (*see U.S. v. Town of Oyster Bay,* 66 F. Supp. 3d 285, 291 [E.D. N.Y.]; *see also Winfield v. City of New York,* 2016 WL 6208564, *6–7, 2016 U.S. Dist. LEXIS 146919, *18–26 [S.D. N.Y., 15CV5236–LIS–DCF]).

LIHP's remaining contentions are without merit.

CHAMBERS, J.P., MALTESE, LASALLE and CHRISTOPHER, JJ., concur.

All Citations

177 A.D.3d 893, 113 N.Y.S.3d 153, 2019 N.Y. Slip Op. 08416

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168 A.D.3d 961
Supreme Court, Appellate Division,
Second Department, New York.

Parviz NOGHREY, Appellant,

v.

TOWN OF BROOKHAVEN,
et al., Respondents.

2017–07189
|
Index No. 18557/01
|
Argued—October 1, 2018
|
January 23, 2019

Synopsis

Background: Property owner brought action against town to recover damages for a regulatory taking of property without just compensation. The Supreme Court, Suffolk County, Joseph Farneti, J., denied property owner's motion to set aside jury verdict in favor of town and for judgment as a matter of law, or in the alternative, to set aside the verdict as contrary to the weight of the evidence and for a new trial. Property owner appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] collateral estoppel did not apply to establish a regulatory taking by town with regard to parcel of real property on which property owner intended to build shopping plaza;

[2] testimony of town's expert with regard to his appraisal of the subject parcel of real property could not be excluded on the basis it was unreliable or consisted of inadmissible hearsay; and

[3] jury verdict in favor of town was not contrary to the weight of the evidence.

Affirmed.

West Headnotes (3)

[1] **Res Judicata** Determinations Made on Appeal or Other Review

Res Judicata Real property in general

Collateral estoppel did not apply to establish a regulatory taking by town with regard to parcel of real property on which property owner intended to build shopping plaza; in a prior appellate decision, the Supreme Court, Appellate Division's conclusion that jury's finding as to a regulatory taking was inconsistent and contrary to the weight of the evidence had to do with a different parcel of real property.

[2] **Evidence** Eminent domain; condemnation; severance damages

Testimony of town's expert with regard to his appraisal of the subject parcel of real property could not be excluded in regulatory takings action on the basis it was unreliable or consisted of inadmissible hearsay, when the claimed deficiencies in the appraisal went to the weight to be given the expert's testimony, and not its admissibility.

1 Case that cites this headnote

[3] **Eminent Domain** Verdict and findings

Jury verdict in favor of town in property owner's action to recover damages for a regulatory taking was not contrary to the weight of the evidence, when there was a valid line of reasoning and permissible inferences from which the jury could rationally conclude that rezoning parcel of land from business to residential did not effectuate a partial taking. N.Y. CPLR § 4404(a).

1 Case that cites this headnote

****342** In an action, inter alia, to recover damages for a regulatory taking of property without just compensation, the plaintiff appeals from a judgment of the Supreme Court,

Suffolk County (Joseph Farneti, J.), entered June 2, 2017. The judgment, upon a jury verdict, and upon an order of the same court dated March 10, 2017, denying the plaintiff's motion pursuant to CPLR 4404(a) to set aside the verdict and for judgment as a matter of law or, in the alternative, to set aside the verdict as contrary to the weight of the evidence and for a new trial, is in favor of the defendants and against the plaintiff, dismissing the 9th and 12th causes of action of the amended complaint.

Attorneys and Law Firms

Gleich, Farkas & Emouna LLP, Great Neck, N.Y. (Stephan B. Gleich, Lawrence W. Farkas, and Lara P. Emouna of counsel), for appellant.

Meyer, Suozzi, English & Klein, P.C., Garden City, N.Y. (Paul F. Millus and Daniel B. Rinaldi of counsel), for respondents.

SHERI S. ROMAN, J.P., SYLVIA O. HINDS–RADIX, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***962** ORDERED that the judgment is affirmed, with costs.

In 1985, the plaintiff purchased two parcels of real property, known as Liberty Plaza and Diamond Plaza, which were located .85 miles away from each other on Middle Country Road in the Town of Brookhaven, with the intention of building shopping plazas (*see Noghrey v. Town of Brookhaven,* 48 A.D.3d 529, 530, 852 N.Y.S.2d 220). At the time the plaintiff purchased the properties, they were zoned for J–2 business, which permitted the construction ****343** of shopping plazas (*see id.* at 530, 852 N.Y.S.2d 220). In 1989, the Town changed the zoning of numerous parcels, including Liberty Plaza and Diamond Plaza, from J–2 business to B–1 residence (*id.*). The salient facts concerning the plaintiff's claim that this rezoning effectuated a partial regulatory taking without just compensation of Liberty Plaza are set forth in this Court's decisions and orders on prior appeals (*see Noghrey v. Town of Brookhaven,* 92 A.D.3d 851, 938 N.Y.S.2d 613; *Noghrey v. Town of Brookhaven,* 48 A.D.3d 529, 852 N.Y.S.2d 220). On the most recent appeal, this Court determined that the jury's finding that the rezoning effectuated a partial regulatory taking of Liberty Plaza was inconsistent and contrary to the weight of the evidence because there was no fair interpretation of the evidence by which the jury could have found both that the rezoning effectuated a regulatory taking of Liberty Plaza and that the plaintiff's damages as to that property were only $360,000. The 9th and 12th causes of action, which related to Liberty Plaza, were severed and remitted to the Supreme Court, Suffolk County, for a new trial (*see Noghrey v. Town of Brookhaven,* 92 A.D.3d 851, 938 N.Y.S.2d 613). Following the retrial, the jury found in favor of the defendants. The court denied the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict and for judgment as a matter of law in his favor or, in the alternative, to set aside the verdict as contrary to the weight of the evidence and for a new trial. A judgment was entered on June 2, 2017, in favor of the defendants and against the plaintiff, dismissing the 9th and 12th ***963** causes of action of the amended complaint. The plaintiff appeals.

Contrary to the plaintiff's contention, there are no extraordinary circumstances that warrant reconsidering our prior determination in a decision and order dated February 13, 2008, on a prior appeal (*see Aurora Loan Servs., LLC v. Grant,* 88 A.D.3d 929, 931 N.Y.S.2d 523; *see generally Noghrey v. Town of Brookhaven,* 48 A.D.3d 529, 852 N.Y.S.2d 220).

[1] The plaintiff's contention that, based on our decision and order dated February 21, 2012 (92 A.D.3d 851, 938 N.Y.S.2d 613) (hereinafter the 2012 decision), the defendant should be collaterally estopped from contesting that there had been a regulatory taking of Liberty Plaza is unpersuasive. In the 2012 decision, we upheld a jury verdict finding a regulatory taking in favor of the plaintiff in relation to Diamond Plaza. However, we also concluded that the jury's finding of a regulatory taking as to Liberty Plaza was inconsistent and contrary to the weight of the evidence. We therefore held that new trial should be held with respect to Liberty Plaza. As the circumstances involving Liberty Plaza are factually distinct from those presented as to Diamond Plaza, collateral estoppel did not apply to establish any of the factors as to Liberty Plaza (*see Matter of Howard v. Stature Elec., Inc.,* 20 N.Y.3d 522, 525, 964 N.Y.S.2d 77, 986 N.E.2d 911; *see generally Noghrey v. Town of Brookhaven,* 92 A.D.3d 851, 938 N.Y.S.2d 613).

[2] We agree with the Supreme Court's determination, on retrial, denying the plaintiff's motion to preclude or strike the testimony of the defendants' expert as unreliable or consisting of inadmissible hearsay (*see Malanga v. City of New York,* 300 A.D.2d 549, 550, 752 N.Y.S.2d 391; *Matter of Ames Dept. Stores v. Assessor of Town of Greenport,* 276 A.D.2d 890, 891–892, 714 N.Y.S.2d 362; *cf. Casiero v. Stamer,* 308 A.D.2d 499, 500, 764 N.Y.S.2d 470). The claimed deficiencies in the expert's appraisal went to the weight to be given the expert's

testimony, not its admissibility **344 (*see White Knight NYC Ventures, LLC v. 15 W. 17th St., LLC,* 110 A.D.3d 576, 577, 973 N.Y.S.2d 208; *National Fuel Gas Supply Corp. v. Goodremote,* 13 A.D.3d 1134, 1135, 787 N.Y.S.2d 570).

[3] We also agree with the Supreme Court's denial of the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict in favor of the defendants and for judgment as a matter of law or, in the alternative, to set aside the verdict as contrary to the weight of the evidence and for a new trial. There was a valid line of reasoning and permissible inferences from which the jury could rationally conclude that the rezoning did not effectuate a partial regulatory taking of Liberty Plaza (*see Cohen v. Hallmark Cards,* 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145). Moreover, *964 given the conflicting expert testimony regarding the diminution in value of Liberty Plaza, and the character of the government action as a comprehensive rezoning, the verdict in favor of the defendants was based on a fair interpretation of the evidence and, therefore, was not contrary to the weight of the evidence (*see Yanyak v. Rosenman,* 134 A.D.3d 817, 819, 20 N.Y.S.3d 647; *Albano v. K.R. & S. Auto Repair, Inc.,* 123 A.D.3d 748, 749–750, 998 N.Y.S.2d 431; *see also Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631; *Adams v. Village of Wesley Chapel,* 259 Fed. Appx. 545, 549 [4th Cir.]).

The plaintiff's remaining contentions are either without merit or not properly before this Court.

ROMAN, J.P., HINDS–RADIX, MALTESE and LASALLE, JJ., concur.

All Citations

168 A.D.3d 961, 92 N.Y.S.3d 341, 2019 N.Y. Slip Op. 00450

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122 A.D.3d 596
Supreme Court, Appellate Division,
Second Department, New York.

Mohammed NOUR, appellant,

v.

CITY OF NEW YORK, respondent.

Nov. 5, 2014.

Synopsis

Background: Arrestee brought action to recover damages for malicious prosecution against a city, after the arrestee's charge of disorderly conduct was dismissed. The Supreme Court, Kings County, Spodek, J., entered judgment for the city following a jury trial, and denied the arrestee's motions to set aside the verdict and for a new trial. The arrestee appealed.

Holding: The Supreme Court, Appellate Division, held that the arrestee's arrest for disorderly conduct could be considered on arrestee's claim that he was malicious prosecuted for resisting arrest.

Affirmed.

West Headnotes (1)

[1] **Malicious Prosecution** Nature of charge

Plaintiff's arrest for disorderly conduct, though a violation, could form basis for malicious prosecution claim, if its elements were present. McKinney's Penal Law § 240.20.

Attorneys and Law Firms

****602** Law Offices of Stewart Lee Karlin, P.C., New York, N.Y. (Natalia Kapitonova on the brief), for appellant.

Zachary W. Carter, Corporation Counsel, New York, N.Y. (Francis F. Caputo and Avshalom Yotam of counsel), for respondent.

THOMAS A. DICKERSON, J.P., JOHN M. LEVENTHAL, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

***597** In an action to recover damages for malicious prosecution, the plaintiff appeals from an amended order of the Supreme Court, Kings County (Spodek, J.), dated September 7, 2012, which, after a jury verdict in favor of the defendant, denied his motion pursuant to CPLR 4404(a) to set aside the verdict and for a new trial.

ORDERED that the amended order is affirmed, with costs.

The plaintiff was arrested by officers of the New York City Police Department and charged with resisting arrest and disorderly conduct. The charges were ultimately dismissed, and the plaintiff subsequently ****603** commenced this action seeking damages from the City of New York for malicious prosecution. After a trial, the jury returned a verdict in favor of the City. The jury concluded that the police did not have probable cause to arrest the plaintiff for resisting arrest, but that there was probable cause for his arrest on disorderly conduct charges. Thereafter, the Supreme Court denied the plaintiff's motion to set aside the verdict and for a new trial.

The plaintiff contends that he is entitled to a new trial because the Supreme Court improperly instructed the jury that the plaintiff could not recover damages unless the jury found that the plaintiff was maliciously prosecuted for both disorderly conduct and resisting arrest. The plaintiff argues that malicious prosecution claims are limited to criminal proceedings and, thus, his arrest for disorderly conduct, which is a violation (*see* Penal Law § 240.20), should not have been a subject for the jury's consideration. However, contrary to the plaintiff's contention, his arrest for disorderly conduct can form the basis for a malicious prosecution cause of action, as long as the proceeding terminated in his favor, lacked probable cause, and was brought out of actual malice (*see Cantalino v. Danner,* 96 N.Y.2d 391, 394, 729 N.Y.S.2d 405, 754 N.E.2d 164; *Rivera v. City of New York,* 40 A.D.3d 334, 836 N.Y.S.2d 108; *Testa v. Federated Dept. Stores, Abraham & Straus Div.,* 118 A.D.2d 696, 499 N.Y.S.2d 973). Accordingly, the jury was properly instructed that a finding that there was probable cause for the disorderly conduct arrest required a verdict in favor of the City on the malicious prosecution cause of action (*see Rivera v. City of New York,* 40 A.D.3d at 338–339, 836 N.Y.S.2d 108; *Whyte v. City of Yonkers,* 36 A.D.3d 799, 828 N.Y.S.2d 218; *Bennett v. New York City Hous. Auth.,* 245 A.D.2d 254, 665 N.Y.S.2d

91). The plaintiff also contends that the Supreme Court improperly precluded certain videotapes from being admitted into evidence. However, the court providently exercised its discretion by not admitting the subject videotapes into evidence (*see People v. Patterson,* 93 N.Y.2d 80, 84, 688 N.Y.S.2d 101, 710 N.E.2d 665; *People v. Addison,* 107 A.D.3d 730, 966 N.Y.S.2d 217).

***598** Thus, the Supreme Court properly denied the plaintiff's motion.

All Citations

122 A.D.3d 596, 995 N.Y.S.2d 602, 2014 N.Y. Slip Op. 07483

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140 A.D.3d 841
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Melvin ALAS, appellant.

June 8, 2016.

Synopsis

Background: Defendant appealed from order of the Supreme Court, Queens County, Koenderman, J., designating him level two sex offender pursuant to Sex Offender Registration Act (SORA).

[Holding:] The Supreme Court, Appellate Division, held that assessment of 20 points against defendant for engaging in continuing course of sexual misconduct against victim was supported by clear and convincing evidence in record.

Affirmed.

West Headnotes (3)

[1] Mental Health Appeal

An appeal from an order designating the defendant a level two sex offender pursuant to the Sex Offender Registration Act (SORA) should not be dismissed on the ground that the defendant has been deported. McKinney's Correction Law § 6–C.

4 Cases that cite this headnote

[2] Mental Health Proceedings

In assessing points for the purpose of establishing a defendant's risk level pursuant to the Sex Offender Registration Act (SORA), evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, the parole officer, or the correction counselor, case summaries prepared by the Board of Examiners of Sex Offenders, or any other reliable source, including reliable hearsay. McKinney's Correction Law § 168–n(3).

2 Cases that cite this headnote

[3] Mental Health Scores and risk levels

Court's assessment of 20 points against defendant, resulting in him being designated level two sex offender pursuant to Sex Offender Registration Act (SORA), for engaging in continuing course of sexual misconduct against victim was supported by clear and convincing evidence in record, including case summary from Board of Examiners of Sex Offenders, presentence report, and felony complaint. McKinney's Correction Law § 168–n(3).

3 Cases that cite this headnote

Attorneys and Law Firms

***112** Seymour W. James, Jr., New York, N.Y. (Natalie Rea of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, William H. Branigan, and Anish M. Patel of counsel), for respondent.

RANDALL T. ENG, P.J., WILLIAM F. MASTRO, JOSEPH J. MALTESE, and HECTOR D. LaSALLE, JJ.

Opinion

Appeal by the defendant from an order of the Supreme Court, Queens County (Koenderman, J.), dated August 26, 2013, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

[1] Contrary to the People's contention, this appeal from an order designating the defendant a level two sex offender pursuant to the Sex Offender Registration Act (*see* Correction Law article 6–C; hereinafter SORA) should not be dismissed on the ground that the defendant has been deported (*see People v. Shim,* 139 A.D.3d 68, 28 N.Y.S.3d 87 [2d

Dept.2016]; *People v. Ibarra,* 137 A.D.3d 1097, 26 N.Y.S.3d 867).

***113** **[2]** **[3]** In establishing a defendant's risk level pursuant to SORA, the People bear the burden of establishing, by clear and convincing evidence, the facts supporting the determinations sought (*see* Correction Law § 168–n[3]; *People v. Pettigrew,* 14 N.Y.3d 406, 408, 901 N.Y.S.2d 569, 927 N.E.2d 1053; *People v. Mingo,* 12 N.Y.3d 563, 571, 883 N.Y.S.2d 154, 910 N.E.2d 983). In assessing points, evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, the parole officer, or the correction counselor, case summaries prepared by the Board of Examiners of Sex Offenders (hereinafter the Board), or any other reliable source, including reliable hearsay (*see People v. Mingo,* 12 N.Y.3d at 571–573, 883 N.Y.S.2d 154, 910 N.E.2d 983; *People v. Sanchez,* 136 A.D.3d 1007, 26 N.Y.S.3d 320; *People v. Arocho,* 130 A.D.3d 996, 997, 13 N.Y.S.3d 836). Contrary to the defendant's contention, the Supreme Court properly assessed 20 points against him under risk factor 4 for engaging in a continuing course of sexual misconduct against the victim. The assessment of these points was supported by clear and convincing evidence in the record, including the Board's case summary, the presentence report, and the felony complaint (*see People v. Arocho,* 130 A.D.3d at 997, 13 N.Y.S.3d 836; *People v. DeJesus,* 127 A.D.3d 1047, 5 N.Y.S.3d 893; *People v. Patronick,* 117 A.D.3d 1018, 1019, 986 N.Y.S.2d 593).

All Citations

140 A.D.3d 841, 35 N.Y.S.3d 112, 2016 N.Y. Slip Op. 04393

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144 A.D.3d 1008
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Nathaniel ALEXANDER, appellant.

Nov. 23, 2016.

Synopsis

Background: Defendant appealed order of the Supreme Court, Kings County, Cyrulnik, J., which designated him a level three sex offender pursuant to the Sex Offender Registration Act (SORA).

Holding: The Supreme Court, Appellate Division, held that clear and convincing evidence supported decision to impose an upward departure.

Affirmed.

West Headnotes (1)

[1] **Mental Health** Scores and risk levels

Clear and convincing evidence of aggravating factors not adequately taken into account by the Risk Assessment Instrument (RAI) supported decision, in proceeding to determine defendant's risk level under the Sex Offender Registration Act (SORA), to impose an upward departure from the presumptive risk level one designation to risk level three; shortly after he pleaded guilty to first-degree rape in satisfaction of the indictment upon which the RAI was based, defendant pleaded guilty to second-degree murder in satisfaction of three other indictments arising out of two incidents in which defendant, acting alone or with an accomplice, forced his way into a victim's apartment and committed forcible sexual acts, and a third incident in which he forced his way into a victim's apartment, attempted to rape her, and caused her death by asphyxiation, and those acts were not accounted for in the RAI. McKinney's Correction Law § 168 et seq.

9 Cases that cite this headnote

Attorneys and Law Firms

****746** Seymour W. James, Jr., New York, NY (Harold V. Ferguson, Jr., of counsel; Jennifer Yun on the brief), for appellant.

Eric Gonzalez, Acting District Attorney, Brooklyn, NY (Leonard Joblove, Joyce Adolfsen, and Daniel Berman of counsel), for respondent.

****747** JOHN M. LEVENTHAL, J.P., ROBERT J. MILLER, HECTOR D. LaSALLE and VALERIE BRATHWAITE NELSON, JJ.

Opinion

***1008** Appeal by the defendant from an order of the Supreme Court, Kings County (Cyrulnik, J.), dated February 24, 2014, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in granting the People's application, upon the recommendation of the Board of Examiners of Sex Offenders (hereinafter the Board), for an upward departure from the presumptive risk level one designation to risk level three. The People demonstrated, by clear and convincing evidence, that there were aggravating factors not adequately taken into account by the Board's Risk Assessment Instrument (hereinafter RAI) (*see People v. Gillotti,* 23 N.Y.3d 841, 861, 994 N.Y.S.2d 1, 18 N.E.3d 701). Specifically, shortly after he pleaded guilty to the crime of rape in the first degree in satisfaction of the indictment upon which the RAI was based, the defendant pleaded guilty to murder in the second degree in satisfaction of three other indictments that had been consolidated. In two of the incidents underlying those indictments, the defendant, acting alone or with an accomplice, forced his way into the victim's apartment and committed forcible sexual acts. In the third incident, the defendant forced his way into a victim's apartment, attempted

to rape her, and caused her death by asphyxiation. Because those acts were not accounted for in the RAI, the court providently exercised its discretion in determining that an upward departure to a risk level three was warranted (*see People v. Palmer,* 68 A.D.3d 1364, 1366, 892 N.Y.S.2d 232).

The defendant's contention that the Supreme Court failed to sufficiently consider certain mitigating factors in arriving at its determination is unavailing. The defendant's satisfactory conduct during his lengthy incarceration and the fact that he completed sex offender treatment were taken into account under risk factors 12 and 13 (*see People v. DeDona,* 102 A.D.3d 58, 71, 954 N.Y.S.2d 541; *People v. Riverso,* 96 A.D.3d 1533, 1534, 947 N.Y.S.2d 250; *People v. King,* 72 A.D.3d 1363, 1364, 898 N.Y.S.2d 734). The defendant otherwise failed to set forth any mitigating factors that would overcome the risk embodied by his conduct prior to his incarceration.

Accordingly, the Supreme Court properly designated the defendant ***1009** a level three sex offender.

All Citations

144 A.D.3d 1008, 41 N.Y.S.3d 746, 2016 N.Y. Slip Op. 07939

151 A.D.3d 767
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Gary ANDERSON, appellant.

June 7, 2017.

Synopsis

Background: Defendant appealed from an order of the Supreme Court, Kings County, Sheryl L. Parker, J., which designated him a level three sex offender pursuant to Sex Offender Registration Act (SORA).

Holdings: The Supreme Court, Appellate Division, held that:

[1] there was no evidence that defendant was expelled from, or refused to participate in, sex offender treatment at residential treatment facilities form which he was discharged, and

[2] defendant failed to identify any appropriate mitigating factor which would warrant a downward departure to a risk level one designation.

Reversed.

West Headnotes (6)

[1] Mental Health Proceedings

In establishing a defendant's risk level pursuant to Sex Offender Registration Act (SORA), the People bear the burden of establishing, by clear and convincing evidence, the facts supporting the determinations sought. McKinney's Correction Law § 168–n(3).

1 Case that cites this headnote

[2] Mental Health Proceedings

In assessing points under Sex Offender Registration Act (SORA), evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders, or any other reliable source, including reliable hearsay. McKinney's Correction Law § 168 et seq.

[3] Mental Health Scores and risk levels

Although defendant was discharged from two residential treatment facilities, the evidence failed to demonstrate that he was expelled from, or explicitly refused to participate in, sex offender treatment during his confinement at those facilities, as required to assess 15 points against defendant under Sex Offender Registration Act (SORA) for having refused or been expelled from sex offender treatment. McKinney's Correction Law § 168 et seq.

[4] Mental Health Scores and risk levels

Conduct that places a defendant in a position where he or she could not receive sex offender treatment is not equal to refusal to participate in treatment, as would warrant assessing 15 points against defendant under Sex Offender Registration Act (SORA), and inferring refusal from a defendant's disciplinary record is not supported by SORA's Risk Assessment Guidelines. McKinney's Correction Law § 168 et seq.

[5] Mental Health Scores and risk levels

Defendant failed to identify any appropriate mitigating factor which would warrant a downward departure to a risk level one designation under Sex Offender Registration Act (SORA). McKinney's Correction Law § 168 et seq.

3 Cases that cite this headnote

[6] **Mental Health** Proceedings

A defendant seeking a downward departure from the presumptive risk level under Sex Offender Registration Act (SORA) has the initial burden of: (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the SORA Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence. McKinney's Correction Law § 168 et seq.

2 Cases that cite this headnote

Attorneys and Law Firms

****241** Seymour W. James, Jr., New York, NY (Bonnie C. Brennan of counsel), for appellant.

Eric Gonzalez, Acting District Attorney, Brooklyn, NY (Leonard Joblove, ****242** Morgan J. Dennehy, and Julian Joiris of counsel), for respondent.

L. PRISCILLA HALL, J.P., SANDRA L. SGROI, JOSEPH J. MALTESE, and HECTOR D. LaSALLE, JJ.

Opinion

***767** Appeal from an order of the Supreme Court, Kings County (Sheryl L. Parker, J.), dated December 19, 2012. The order, after a hearing, designated the defendant a level three sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the defendant is designated a level two sex offender.

The defendant was convicted, upon his plea of guilty, of sexual abuse in the first degree and endangering the welfare of a child. Following a hearing to determine the defendant's risk level under the Sex Offender Registration Act (*see* Correction Law article 6–C; hereinafter SORA), the Supreme Court assessed a total of 120 points under the risk assessment instrument (hereinafter RAI), denied the defendant's request for a downward departure, and designated him a level three sex offender. ***768** On appeal, the defendant challenges the assessment of points under risk factors 12 and 13, as well as the court's denial of his request for a downward departure.

[1] [2] "In establishing a defendant's risk level pursuant to SORA, the People bear the burden of establishing, by clear and convincing evidence, the facts supporting the determinations sought" (*People v. Eaton,* 105 A.D.3d 722, 723, 963 N.Y.S.2d 271; *see* Correction Law § 168–n[3]). "In assessing points, evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders (hereinafter the Board), or any other reliable source, including reliable hearsay" (*People v. Crandall,* 90 A.D.3d 628, 629, 934 N.Y.S.2d 446).

Contrary to the defendant's contention, the Supreme Court properly assessed 20 points under risk factor 13, rather than the 10 points assessed by the Board on the RAI. The People demonstrated by clear and convincing evidence that the defendant engaged in unsatisfactory conduct during his confinement or supervision involving sexual misconduct (*see People v. George,* 142 A.D.3d 1059, 1060, 38 N.Y.S.3d 561; *People v. Dallas,* 122 A.D.3d 698, 699, 995 N.Y.S.2d 618; *People v. Baluja,* 109 A.D.3d 803, 804, 971 N.Y.S.2d 213; *People v. Lawson,* 90 A.D.3d 1006, 1006–1007, 935 N.Y.S.2d 650).

[3] [4] We agree with the defendant, however, that the People failed to establish by clear and convincing evidence that the Board correctly assessed 15 points against him under risk factor 12 (*see People v. Ford,* 25 N.Y.3d 939, 941, 6 N.Y.S.3d 541, 29 N.E.3d 888; *People v. Loughlin,* 145 A.D.3d 1426, 1427, 44 N.Y.S.3d 821; *People v. Fowler,* 145 A.D.3d 437, 438, 43 N.Y.S.3d 275; *cf. People George,* 142 A.D.3d 1059, 1060, 38 N.Y.S.3d 561; *People v. Valdez,* 123 A.D.3d 785, 786, 996 N.Y.S.2d 727; *People v. Harris,* 100 A.D.3d 727, 728, 953 N.Y.S.2d 671). Under risk factor 12, a court may assess 15 points against an offender who "has refused or been expelled from" sex offender treatment (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). However, "[c]onduct that places a defendant in a position where he or she could not receive treatment is not equal to refusal to participate in treatment. Inferring refusal from a defendant's disciplinary record is not supported ****243** by the Guidelines, which state that points should be assessed where a defendant refuses treatment or is

expelled from treatment" (*People v. Ford,* 25 N.Y.3d at 941, 6 N.Y.S.3d 541, 29 N.E.3d 888).

Here, although it is undisputed that the defendant was discharged from two residential treatment facilities due to misconduct, the People failed to present any reliable evidence demonstrating that the defendant received sex offender treatment ***769** during his confinement or supervision at those facilities. In December 2004, after the defendant's conviction in November 2004, when he was 16 years old, the defendant was placed at Lakeview NeuroRehabilitation Center (hereinafter Lakeview), a residential treatment facility. In November 2005, the defendant was discharged from Lakeview and remanded to Rikers Island after numerous incidents of aggression. According to a psychosexual evaluation dated October 20, 2005, the defendant received various forms of behavioral therapy at Lakeview but, as of that date, he had " not received any sexual offender-specific treatment." In June 2006, the defendant was transferred to another residential treatment facility, Pennsylvania Clinical School, which was described as a facility that treated juveniles who commit sex offenses, arson, and various other serious offenses. In October 2006, the defendant was discharged from Pennsylvania Clinical School after attacking a staff member. Thus, although the evidence demonstrated that the defendant was discharged from two residential treatment facilities, the evidence failed to demonstrate that the defendant was expelled from, or explicitly refused to participate in, sex offender treatment during his confinement at those facilities (*see People v. Ford,* 25 N.Y.3d at 941, 6 N.Y.S.3d 541, 29 N.E.3d 888).

[5] **[6]** The Supreme Court properly denied the defendant's request for a downward departure to a risk level one designation. A defendant seeking a downward departure from the presumptive risk level has the initial burden of "(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" (*People v. Wyatt,* 89 A.D.3d 112, 128, 931 N.Y.S.2d 85; *see People v. Gillotti,* 23 N.Y.3d 841, 861, 994 N.Y.S.2d 1, 18 N.E.3d 701). Here, the defendant failed to identify any appropriate mitigating factor which would warrant a downward departure (*see People v. Calle–Calle,* 145 A.D.3d 804, 804, 41 N.Y.S.3d 911; *People v. White,* 144 A.D.3d 881, 882, 40 N.Y.S.3d 786; *People v. Jordan,* 142 A.D.3d 596, 596, 36 N.Y.S.3d 608).

After subtracting the 15 points improperly assessed under risk factor 12, the defendant's point total on the RAI is 105, within the range for a level two sex offender. We therefore reverse the order appealed from and designate the defendant a level two sex offender.

All Citations

151 A.D.3d 767, 56 N.Y.S.3d 240, 2017 N.Y. Slip Op. 04478

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120 A.D.3d 1355
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Alphonso BARNES, appellant.

Sept. 17, 2014.

Synopsis

Background: Defendant was convicted in the Supreme Court, Nassau County, Robbins, J., of rape in the first degree, criminal sexual act in the first degree, and sexual abuse in the first degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant did not knowingly, voluntarily, and intelligently waive his *Miranda* rights; but

[2] court's error in admitting defendant's statements to law enforcement officials was harmless; and

[3] court's inclusion in jury charge of amendment to definition of "sexual contact" which became effective after alleged offense was not prejudicial error.

Affirmed.

West Headnotes (4)

[1] Criminal Law Particular Cases

Although rape defendant's refusal to sign the *Miranda* card did not, in itself, preclude the finding of a valid waiver of *Miranda* rights, the record was devoid of any indication that defendant clearly understood his *Miranda* rights as read to him, and thus he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights before making statements to law enforcement officials.

[2] Criminal Law Acts, admissions, declarations, and confessions of accused

Trial court's error in admitting defendant's statements to law enforcement officials, which were obtained without a knowing, voluntary, and intelligent waiver by defendant of his *Miranda* rights, was harmless, since the evidence of defendant's guilt, without reference to the error, was overwhelming, and there was no reasonable possibility that the error might have contributed to his conviction for rape in the first degree, criminal sexual act in the first degree, and sexual abuse in the first degree.

1 Case that cites this headnote

[3] Criminal Law Credibility of Witnesses

In fulfilling its responsibility to conduct an independent review of the weight of the evidence, appellate court nevertheless accords great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor. McKinney's CPL § 470.15(5).

[4] Criminal Law Elements and incidents of offense; definitions

Although trial court erred in including in its jury instruction regarding sexual abuse in the first degree an amendment to the definition of "sexual contact," which became effective after the acts in question were committed, the error was not substantial and did not seriously and prejudicially undermine the defendant's defense to the charge.

Attorneys and Law Firms

****151** Matthew W. Brissenden, Garden City, N.Y., for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Tammy J. Smiley and Laurie K. Gibbons of counsel), for respondent.

PETER B. SKELOS, J.P., LEONARD B. AUSTIN, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

***1355** Appeal by the defendant from a judgment of the Supreme Court, Nassau County, (Robbins, J.) rendered September 5, 2012, as amended September 7, 2012, convicting him of rape in the first degree, criminal sexual act in the first degree, and sexual abuse in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing pursuant to a stipulation in lieu of motions (St. George, J.), of the suppression of the defendant's statements to law enforcement officials.

****152** ORDERED that the judgment, as amended, is affirmed.

[1] **[2]** Contrary to the hearing court's determination, the evidence adduced at the suppression hearing was insufficient to establish that the defendant's statements to law enforcement officials were made after he knowingly, voluntarily, and intelligently waived his *Miranda* rights (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694). Although the defendant's refusal to sign the *Miranda* card did not, in itself, preclude the finding of a valid waiver (*see People v. Sirno,* 76 N.Y.2d 967, 968, 563 N.Y.S.2d 730, 565 N.E.2d 479; *People v. Thornton,* 87 A.D.3d 663, 664, 928 N.Y.S.2d 358; *People v. Saunders,* 71 A.D.3d 1058, 1059, 898 N.Y.S.2d 168), the record was devoid of any indication that the defendant clearly understood his *Miranda* rights as read to him (*see Berghuis v. Thompkins,* 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098; *People v. Sirno,* 76 N.Y.2d at 970, 563 N.Y.S.2d 730, 565 N.E.2d 479; *cf. People v. Thornton,* 87 A.D.3d at 664, 928 N.Y.S.2d 358; *People v. Saunders,* 71 A.D.3d at 1059, 898 N.Y.S.2d 168; *People v. Cartwright,* 61 A.D.3d 695, 877 N.Y.S.2d 136; *People v. Gill,* 20 A.D.3d 434, 798 N.Y.S.2d 507; *People v. Rivas,* 182 A.D.2d 722, 723, 582 N.Y.S.2d 727; *People v. Rivas,* 175 A.D.2d 186, 572 N.Y.S.2d 336). Accordingly, the hearing court should have suppressed the defendant's statements. However, the evidence of the defendant's guilt, without reference to the error, was overwhelming, and there is no reasonable possibility that the error might have contributed to the defendant's conviction (*see People v. Crimmins,* 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 326 N.E.2d 787; ***1356** *People v. Olavarrueth,* 74 A.D.3d 1361, 1362, 904 N.Y.S.2d 214). Thus, the admission of these statements into evidence at the defendant's trial was harmless beyond a reasonable doubt.

[3] In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson,* 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Romero,* 7 N.Y.3d 633, 643–644, 826 N.Y.S.2d 163, 859 N.E.2d 902; *People v. Mateo,* 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Cahill,* 2 N.Y.3d 14, 58, 777 N.Y.S.2d 332, 809 N.E.2d 561; *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt as to the crimes of which the defendant was convicted was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d at 643–644, 826 N.Y.S.2d 163, 859 N.E.2d 902; *People v. Cahill,* 2 N.Y.3d at 58, 777 N.Y.S.2d 332, 809 N.E.2d 561).

[4] The defendant's objections to the Supreme Court's instructions to the jury on the charges of rape in the first degree and sexual abuse in the first degree are unpreserved for appellate review (*see People v. Devers,* 82 A.D.3d 1261, 1263, 920 N.Y.S.2d 177; *People v. Pruitt,* 74 A.D.3d 1366, 1367, 903 N.Y.S.2d 239; *People v. Floyd,* 34 A.D.3d 494, 495, 823 N.Y.S.2d 532; *People v. Soto,* 31 A.D.3d 793, 818 N.Y.S.2d 487; CPL 470.05). In any event, we are satisfied that the court's charge, as a whole, adequately conveyed to the jury the correct principles, and all of the elements of rape in the first degree (*see People v. Gray,* 300 A.D.2d 27, 750 N.Y.S.2d 613). Further, although the court erred in including in its charge regarding sexual abuse in the first degree an amendment to the definition of "sexual contact," which became effective after the acts in question were committed, the error was not "substantial" and did not "seriously ****153** and prejudicially" undermine the defendant's defense (*People v. Lopez,* 200 A.D.2d 767, 768, 607 N.Y.S.2d 368).

The defendant's contention that his trial counsel rendered ineffective assistance is without merit (*see People v. Caban,* 5 N.Y.3d 143, 152, 800 N.Y.S.2d 70, 833 N.E.2d 213; *People v. Henry,* 95 N.Y.2d 563, 565–566, 721 N.Y.S.2d 577, 744 N.E.2d 112; *People v. Berroa,* 99 N.Y.2d 134, 138–139, 753 N.Y.S.2d 12, 782 N.E.2d 1148; *People v. Hobot,* 84 N.Y.2d 1021, 1022, 622 N.Y.S.2d 675, 646 N.E.2d 1102; *People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400).

All Citations

120 A.D.3d 1355, 992 N.Y.S.2d 150, 2014 N.Y. Slip Op. 06209

117 A.D.3d 1071
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Gary BENLOSS, appellant.

May 29, 2014.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Collini, J., of murder in the second degree. Following denial of his motion to vacate judgment by order of the Supreme Court, Kings County, Gary, J., defendant appealed.

Holding: The Supreme Court, Appellate Division, held that prosecution's failure to disclose that one of its witnesses at trial had a criminal charge pending against him was not *Brady* violation.

Affirmed.

West Headnotes (1)

[1] **Criminal Law** Impeaching evidence

Prosecution's failure to disclose that one of its witnesses at trial had a criminal charge pending against him did not constitute a *Brady* violation, where there was no reasonable possibility that such nondisclosure affected the outcome of the trial.

3 Cases that cite this headnote

Attorneys and Law Firms

****625** Ronald Paul Hart, New York, N.Y., for appellant.

Kenneth P. Thompson, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Solomon Neubort of counsel), for respondent.

WILLIAM F. MASTRO, J.P., PETER B. SKELOS, JEFFREY A. COHEN, and HECTOR D. LASALLE, JJ.

Opinion

****626** ***1072** Appeal by the defendant, by permission, from an order of the Supreme Court, Kings County (Gary, J.), entered November 30, 2012, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of the same court (Collini, J.), rendered November 20, 2003, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the order is affirmed.

The Supreme Court properly denied, without a hearing, that branch of the defendant's motion pursuant to CPL 440.10 which was to vacate a judgment of conviction on the ground that the defendant was deprived of the effective assistance of counsel. The parties' submissions in support of and in opposition to the defendant's motion established that the defendant received meaningful representation at trial (*see* CPL 440.30[4]; *People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400; *People v. Majors,* 59 A.D.3d 738, 739, 875 N.Y.S.2d 111; *cf. People v. Jenkins,* 84 A.D.3d 1403, 1409, 923 N.Y.S.2d 706).

Furthermore, the Supreme Court properly denied, without a hearing, that branch of the defendant's motion which was pursuant to CPL 440.10 to vacate the judgment on the ground that the prosecution committed a *Brady* violation (*see Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215), by failing to disclose that one of its witnesses at trial had a criminal charge pending against him. Based upon the parties' submissions in support of and in opposition to the defendant's motion, there was no reasonable possibility that such nondisclosure affected the outcome of the trial (*see People v. Fuentes,* 12 N.Y.3d 259, 263, 879 N.Y.S.2d 373, 907 N.E.2d 286; *People v. Graves,* 62 A.D.3d 900, 901, 878 N.Y.S.2d 630; *cf. People v. Johnson,* 107 A.D.3d 1161, 1166, 967 N.Y.S.2d 217; *cf. also People v. Garrett,* 106 A.D.3d 929, 931, 964 N.Y.S.2d 652).

The defendant's remaining contentions were either previously determined on the merits on the direct appeal from the judgment of conviction (*see* CPL 440.10 [2] [c]; *see also*

People v. Benloss, 60 A.D.3d 686, 874 N.Y.S.2d 558), or sufficiently appeared on the record "to have permitted" adequate review thereof on the direct appeal (CPL 440.10[2][c]; *see People v. Cooks,* 67 N.Y.2d 100, 103, 500 N.Y.S.2d 503, 491 N.E.2d 676; *People v. Kandekore,* 300 A.D.2d 318, 319, 750 N.Y.S.2d 776). Accordingly, the Supreme Court properly denied those branches of the defendant's motion (*see* CPL 440.10[2]; *People v. Kandekore,* 300 A.D.2d at 319, 750 N.Y.S.2d 776).

All Citations

117 A.D.3d 1071, 986 N.Y.S.2d 625, 2014 N.Y. Slip Op. 03852

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195 A.D.3d 740
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Darren BERNARD, appellant.

2016–08012, 2016–08155
|
(Ind. Nos. 10980/97, 10644/02)
|
Argued—May 17, 2021
|
June 9, 2021

Attorneys and Law Firms

Paul Skip Laisure, New York, N.Y. (Michael Arthus of counsel), for appellant.

Melinda Katz, District Attorney, Kew Gardens, N.Y. (Johnnette Traill, Joseph N. Ferdenzi, and Josette Simmons McGhee of counsel), for respondent.

HECTOR D. LASALLE, P.J., CHERYL E. CHAMBERS, BETSY BARROS, ANGELA G. IANNACCI, JJ.

DECISION & ORDER

***740** Appeals by the defendant, by permission, from (1) an order ***741** of the Supreme Court, Queens County (Barry Kron, J.), dated January 12, 2016, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate two judgments of the same court (Fernando Camacho, J.), both rendered August 23, 2011, convicting him ****403** of criminal sale of a controlled substance in the fifth degree under Indictment No. 10980/97, and bail jumping in the first degree under Indictment No. 10644/02, upon his pleas of guilty, and imposing sentences, and (2) an order of the same court (Barry Kron, J.) dated April 29, 2016.

ORDERED that the order dated January 12, 2016, is reversed, on the law, and the matter is remitted to the Supreme Court, Queens County, for a hearing and a new determination thereafter of the defendant's motion pursuant to CPL 440.10 to vacate the judgments rendered August 23, 2011; and it is further,

ORDERED that the appeal from the order dated April 29, 2016, is dismissed as academic in light of our determination on the appeal from the order dated January 12, 2016.

On August 23, 2011, the defendant, a citizen of Trinidad and Tobago and lawful permanent resident of the United States, pleaded guilty to criminal sale of a controlled substance in the fifth degree under Indictment No. 10980/97 and bail jumping in the first degree under Indictment No. 10644/02, and was sentenced to time served. In April 2013, the United States Department of Homeland Security initiated a removal proceeding against the defendant on the ground, inter alia, that his conviction of criminal sale of a controlled substance in the fifth degree was a deportable offense.

In October 2015, the defendant moved pursuant to CPL 440.10 to vacate the judgments of conviction, contending that he was denied the effective assistance of counsel by his attorney's alleged failure to advise him of the clear immigration consequences of his pleas. In an order dated January 12, 2016, the Supreme Court denied the motion without conducting a hearing. The defendant appeals.

A defendant has the right to the effective assistance of counsel, guaranteed under both the federal and state constitutions (*see* U.S. Const Amend VI; NY Const, art I, § 6; *People v. Baldi,* 54 N.Y.2d 137, 146, 444 N.Y.S.2d 893, 429 N.E.2d 400). A defendant is entitled to such effective assistance of counsel before deciding whether to plead guilty (*see Padilla v. Kentucky,* 559 U.S. 356, 364, 130 S.Ct. 1473, 176 L.Ed.2d 284; *People v. Facey,* 180 A.D.3d 927, 928, 116 N.Y.S.3d 607). To prevail on a claim of ineffective assistance of counsel under the Federal Constitution, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" ***742** and "that the deficient performance prejudiced the defense" (*Strickland v. Washington,* 466 U.S. 668, 687–688, 104 S.Ct. 2052, 80 L.Ed.2d 674).

In *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284, the U.S. Supreme Court held that, due to the unique nature of deportation, criminal defense counsel has a duty to inform defendants whether their pleas of guilty carry a risk of deportation. Thus, "[w]ith regard to the first prong, in the context of a plea of guilty, an attorney's failure to advise a criminal defendant, or affirmative misadvice to

the defendant, regarding the clear removal consequences of the plea constitutes deficient performance" (*People v. Lovell,* 188 A.D.3d 1255, 1256–1257, 132 N.Y.S.3d 829; *see Padilla v. Kentucky,* 559 U.S. at 369, 130 S.Ct. 1473; *People v. Abdallah,* 153 A.D.3d 1424, 1425, 61 N.Y.S.3d 618; *People v. Picca,* 97 A.D.3d 170, 178, 947 N.Y.S.2d 120). In such cases, relief will depend upon whether the defendant can demonstrate prejudice as a result thereof (*see Padilla v. Kentucky,* 559 U.S. at 374, 130 S.Ct. 1473).

****404** Under the New York Constitution, a defendant must show that he or she was not afforded "meaningful representation" (*People v. Baldi,* 54 N.Y.2d at 147, 444 N.Y.S.2d 893, 429 N.E.2d 400), which also entails a two-pronged test. The first prong is identical to its federal counterpart (*see People v. Galan,* 116 A.D.3d 787, 789, 983 N.Y.S.2d 317). The second prong contains a "prejudice component [which] focuses on the 'fairness of the process as a whole rather than its particular impact on the outcome of the case' " (*People v. Caban,* 5 N.Y.3d 143, 156, 800 N.Y.S.2d 70, 833 N.E.2d 213, quoting *People v. Benevento,* 91 N.Y.2d 708, 714, 674 N.Y.S.2d 629, 697 N.E.2d 584).

Here, the defendant avers that he was not advised of the immigration consequences of his pleas of guilty, and there is no evidence in the transcript of the extremely brief plea proceeding that defense counsel advised the defendant of such consequences. Moreover, the defendant's averments, including that he has been in a long-term relationship with a United States citizen, with whom he has four children, sufficiently alleged that a decision to reject the plea offer, and take a chance, however slim, of being acquitted after trial, would have been rational (*see People v. Picca,* 97 A.D.3d at 184–185, 947 N.Y.S.2d 120).

Accordingly, we reverse the order denying the defendant's motion to vacate the judgments of conviction and remit the matter to the Supreme Court, Queens County, for a hearing on the issue of whether the defendant was denied the effective assistance of counsel due to his counsel's failure to advise him of the immigration consequences of his pleas of guilty and a new determination thereafter of the motion. In light of our determination, the appeal from the order dated April 29, 2016, has been rendered academic.

LASALLE, P.J., CHAMBERS, BARROS and IANNACCI, JJ., concur.

All Citations

195 A.D.3d 740, 145 N.Y.S.3d 402 (Mem), 2021 N.Y. Slip Op. 03601

149 A.D.3d 860
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Rudolph BISNAUTH, appellant.

April 12, 2017.

Synopsis

Background: Defendant was convicted in the County Court, Suffolk County, Doyle, J., of murder in the second degree. Following the denial of his motion to vacate, Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] any error in introduction of prior statements to impeach two prosecution witnesses was harmless;

[2] missing witness charge regarding co-defendant, who had pleaded guilty to manslaughter in the first degree, was not warranted; and

[3] there was no *Brady* violation in the prosecution's failure to disclose that a witness had been a police informant.

Affirmed.

West Headnotes (3)

[1] Criminal Law Witnesses

Any error was harmless in prosecutor's introduction into evidence, at defendant's trial for murder in the second degree, of prior statements to impeach two prosecution witnesses, trial court's failure to give limiting instructions at the time the impeachment material was introduced, and the prosecutor's reference to the prior statements during summation; the evidence of defendant's guilt was overwhelming and there was no significant probability that the error contributed to the defendant's conviction. McKinney's CPL § 60.35.

1 Case that cites this headnote

[2] Criminal Law Failure to call witness or produce evidence

Missing witness charge regarding co-defendant, who had pleaded guilty to manslaughter in the first degree, was not warranted, in defendant's trial for murder in the second degree, since defendant failed to meet his burden of establishing that co-defendant would normally be expected to give noncumulative testimony favorable to the People. McKinney's CPL § 60.22.

1 Case that cites this headnote

[3] Criminal Law Impeaching evidence

There was no *Brady* violation in the prosecution's failure to disclose that a witness had been a police informant, since there was no reasonable possibility that the nondisclosure affected the outcome of the trial at which defendant was convicted of murder in the second degree.

Attorneys and Law Firms

****600** Joseph Ferrante, Hauppauge, NY, for appellant.

Thomas J. Spota, District Attorney, Riverhead, NY (Michael J. Miller of counsel), for respondent.

RUTH C. BALKIN, J.P., LEONARD B. AUSTIN, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

***860** Appeals by the defendant (1) from a judgment of the County Court, Suffolk County (Doyle, J.), rendered March 15, 2011, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence, and (2), by permission, from an order of the Supreme Court, Suffolk County (Cohen, J.), dated April 23, 2015, which, after a hearing, denied his motion pursuant to CPL 440.10 to vacate the judgment rendered March 15, 2011.

ORDERED that the judgment and the order are affirmed.

A grand jury indicted the defendant and Michael McKenzie for acting in concert to commit murder in the second degree (two counts: intentional and depraved indifference; Penal Law §§ 125.25[1], [2]) in connection with the shooting death of Jeremiah Armstrong outside of a residence in Wyandanch on the evening of June 1, 2009. McKenzie subsequently pleaded guilty to manslaughter in the first degree in satisfaction of the indictment insofar as against him (*see People v. McKenzie,* 98 A.D.3d 749, 950 N.Y.S.2d 177). A jury found the defendant guilty of depraved indifference murder. Thereafter, the defendant moved ***861** pursuant to CPL 440.10 to vacate the judgment on the ground that the prosecution committed a *Brady* violation (*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215) by failing to disclose, prior to trial, that a key witness for the prosecution had been a police informant. After a hearing, the Supreme Court denied the motion.

The defendant contends that the jury verdict was against the weight of the evidence. In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson,* 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo,* 2 N.Y.3d 383, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley,* 69 N.Y.2d 490, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the ****601** evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[1] The defendant ascribes error to the prosecutor's introduction into evidence of prior statements to impeach two prosecution witnesses, the failure of the trial court to give limiting instructions at the time the impeachment material was introduced pursuant to CPL 60.35, and the prosecutor's reference to the prior statements during summation (*see People v. Solomon,* 16 A.D.3d 701, 702, 794 N.Y.S.2d 55). These contentions are, for the most part, unpreserved for appellate review (*see* CPL 470.05[2]). In any event, to the extent these contentions have merit, we find any error harmless, as the evidence of the defendant's guilt was overwhelming and there was no significant probability that the error contributed to the defendant's conviction (*see People v. Saez,* 69 N.Y.2d 802, 804, 513 N.Y.S.2d 380, 505 N.E.2d 945; *People v. Crimmins,* 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787). Contrary to the defendant's alternative contention, he was not deprived of the effective assistance of counsel by his attorney's failure to preserve some of these claims during trial (*see People v. Ennis,* 11 N.Y.3d 403, 415, 872 N.Y.S.2d 364, 900 N.E.2d 915; *People v. Stultz,* 2 N.Y.3d 277, 287, 778 N.Y.S.2d 431, 810 N.E.2d 883; *People v. Howard,* 120 A.D.3d 1259, 1260, 992 N.Y.S.2d 144).

[2] The trial court properly denied the defendant's request for a missing witness charge, as the defendant failed to meet his burden of establishing that the witness in question, the codefendant, would normally be expected to give noncumulative testimony favorable to the People (*see generally People v. Savinon,* 100 N.Y.2d 192, 196, 761 N.Y.S.2d 144, 791 N.E.2d 401; *People v. Gonzalez,* 68 N.Y.2d 424, 427, 509 N.Y.S.2d 796, 502 N.E.2d 583; *Buttice v. Dyer,* 1 A.D.3d 552, 552–553, 767 N.Y.S.2d 784). Indeed, the testimony of a codefendant who has pleaded guilty is "presumptively suspect," and a prosecutor would not ***862** normally be expected to call such a witness at trial (*People v. Rios,* 184 A.D.2d 244, 245, 584 N.Y.S.2d 813; *see* CPL 60.22; *People v. Heidt,* 95 A.D.3d 1234, 1235, 945 N.Y.S.2d 164; *People v. Cyrus,* 18 A.D.3d 1020, 1022, 794 N.Y.S.2d 755; *People v. Arnold,* 298 A.D.2d 895, 895, 748 N.Y.S.2d 92).

[3] The Supreme Court properly denied, after a hearing, the defendant's motion pursuant to CPL 440.10 to vacate the judgment on the ground that the prosecution committed a *Brady* violation (*see Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215) by failing to disclose that a witness had been a police informant. There was no reasonable possibility that such nondisclosure affected the outcome of the trial (*see People v. Fuentes,* 12 N.Y.3d 259, 263, 879 N.Y.S.2d 373, 907 N.E.2d 286; *People v. Benloss,* 117 A.D.3d 1071, 986 N.Y.S.2d 625; *People v. Graves,* 62 A.D.3d 900, 901, 878 N.Y.S.2d 630; *People v. Mauro,* 236 A.D.2d 560, 654 N.Y.S.2d 384).

All Citations

149 A.D.3d 860, 51 N.Y.S.3d 599, 2017 N.Y. Slip Op. 02807

121 A.D.3d 658
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Joseph BOYD, appellant.

Oct. 1, 2014.

Synopsis

Background: Defendant appealed order of the County Court, Dutchess County, Greller, J., which designated him a level three sex offender pursuant to the Sex Offender Registration Act (SORA).

Holding: The Supreme Court, Appellate Division, held that clear and convincing evidence supported decision to depart upward from presumptive risk level classification.

Affirmed.

West Headnotes (1)

[1] **Mental Health** Proceedings

Clear and convincing evidence, in proceeding to determine defendant's risk level under the Sex Offender Registration Act (SORA), of the existence of an aggravating factor not adequately taken into account by the Risk Assessment Guidelines, supported decision to depart upward from a level two to a level three sex offender; proof presented at hearing established that defendant was convicted in New Jersey of failing to register as a sex offender. McKinney's Correction Law § 168 et seq.

5 Cases that cite this headnote

Attorneys and Law Firms

****184** Thomas N.N. Angell, Poughkeepsie, N.Y. (Steven Levine of counsel), for appellant.

William V. Grady, District Attorney, Poughkeepsie, N.Y. (Kirsten A. Rappleyea of counsel), for respondent.

****185** PETER B. SKELOS, J.P., SHERI S. ROMAN, SYLVIA O. HINDS–RADIX, and HECTOR D. LaSALLE, JJ.

Opinion

***658** Appeal by the defendant from an order of the County Court, Dutchess County (Greller, J.), dated June 21, 2012, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

"Utilization of the risk assessment instrument will generally 'result in the proper classification in most cases so that departures will be the exception—not the rule' " (*People v. Walker,* 67 A.D.3d 760, 761, 888 N.Y.S.2d 195, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). However, "[a] court may exercise its discretion and depart upward from the presumptive risk level where 'it concludes that there exists an aggravating ... factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [Sex Offender Registration Act] guidelines' " (*People v. Richardson,* 101 A.D.3d 837, 838, 957 N.Y.S.2d 158, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *see People v. LaPorte,* 119 A.D.3d 758, 989 N.Y.S.2d 309; *People v. Willette,* 115 A.D.3d 920, 982 N.Y.S.2d 173; *People v. Dexter,* 21 A.D.3d 403, 404, 799 N.Y.S.2d 807).

Here, the County Court properly granted the People's motion for an upward departure of the defendant's risk level designation from a level two to a level three sex offender. Contrary to the defendant's contention, the People demonstrated by clear and convincing evidence the existence of an aggravating factor that was not adequately taken into account by the guidelines. The proof presented at the hearing established, inter alia, that the defendant was convicted in New Jersey of failing to register as a sex offender, which justified the court's determination to grant the People's request for an upward departure (*see People v. Faver,* 113 A.D.3d 662, 663, 978 N.Y.S.2d 690; *People v. Porter,* 74 A.D.3d 767, 767–

768, 901 N.Y.S.2d 534; *People v. Turpeau,* 68 A.D.3d 1083, 1083, 890 N.Y.S.2d 334; ***659** *People v. Walker,* 67 A.D.3d 760, 761, 888 N.Y.S.2d 195; *People v. Roberts,* 54 A.D.3d 1106, 1107, 863 N.Y.S.2d 837).

The parties' remaining contentions either are without merit, or need not be reached in light of our determination.

All Citations

121 A.D.3d 658, 993 N.Y.S.2d 184, 2014 N.Y. Slip Op. 06566

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178 A.D.3d 716
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Daquan BRELAND, Appellant.

2015–11522
|
(Ind. No. 7761/13)
|
Argued - September 16, 2019
|
December 4, 2019

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Neil Jon Firetog, J., of murder in the second degree and criminal possession of a weapon in the second degree. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division held that State's failure to disclose that witness had collected $2,000 reward from crime tip organization prior to trial did not constitute a *Brady* violation warranting reversal of conviction.

Affirmed.

West Headnotes (5)

[1] **Criminal Law** Information Within Knowledge of Prosecution

People have a duty to disclose to the defense evidence in its possession that is favorable to the accused.

[2] **Criminal Law** Impeaching evidence

Disclosure of evidence affecting credibility falls within the general rule that State has duty to disclose to the defense evidence in its possession that is favorable to the accused.

[3] **Criminal Law** Constitutional obligations regarding disclosure

Criminal Law Impeaching evidence

To establish a *Brady* violation, a defendant must show that the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature, the evidence was suppressed by the prosecution, and prejudice arose because the suppressed evidence was material.

2 Cases that cite this headnote

[4] **Criminal Law** Materiality and probable effect of information in general

Absent a specific request by the defendant for the evidence, materiality, as required for *Brady* violation, can only be demonstrated by a showing that there is a reasonable probability that it would have changed the outcome of the proceedings.

1 Case that cites this headnote

[5] **Criminal Law** Information Within Knowledge of Prosecution

State's failure to disclose that witness had collected a $2,000 reward from crime tip organization prior to trial did not constitute a *Brady* violation warranting a reversal of defendant's conviction for murder in the second degree and criminal possession of a weapon in the second degree; there was no evidence prosecution was aware of the reward at the time of defendant's trial, it was clear witness received substantial benefits of approximately $12,000 in exchange for cooperation in the case against defendant and that the information was disclosed to defendant, and defendant engaged in extensive cross-examination of witness regarding reward issue, as well as witness's extensive criminal history, pending charges, and inconsistent statements regarding the shooting.

****428** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Neil Jon Firetog, J.), rendered November 6, 2015, convicting him of murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Attorneys and Law Firms

Janet E. Sabel, New York, N.Y. (Rachel L. Pecker and Alan Axelrod of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Camille O'Hara Gillespie, and Marie John–Drigo of counsel), for respondent.

RUTH C. BALKIN, J.P., JEFFREY A. COHEN, ROBERT J. MILLER, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***717** ORDERED that the judgment is affirmed.

The relevant facts of this case are set forth in the decision and order on the appeal of the codefendant Deshawn Wright (*see People v. Wright*, 166 A.D.3d 1022, 88 N.Y.S.3d 457).

[1] **[2]** There is no merit to the defendant's contention that the People committed ****429** a *Brady* violation (*see Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215) by failing to disclose that a witness had collected a $2,000 reward from Crime Stoppers prior to trial. The People have a duty to disclose to the defense evidence in its possession that is favorable to the accused (*see id.*; *People v. Steadman*, 82 N.Y.2d 1, 7, 603 N.Y.S.2d 382, 623 N.E.2d 509). The disclosure of evidence affecting credibility falls within this general rule (*see Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104; *People v. Steadman*, 82 N.Y.2d at 7, 603 N.Y.S.2d 382, 623 N.E.2d 509; *People v. Novoa*, 70 N.Y.2d 490, 496, 522 N.Y.S.2d 504, 517 N.E.2d 219).

[3] **[4]** To establish a *Brady* violation, a defendant must show that the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature, the evidence was suppressed by the prosecution, and prejudice arose because the suppressed evidence was material (*see People v. Fuentes*, 12 N.Y.3d 259, 263, 879 N.Y.S.2d 373, 907 N.E.2d 286; *see also People v. Garrett*, 23 N.Y.3d 878, 885, 994 N.Y.S.2d 22, 18 N.E.3d 722). Absent a specific request by the defendant for the evidence, materiality can only be demonstrated by a showing that there is a "reasonable probability" that it would have changed the outcome of the proceedings (*People v. Fuentes*, 12 N.Y.3d at 263, 879 N.Y.S.2d 373, 907 N.E.2d 286 [internal quotation marks omitted]; *see People v. Hunter*, 11 N.Y.3d 1, 5, 862 N.Y.S.2d 301, 892 N.E.2d 365; *People v. Bryce*, 88 N.Y.2d 124, 128, 643 N.Y.S.2d 516, 666 N.E.2d 221). Here, the defendant made only a general request for exculpatory material (*see People v. Vilardi*, 76 N.Y.2d 67, 70–72, 556 N.Y.S.2d 518, 555 N.E.2d 915).

[5] There is no evidence that the prosecution was aware of the $2,000 reward at the time of the defendant's trial, as the identity of individuals providing information to, and collecting rewards from, Crime Stoppers is kept confidential. Moreover, it is clear that the witness received substantial benefits of approximately $12,000 in exchange for his cooperation in the case against the defendant and that this information was disclosed to the defendant. The defendant engaged in extensive cross-examination of the witness regarding this issue, as well as that witness's extensive criminal history, current pending charges, and inconsistent statements regarding the shooting. Under these circumstances, there is no reasonable probability that additional cross-examination of that witness concerning the $2,000 reward would have yielded a different result and, therefore, reversal is not required on this ground (*see People v. Fuentes*, 12 N.Y.3d at 263, 879 N.Y.S.2d 373, 907 N.E.2d 286; *People v. Portilloaguilar*, 164 A.D.3d 1376, 81 N.Y.S.3d 746).

***718** The defendant's contention that the Supreme Court erred in admitting excerpts of a sworn audiotaped statement made by a witness to law enforcement officials under the past recollection recorded exception to the hearsay rule is without merit (*see People v. Taylor*, 80 N.Y.2d 1, 8, 586 N.Y.S.2d 545, 598 N.E.2d 693; *People v. Wright*, 166 A.D.3d at 1024, 88 N.Y.S.3d 457). The defendants's alternative contention that the statement excerpts were improperly admitted as an attempt by the People to impeach their own witness is unpreserved for appellate review (*see* CPL 470.05[2]) and, in any event, without merit.

BALKIN, J.P., COHEN, MILLER and LASALLE, JJ., concur.

115 N.Y.S.3d 427, 2019 N.Y. Slip Op. 08686

All Citations

178 A.D.3d 716, 115 N.Y.S.3d 427, 2019 N.Y. Slip Op. 08686

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119 A.D.3d 600, 987 N.Y.S.2d 869
(Mem), 2014 N.Y. Slip Op. 04955

****1** The People of the State of New York, Respondent

v

Joseph Bridgeforth, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
July 2, 2014

CITE TITLE AS: People v Bridgeforth

HEADNOTES

Crimes
Right to be Present at Trial
Defendant's Failure to Rebut Presumption of Regularity

Crimes
Jurors
Selection of Jury—Batson Application—Failure to Show Prosecutor's Misconduct

Lynn W.L. Fahey, New York, N.Y. (Tammy Linn of counsel), for appellant.
Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Nicoletta J. Caferri, and Merri Turk Lasky of counsel), for respondent.
Appeal by the defendant from a judgment of the Supreme Court, Queens County (Blumenfeld, J.), rendered July 31, 2012, convicting him of robbery in the first degree and robbery in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant failed to satisfy his burden of coming forward with substantial evidence to rebut the presumption of regularity that attaches to all criminal proceedings with respect to his claim that he was deprived of his right to be present at the *Sandoval* hearing (*see People v Sandoval*, 34 NY2d 371, 374 [1974]; *People v Frank*, 295 AD2d 535 [2002]; *People v Firrira*, 258 AD2d 666 [1999]). Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in rendering its *Sandoval* ruling (*see People v Marcus*, 112 AD3d 652, 653 [2013]; *People v Filipe*, 7 AD3d 539, 540 [2004]). ***601**

In the defendant's *Batson* application (*Batson v Kentucky*, 476 US 79 [1986]), he argued that the prosecutor used peremptory challenges to strike all the black, Guyanese, or "dark-colored" prospective female jurors, including an Indian woman. Under the circumstances of this case, the defendant did not meet his prima facie burden of establishing that the prosecutor exercised a peremptory challenge to remove that prospective juror on the basis of her membership in a constitutionally cognizable class protected under the Equal Protection Clause of the United States and New York Constitutions (*see Hernandez v New York*, 500 US 352, 358 [1991]; *People v Quiles*, 74 AD3d 1241, 1242-1243 [2010]).

The defendant's contention that the jury charge with regard to robbery in the first degree was inadequate is not preserved for appellate review (*see* CPL 470.05 [2]). In any event, the error was harmless in light of the overwhelming evidence of the defendant's guilt, and there is no significant probability that the jury would have acquitted the defendant but for the error (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Diaz*, 71 AD3d 1158 [2010]). Although defense counsel failed to object to the jury charge as given, viewing defense counsel's performance in totality, counsel provided meaningful representation (*see Strickland v Washington*, 466 US 668, 687-694 [1984]; ****2** *People v Benevento*, 91 NY2d 708, 714 [1998]; *People v Sweeney*, 84 AD3d 1123, 1124 [2011]). Skelos, J.P., Lott, Roman and LaSalle, JJ., concur.

153 A.D.3d 850
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Christopher BROWN, appellant.

Aug. 23, 2017.

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Latella, J., of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] prosecution's race-neutral explanation for challenging two prospective black jurors was pretextual, and

[2] evidence that police found $2,120 in cash in defendant's possession when he was arrested was relevant.

Reversed.

West Headnotes (5)

[1] **Criminal Law** Sustaining challenges to jurors

Jury Peremptory challenges

Prosecution's race-neutral explanation for challenging two prospective black jurors, that they had failed to give satisfactory responses to certain hypothetical questions, was pretextual, and thus defendant was entitled to new trial, in prosecution for criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree; prospective jurors who were not black had answered subject hypothetical questions in same way that prospective black jurors had answered, and prosecution had not sought to challenge those prospective jurors.

1 Case that cites this headnote

[2] **Jury** Peremptory challenges

New York courts apply the three-step *Batson* test to determine whether a party has used peremptory challenges to exclude potential jurors for an impermissible discriminatory reason: the first step requires that the moving party make a prima facie showing of discrimination in the exercise of peremptory challenges; the second step shifts the burden to the nonmoving party to provide race-neutral reasons for each juror being challenged; and the third step requires the court to make a factual determination as to whether the race-neutral reasons are merely a pretext for discrimination.

1 Case that cites this headnote

[3] **Jury** Peremptory challenges

Uneven application of race-neutral factors does not always indicate pretext under *Batson* analysis where the prosecution can articulate other legitimate reasons to justify the uneven use of its peremptory challenges.

1 Case that cites this headnote

[4] **Controlled Substances** Admissibility of evidence

Evidence that police found $2,120 in cash in defendant's possession when he was arrested was relevant and, thus, was admissible; criminal possession of controlled substance in the third degree required proof of intent to sell. McKinney's Penal Law § 220.16(1).

[5] **Sentencing and Punishment** Other Offenses, Charges, Misconduct

An out-of-state conviction may be used as a predicate felony conviction for sentencing where its elements are equivalent to those of a New York felony. McKinney's Penal Law § 70.06(1)(b)(i).

Attorneys and Law Firms

****102** David Louis Cohen, Kew Gardens, NY, for appellant.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, William H. Branigan, and Josette Simmons McGhee of counsel), for respondent.

MARK C. DILLON, J.P., SHERI S. ROMAN, ROBERT J. MILLER, and HECTOR D. LaSALLE, JJ.

Opinion

***850** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered November 9, 2015, convicting him of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law and the facts, and a new trial is ordered.

[1] The defendant contends that the Supreme Court erred in granting the prosecution's peremptory challenges to two prospective black jurors because the prosecution's race-neutral explanations for challenging those potential jurors were pretextual (*see Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Kern,* 75 N.Y.2d 638, 555 N.Y.S.2d 647, 554 N.E.2d 1235). During jury selection, the defendant made an application to the court pursuant to *Batson v. Kentucky* (476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69), arguing that the prosecution was exercising its peremptory challenges in a discriminatory manner against prospective black jurors. The prosecutor proffered an explanation for challenging one of the prospective black jurors at issue, No. 15, citing certain facial expressions made by that prospective juror which led him to believe that the prospective juror would "be more inclined to disbelieve police officers." The prosecutor also proffered an explanation for challenging two of the other prospective black jurors at issue, Nos. 2 and 8, stating that those potential jurors had failed to give satisfactory responses to certain hypothetical questions posed during voir dire. In response, defense counsel argued, among other things, that other prospective jurors who were not black had answered the subject hypothetical questions in the same way that prospective jurors Nos. 2 and 8 had answered, and that the prosecution had not sought to challenge those prospective jurors.

The Supreme Court determined that the prosecutor's explanation for challenging prospective juror No. 15 was pretextual, and seated her as a juror. However, the court determined that the prosecutor's explanations for challenging prospective jurors Nos. 2 and 8 were not pretextual, and denied the defendant's application with respect to those two prospective jurors.

[2] ***851** New York courts apply the three-step test of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 to determine whether a party has used peremptory challenges to exclude potential jurors ****103** for an impermissible discriminatory reason (*see People v. Smocum,* 99 N.Y.2d 418, 421–422, 757 N.Y.S.2d 239, 786 N.E.2d 1275; *People v. Jones,* 139 A.D.3d 878, 879, 31 N.Y.S.3d 191; *People v. Carillo,* 9 A.D.3d 333, 334, 780 N.Y.S.2d 143). "The first step requires that the moving party make a prima facie showing of discrimination in the exercise of peremptory challenges; the second step shifts the burden to the nonmoving party to provide race-neutral reasons for each juror being challenged; and the third step requires the court to make a factual determination as to whether the race-neutral reasons are merely a pretext for discrimination" (*People v. Carillo,* 9 A.D.3d at 334, 780 N.Y.S.2d 143; *see People v. Smocum,* 99 N.Y.2d at 421–422, 757 N.Y.S.2d 239, 786 N.E.2d 1275; *People v. Jones,* 139 A.D.3d at 879, 31 N.Y.S.3d 191).

[3] Here, the record demonstrates that the race-neutral reasons for challenging prospective jurors Nos. 2 and 8 were not applied equally to exclude other prospective jurors who were not black, even though those other jurors had answered the subject hypothetical questions in the same way that prospective jurors Nos. 2 and 8 had answered. Although the uneven application of race-neutral factors does not always indicate pretext where the prosecution can articulate other legitimate reasons to justify the uneven use of its challenges (*see People v. Allen,* 86 N.Y.2d 101, 110, 629 N.Y.S.2d 1003, 653 N.E.2d 1173), the prosecution here failed to do so. Under the circumstances, we conclude that the nonracial bases advanced by the prosecutor for challenging prospective jurors Nos. 2 and 8 were pretextual (*see People v. Fabregas,* 130 A.D.3d 939, 942, 15 N.Y.S.3d 794; *People v. Bell,* 126 A.D.3d 718, 720, 5 N.Y.S.3d 227; *People v. Hall,* 64 A.D.3d 665, 666, 882 N.Y.S.2d 515; *People v. Morrison,* 220 A.D.2d 694, 695, 633 N.Y.S.2d 65; *see also People v. Hurdle,* 99 A.D.3d 943,

944, 952 N.Y.S.2d 297). Accordingly, the defendant is entitled to a new trial (*see People v. McIndoe,* 277 A.D.2d 252, 715 N.Y.S.2d 734).

[4] Since there must be a new trial, we reach the defendant's contention that the Supreme Court erred in admitting evidence that the police found $2,120 in cash in his possession when he was arrested. This contention is without merit. Since the defendant was charged with criminal possession of a controlled substance in the third degree under Penal Law § 220.16(1), which requires proof of the intent to sell, the court correctly found that the evidence regarding the defendant's possession of the $2,120 in cash was relevant (*see People v. Whaley,* 70 A.D.3d 570, 571, 895 N.Y.S.2d 78; *People v. Leak,* 66 A.D.3d 403, 404, 886 N.Y.S.2d 155; *People v. Rodriguez,* 233 A.D.2d 409, 410, 650 N.Y.S.2d 239; *People v. Strunkey,* 221 A.D.2d 387, 633 N.Y.S.2d 353; ***852** *People v. Boomer,* 221 A.D.2d 351, 352, 633 N.Y.S.2d 367; *People v. Charles,* 212 A.D.2d 541, 541–542, 622 N.Y.S.2d 329; *People v. Woodson,* 198 A.D.2d 535, 604 N.Y.S.2d 187).

[5] Further, as the defendant contends, and the People properly concede, he was incorrectly sentenced as a second felony offender. An out-of-state conviction may be used as a predicate felony conviction where its elements are equivalent to those of a New York felony (*see* Penal Law § 70.06[1][b][i]; *People v. Jurgins,* 26 N.Y.3d 607, 613, 26 N.Y.S.3d 495, 46 N.E.3d 1048; *People v. Yusuf,* 19 N.Y.3d 314, 321, 947 N.Y.S.2d 399, 970 N.E.2d 422; *People v. Muniz,* 74 N.Y.2d 464, 467–468, 548 N.Y.S.2d 633, 547 N.E.2d 1160; *People v. Gonzalez,* 61 N.Y.2d 586, 590, 475 N.Y.S.2d 358, 463 N.E.2d 1210). The elements of Connecticut General Statute § 53–21(a)(2), under which the defendant was convicted, are not equivalent to those ****104** of any New York felony. However, because a new trial is required, we need not consider whether the sentence imposed by the Supreme Court was nevertheless appropriate or was affected by its mistaken belief that the defendant was a predicate felon (*see People v. Ballinger,* 99 A.D.3d 931, 932, 952 N.Y.S.2d 272).

In light of the foregoing, we need not reach the defendant's remaining contention.

All Citations

153 A.D.3d 850, 61 N.Y.S.3d 101, 2017 N.Y. Slip Op. 06289

205 A.D.3d 729
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Donovan BUYUND, appellant.

2016–04948
|
(Ind. No. 4558/14)
|
Argued—March 1, 2019
|
May 4, 2022

Attorneys and Law Firms

Patricia Pazner, New York, NY, for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Morgan J. Dennehy, and Daniel Berman of counsel), for respondent.

HECTOR D. LASALLE, P.J., MARK C. DILLON, BETSY BARROS, JOSEPH J. MALTESE, JJ.

****706** DECISION & ORDER

***730** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Ruth Shillingford, J.), rendered April 1, 2016, convicting him of burglary in the first degree as a sexually motivated felony, upon his plea of guilty, imposing sentence, certifying him as a sex offender pursuant to the Sex Offender Registration Act, and requiring him to register as a sex offender and pay a $50 sex offender registration fee. By opinion and order dated November 13, 2019, this Court modified the judgment, on the law, by vacating the provisions thereof requiring the defendant to register as a sex offender and pay the $50 sex offender registration fee, and as so modified, affirmed the judgment (*see People v. Buyund,* 179 A.D.3d 161, 112 N.Y.S.3d 179). On November 23, 2021, the Court of Appeals reversed the opinion and order of this Court and remitted the matter to this Court for further proceedings (*see People v. Buyund,* 37 N.Y.3d 532, 162 N.Y.S.3d 276, 182 N.E.3d 1068). Justice Barros has been substituted for former Presiding Justice Scheinkman (*see* 22 NYCRR 1250.1[b]).

ORDERED that, upon remittitur from the Court of Appeals, the judgment is modified, as a matter of discretion in the interest of justice, by vacating the provisions thereof certifying the defendant as a sex offender pursuant to the Sex Offender Registration Act and requiring him to register as a sex offender and pay the $50 sex offender registration fee; as so modified, the judgment is affirmed.

The defendant was convicted of burglary in the first degree as a sexually motivated felony. As part of the judgment of conviction, the defendant was certified as a sex offender pursuant to the Sex Offender Registration Act (*see* Correction Law § 168–d). On appeal from the judgment of conviction, the defendant contends, inter alia, that his certification as a sex offender was unlawful because the crime of which he was convicted is not an enumerated registerable offense under Correction Law § 168–a(2)(a). The People contend that this argument is unpreserved for appellate review and, in any event, without merit. The People do not contend before this Court that this argument is precluded by the defendant's waiver of the right to appeal.

In an opinion and order dated November 13, 2019, this Court concluded that the defendant's certification as a sex offender was unlawful, and that this issue fell within the exception to the preservation rule for challenges to unlawful sentences (*see People v. Buyund,* 179 A.D.3d 161, 169–170, 112 N.Y.S.3d 179). Accordingly, this Court modified the judgment, on the law, by vacating the provisions thereof requiring the defendant to register as a sex ***731** offender and pay the $50 sex offender registration fee (*see id.* at 171, 112 N.Y.S.3d 179).

In an opinion dated November 23, 2021, the Court of Appeals concluded that sex offender certification is not part of a defendant's sentence, and thus, a contention regarding sex offender certification does not fall within the exception to the preservation rule for challenges to unlawful sentences (*see* ****707** *People v. Buyund,* 37 N.Y.3d 532, 537–541, 162 N.Y.S.3d 276, 182 N.E.3d 1068). However, the Court of Appeals noted that although it does not have interest-of-justice jurisdiction to review unpreserved issues, the "Appellate Division may have authority to take corrective action in the interest of justice based upon defendant's unpreserved challenge to the legality of his certification as

a sex offender" (*id.* at 541, 162 N.Y.S.3d 276, 182 N.E.3d 1068). Accordingly, the Court of Appeals remitted the matter to this Court for further proceedings (*see id.*).

We now reach the defendant's unpreserved contention in the exercise of our interest of justice jurisdiction (*see* CPL 470.15[3][c]; [6][a]). For the reasons stated in our prior opinion and order, the defendant's certification as a sex offender was unlawful (*see People v. Buyund,* 179 A.D.3d at 169–170, 112 N.Y.S.3d 179; *see also People v. Simmons,* 203 A.D.3d 106, 161 N.Y.S.3d 69).

The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v. Buyund,* 179 A.D.3d at 171, 112 N.Y.S.3d 179).

Accordingly, we modify the judgment, as a matter of discretion in the interest of justice, by vacating the provisions thereof certifying the defendant as a sex offender pursuant to the Sex Offender Registration Act and requiring him to register as a sex offender and pay the $50 sex offender registration fee, and as so modified, affirm the judgment.

LASALLE, P.J., DILLON, BARROS and MALTESE, JJ., concur.

All Citations

205 A.D.3d 729, 165 N.Y.S.3d 705 (Mem), 2022 N.Y. Slip Op. 03004

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137 A.D.3d 929
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Andrew CABALLERO, appellant.

March 9, 2016.

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Schwartz, J., of murder in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant was not entitled to *Rosario* hearing, and

[2] witness' statement was properly admitted as an excited utterance.

Affirmed.

West Headnotes (4)

[1] Criminal Law Cross-examination and impeachment

While the Confrontation Clause guarantees an opportunity for effective cross-examination, it does not guarantee a cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

[2] Witnesses Irrelevant, Collateral, or Immaterial Matters

It is within the discretion of the trial court to limit the scope of cross-examination when questions are irrelevant, concern collateral issues, or risk misleading the jury.

3 Cases that cite this headnote

[3] Criminal Law Request for disclosure; procedure

Defendant was not entitled to *Rosario* hearing as to whether prosecution turned over to defense counsel all statements of a prosecution witness relating to the subject matter of the witness' testimony, where prosecutor represented that no prior statements of the witness requested by defense counsel existed, and defendant could not articulate a factual basis for his claim that the prosecutor improperly denied the existence of such statements. McKinney's CPL § 240.45(1)(a).

[4] Criminal Law Subsequent to commission of crime

Witness' statement was admissible as an excited utterance in murder prosecution; circumstances surrounding the statement warranted the conclusion that the statement was not made under the impetus of studied reflection, and permitted a reasonable inference that the witness had an opportunity to observe the altercation that led to the victim's death.

Attorneys and Law Firms

****85** Robert DiDio, Kew Gardens, N.Y. (Danielle Muscatello of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Robert J. Masters and Jill Gross–Marks of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., THOMAS A. DICKERSON, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

Opinion

***929** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Schwartz, J.), rendered September 10, 2014, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that his conviction was not supported by legally sufficient evidence is largely unpreserved for appellate review (*see People v. Gray,* 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, upon our independent review of the evidence pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[1] **[2]** The defendant's contention that the Supreme Court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution is not preserved for appellate ***930** review (*see People v. Walker,* 70 A.D.3d 870, 871, 894 N.Y.S.2d 156). In any event, the contention is without merit. While the Confrontation Clause guarantees an opportunity for effective cross-examination, it does not guarantee a cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish" (****86** *Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15; *see People v. Burns,* 6 N.Y.3d 793, 795, 811 N.Y.S.2d 297, 844 N.E.2d 751; *People v. Goodson,* 35 A.D.3d 760, 761, 825 N.Y.S.2d 778). It is within the discretion of the trial court to limit the scope of cross-examination when questions are irrelevant, concern collateral issues, or risk misleading the jury (*see Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674; *People v. Legere,* 81 A.D.3d 746, 750, 916 N.Y.S.2d 187; *People v. Gaviria,* 67 A.D.3d 701, 886 N.Y.S.2d 900; *People v. Francisco,* 44 A.D.3d 870, 843 N.Y.S.2d 439). Here, the court's limitation of the defense cross-examination was a provident exercise of its discretion.

[3] The prosecution is required to turn over to the defense counsel all statements of a prosecution witness relating to the subject matter of the witness's testimony (*see* CPL 240.45[1][a]; *People v. Rosario,* 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881). Here, the representation by the prosecutor, that no prior statements of the subject witness requested by defense counsel existed, satisfied the prosecutor's burden, since the defendant could not articulate a factual basis for his claim that the prosecutor improperly denied the existence of such statements (*see People v. Poole,* 48 N.Y.2d 144, 149, 422 N.Y.S.2d 5, 397 N.E.2d 697; *People v. Rodriguez,* 270 A.D.2d 505, 705 N.Y.S.2d 387; *People v. Perez,* 209 A.D.2d 643, 644, 619 N.Y.S.2d 641). Therefore, a *Rosario* hearing was not warranted.

[4] Contrary to the defendant's contention, the Supreme Court properly admitted into evidence a statement of a certain witness as an excited utterance. The circumstances surrounding the statement warrant the conclusion that the statement was not made "under the impetus of studied reflection" (*People v. Edwards,* 47 N.Y.2d 493, 497, 419 N.Y.S.2d 45, 392 N.E.2d 1229), and permit a reasonable inference that the declarant had an opportunity to observe the altercation that led to the victim's death (*see People v. Fratello,* 92 N.Y.2d 565, 571, 684 N.Y.S.2d 149, 706 N.E.2d 1173; *People v. Young,* 308 A.D.2d 555, 556, 764 N.Y.S.2d 468).

The defendant's remaining contentions are without merit.

All Citations

137 A.D.3d 929, 27 N.Y.S.3d 84, 2016 N.Y. Slip Op. 01688

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194 A.D.3d 760
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Peter CARMAN, appellant.

2018-10126
|
Submitted—January 19, 2021
|
May 5, 2021

Synopsis

Background: Following conviction, upon guilty plea, of possessing a sexual performance by a child less than 16 years of age, in a proceeding pursuant to the Sex Offender Registration Act, the County Court, Suffolk County, Barbara Khan, J., granted the People's request to assess additional points to defendant's risk assessment instrument resulting in a level three sex offender designation. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant was properly assessed 30 points under risk factor for number of victims;

[2] defendant was properly assessed 20 points under risk factor for relationship with victims;

[3] defendant was properly assessed 10 points under risk factor for conduct while confined; and

[4] defendant was not deprived of effective assistance by counsel's alleged failure to expressly argue for a downward departure.

Affirmed.

Barros, J., dissented with memorandum.

West Headnotes (5)

[1] **Mental Health** Scores and risk levels

Clear and convincing evidence established that the child pornography possessed by defendant depicted the images of more than three child victims, and thus defendant was properly assessed 30 points under risk factor for number of victims, in proceeding pursuant to Sex Offender Registration Act, where there were 67 pornographic images of more than three different young children on defendant's cell phone. N.Y. Correction Law § 168 et seq.

2 Cases that cite this headnote

[2] **Mental Health** Scores and risk levels

Clear and convincing evidence established that the children depicted in the pornographic images defendant possessed were strangers to him, and thus defendant was properly assessed 20 points under risk factor for relationship with victims, in proceeding pursuant to Sex Offender Registration Act. N.Y. Correction Law § 168 et seq.

3 Cases that cite this headnote

[3] **Mental Health** Scores and risk levels

Defendant was properly assessed 10 points under risk factor for conduct while confined, in proceeding pursuant to Sex Offender Registration Act, where defendant had committed six Tier II and one Tier III disciplinary violations while in jail. N.Y. Correction Law § 168 et seq.

1 Case that cites this headnote

[4] **Mental Health** Appeal

Defendant did not specifically argue that counsel was ineffective for failing to request a downward departure from his presumptive risk level under the Sex Offender Registration Act (SORA) or that counsel was ineffective for failing to adequately argue against the assessment of

points under any specific risk factor, and thus the question of whether defense counsel was ineffective at the SORA hearing was not properly before the court. U.S. Const. Amend. 6; N.Y. Correction Law § 168 et seq.

2 Cases that cite this headnote

[5] Mental Health Proceedings

Downward departure from defendant's presumptive risk level would not have been appropriate, and thus defendant was not deprived of effective assistance by counsel's alleged failure to expressly argue for a downward departure at Sex Offender Registration Act hearing rather than simply opposing the People's request for an upward departure; defendant did not demonstrate the absence of a strategic or other legitimate explanation for counsel's failure to request a downward departure, or address the issue at all in his pro se supplemental brief, and the pornographic depictions of children on defendant's phone included young girls who were toddlers to age seven, including those engaged in sexual intercourse and oral sex with men. U.S. Const. Amend. 6; N.Y. Correction Law § 168 et seq.

1 Case that cites this headnote

Attorneys and Law Firms

****120** Laurette D. Mulry, Riverhead, N.Y. (Kirk R. Brandt of counsel), for appellant, and appellant pro se.

Timothy D. Sini, District Attorney, Riverhead, N.Y. (Edward A. Bannan of counsel), for respondent.

MARK C. DILLON, J.P., HECTOR D. LASALLE, BETSY BARROS, FRANCESCA E. CONNOLLY, JJ.

DECISION & ORDER

***760** Appeal by the defendant from an order of the County Court, Suffolk County (Barbara Khan, J.), dated July 26, 2018, which, ***761** after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of possessing a sexual performance by a child less than 16 years of age under Penal Law § 263.16, while on ****121** probation for another offense, and was sentenced to a definite term of one year of imprisonment.

This appeal arises from a proceeding pursuant to the Sex Offender Registration Act (Correction Law art 6–C; hereinafter SORA). The Board of Examiners of Sex Offenders (hereinafter the Board), in its risk assessment instrument (hereinafter RAI), assessed a total of 60 points against the defendant, resulting in a presumptive level one classification (*see People v. Curry,* 158 A.D.3d 52, 54, 68 N.Y.S.3d 483). The People submitted their own RAI assessing additional points, resulting in a level three classification. At the SORA hearing, the People requested that in addition to points assessed by the Board, 30 additional points should be assessed under risk factor 3 (number of victims: three or more), 20 additional points should be assessed under risk factor 7 (relationship with victim: stranger), and 10 additional points should be assessed under risk factor 12 (acceptance of responsibility). Those 120 points, if assessed, placed the defendant in the category of a presumptive level three sex offender. Defense counsel opposed the assessment of additional points, arguing that under *People v. Gillotti,* 23 N.Y.3d 841, 994 N.Y.S.2d 1, 18 N.E.3d 701, the court had discretion to assess the points, but was not required to do so. As to risk factor 12, the defendant, after having pleaded guilty, told the Department of Probation during its presentence investigation that the child pornography had been accidently downloaded into his phone and was found without him knowing how it got there. In a letter the defendant had written to the Board, he stated that he had stumbled upon the child pornography but did not look at it. The defendant's counsel argued that the defendant had taken responsibility for his actions.

The County Court granted the People's request, and in addition to the 60 points set forth in the Board's RAI, assessed 30 points under risk factor 3 and 20 points under risk factor 7, for a total of 110 points, and designated the defendant a level three sex offender. The court did not assess any points under risk factor 12, finding that the assessment of 10 points under that factor was academic, as, with or without the assessment of those points, the defendant would be designated a level

three ***762** sex offender. The court also stated that it did not consider a downward departure from the presumptive risk level, as no request had been made for that relief.

[1] **[2]** Contrary to the defendant's contentions, the County Court properly assessed points under risk factors 3 and 7. As to risk factor 3, the People established by clear and convincing evidence that the child pornography possessed by the defendant depicted the images of more than three child victims, as there were 67 pornographic images of more than three different young children on his cell phone. As to risk factor 7, the People established by clear and convincing evidence that the children in the images were strangers to the defendant (*see People v. Gillotti,* 23 N.Y.3d at 859–860, 994 N.Y.S.2d 1, 18 N.E.3d 701; *People v. Smith,* 187 A.D.3d 1228, 131 N.Y.S.3d 572; *People v. Waldman,* 178 A.D.3d 1107, 112 N.Y.S.3d 554; *People v. Rivas,* 173 A.D.3d 786, 786–787, 99 N.Y.S.3d 678; *People v. Reuter,* 140 A.D.3d 1143, 33 N.Y.S.3d 757; *People v. Morel–Baca,* 127 A.D.3d 833, 4 N.Y.S.3d 893).

In his pro se supplemental brief, the defendant challenges the County Court's assessment of 10 points under risk factor 12. However, as noted above, the court did not actually assess 10 points for that factor.

****122** **[3]** In his pro se supplemental brief, the defendant also challenges the County Court's assessment of 10 points under risk factor 13 (conduct while confined). However, the court's assessment of 10 points under that risk factor was proper based upon the defendant's commission of six Tier II and one Tier III disciplinary violations while in jail (*see People v. Collins,* 188 A.D.3d 1107, 1107–1108, 132 N.Y.S.3d 697; *People v. Holmes,* 166 A.D.3d 821, 85 N.Y.S.3d 792; *People v. Lima–Sanchez,* 162 A.D.3d 698, 79 N.Y.S.3d 52; *People v. Williams,* 100 A.D.3d 610, 953 N.Y.S.2d 298).

[4] The defendant further argues in his pro se supplemental brief that he was deprived of the effective assistance of counsel. Specifically, the defendant contends that his attorney did not permit him to speak to the court, failed to advise him prior to the SORA hearing that the People intended to argue for the assessment of points in addition to those assessed by the Board, and failed to preserve an objection about the timeliness of the People's intention to deviate from the Board's RAI. Nowhere, however, does the defendant specifically argue that counsel was ineffective for failing to request a downward departure from his presumptive risk level assessment, or that counsel was ineffective for failing to adequately argue against the assessment of points under any specific risk factor. As a result, the question of whether defense counsel was ineffective at the SORA hearing for the reasons now raised by our dissenting colleague is not properly before our Court (*see* ***763** *Misicki v. Caradonna,* 12 N.Y.3d 511, 519, 882 N.Y.S.2d 375, 909 N.E.2d 1213; *Kaufman v. Kaufman,* 189 A.D.3d 31, 133 N.Y.S.3d 54; *Matter of Cassini,* 182 A.D.3d 13, 42, 120 N.Y.S.3d 103; *Levin v. State of New York,* 32 A.D.3d 501, 503, 820 N.Y.S.2d 626; *Tammaro v. County of Suffolk,* 224 A.D.2d 406, 407, 638 N.Y.S.2d 121).

[5] As to the ineffectiveness issues actually raised by the defendant in his pro se supplemental brief, he was not deprived of the effective assistance of counsel (*see Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Benevento,* 91 N.Y.2d 708, 713–714, 674 N.Y.S.2d 629, 697 N.E.2d 584; *People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400).

Assuming arguendo that in hindsight, the defendant's counsel, instead of simply opposing the People's request for an upward departure from the Board's assessment of points, also should have expressly argued for a downward departure from the assessment of points contained in the People's RAI, the omission was not so egregious or prejudicial as to deprive the defendant of the effective assistance of counsel (*see People v. Bowles,* 89 A.D.3d 171, 181, 932 N.Y.S.2d 112). The defendant has neither demonstrated the absence of a strategic or other legitimate explanation for counsel's failure to request a downward departure, nor even addressed that issue in the pro se supplemental brief, as is necessary to sustain an ineffectiveness claim (*see People v. Rivera,* 71 N.Y.2d 705, 709, 530 N.Y.S.2d 52, 525 N.E.2d 698). Further, depictions on the defendant's phone included young girls who were toddlers to age seven, including those engaged in sexual intercourse and oral sex with men. Under these circumstances, a downward departure would not have been appropriate given "the number and nature of the images possessed by the defendant" (*People v. Rossano,* 140 A.D.3d 1042, 1043, 35 N.Y.S.3d 364).

The defendant's remaining contentions are either unpreserved for appellate review or without merit.

****123** Accordingly, we agree with the County Court's determination designating the defendant a level three sex offender pursuant to Correction Law article 6–C.

DILLON, J.P., LASALLE and CONNOLLY, JJ., concur.

BARROS, J., dissents and votes to reverse the order, on the law, and remit the matter to the County Court, Suffolk County, for a new hearing and determination, with the following memorandum:

The defendant established that he was deprived of the effective assistance of counsel at the hearing pursuant to the Sex Offender Registration Act (Correction Law art 6–C; hereinafter SORA) based upon his assigned counsel's misunderstanding of *People v. Gillotti,* 23 N.Y.3d 841, 994 N.Y.S.2d 1, 18 N.E.3d 701, the seminal case governing SORA proceedings against child pornography offenders, and his concomitant failure to request a downward departure from the level three sex offender ***764** designation sought by the People (*see People v. Collins,* 156 A.D.3d 830, 67 N.Y.S.3d 248; *People v. Willingham,* 101 A.D.3d 979, 956 N.Y.S.2d 165; *cf. People v. Bowles,* 89 A.D.3d 171, 179, 932 N.Y.S.2d 112).

On October 29, 2014, the defendant was convicted, upon his plea of guilty, of possessing a sexual performance by a child less than 16 years of age (Penal Law § 263.16). The conviction arose out of the defendant's possession of a cell phone containing 67 pornographic images of young children. The defendant was sentenced to a one-year definite term of imprisonment.

Upon the defendant's release, the Board of Examiners of Sex Offenders (hereinafter the Board) prepared a risk assessment instrument (hereinafter RAI) dated May 9, 2018, in which it assessed 60 points, and designated the defendant as a presumptive level one sex offender, reflecting its determination that the defendant was a low risk to reoffend. Notably, in its Case Summary, the Board stated that there were no factors in its Scoring for Child Pornography Position Statement warranting an upward departure.

At the SORA hearing, the People requested the assessment of 120 points and the designation of the defendant as a level three sex offender. The defendant's assigned counsel contested, inter alia, the People's request for 30 points under risk factor 3 (number of victims: three or more) even though the child pornography possessed by the defendant depicted the images of more than three child victims. He also contested the People's request for the assessment of 20 points under risk factor 7 (relationship with victim: stranger), even though the children in the images were strangers to the defendant. Assigned counsel argued that, in accordance with *People v. Gillotti,* 23 N.Y.3d 841, 994 N.Y.S.2d 1, 18 N.E.3d 701, the court had "discretion to give the points or not give the points" under risk factors 3 and 7.

After the County Court heard arguments regarding the points to be assessed on the RAI, it asked the defendant's assigned counsel if there was "anything further?" Counsel merely indicated that his client "reaffirms his guilty plea" and has taken responsibility. Counsel failed to request a downward departure from the level three designation sought by the People. The court then indicated that it would reserve its decision. The defendant then asked whether he could be given an opportunity to speak, and his assigned counsel said "no."

In the order appealed from, the County Court determined, inter alia, that the People established, by clear and convincing evidence, the assessment of 110 points. ****124** The court specifically noted that "the defendant failed to make an application for downward departure," and stated that it therefore "will not address ***765** the three-part analytical process set forth in *Gillotti.*" The court designated the defendant a level three sex offender, reflecting a determination that he is at the highest level of risk to reoffend.

Contrary to the determination of my colleagues in the majority, the defendant's pro se supplemental brief at pages 11 and 17 sufficiently presents the argument that his assigned counsel was ineffective in failing to allow him to present mitigating circumstances in furtherance of a request for a downward departure. In this regard, the defendant specifically argues that his attorney's failure to allow him to speak "resulted in my not being able to give reasons or introduce all of the mitigating factors that would prove I should be a Level One Offender." He argues that "[t]here were mitigating factors in my case and circumstances that prove I stand apart from these types of [level three] offenders and do not deserve to be in the same class as them."

"A sex offender facing risk level classification under SORA has a right to the effective assistance of counsel" (*People v. Willingham,* 101 A.D.3d at 979, 956 N.Y.S.2d 165; *see People v. Collins,* 156 A.D.3d at 830, 67 N.Y.S.3d 248; *People v. Bowles,* 89 A.D.3d at 173, 932 N.Y.S.2d 112). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been

met" (*People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400; *see People v. Wright,* 25 N.Y.3d 769, 779, 16 N.Y.S.3d 485, 37 N.E.3d 1127). "Where a defendant claims that counsel's performance is deficient the defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v. Wright,* 25 N.Y.3d at 779, 16 N.Y.S.3d 485, 37 N.E.3d 1127 [internal quotation marks omitted]; *see People v. Benevento,* 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584). "[T]he claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v. Benevento,* 91 N.Y.2d at 714, 674 N.Y.S.2d 629, 697 N.E.2d 584).

The circumstances of this case, viewed in totality and as of the time of the representation, reveal that the defendant's assigned counsel did not provide meaningful representation at the SORA hearing (*see People v. Collins,* 156 A.D.3d at 830–831, 67 N.Y.S.3d 248; *People v. Willingham,* 101 A.D.3d at 980, 956 N.Y.S.2d 165; *cf. People v. Bowles,* 89 A.D.3d 171, 932 N.Y.S.2d 112). Counsel's attempt to controvert points under risk factors 3 and 7, and failure to request a downward departure, evinced a misunderstanding of *People v. Gillotti,* 23 N.Y.3d 841, 994 N.Y.S.2d 1, 18 N.E.3d 701. In *Gillotti,* the Court of Appeals held that, in assessing child pornography offenders, the plain language of ***766** the RAI authorizes the scoring of points under risk factors 3 and 7, and that the court must score points in accordance with the RAI (*see id.* at 859, 994 N.Y.S.2d 1, 18 N.E.3d 701). Thus, contrary to the arguments made by assigned counsel, the SORA court was constrained, under the facts of this case, to assess points under risk factors 3 and 7, since the child pornography possessed by the defendant depicted the images of more than three child victims who were strangers to the defendant (*see People v. Smith,* 187 A.D.3d 1228, 131 N.Y.S.3d 572; *People v. Bolan,* 186 A.D.3d 1273, 127 N.Y.S.3d 891; ****125** *People v. Benton,* 185 A.D.3d 1103, 1104–1105, 125 N.Y.S.3d 206; *People v. Worrell,* 183 A.D.3d 602, 603, 122 N.Y.S.3d 356; *People v. Waldman,* 178 A.D.3d 1107, 112 N.Y.S.3d 554).

Moreover, *Gillotti* held that "in deciding a child pornography offender's application for a downward departure, a SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration" (*People v. Gillotti,* 23 N.Y.3d at 860, 994 N.Y.S.2d 1, 18 N.E.3d 701). Even though the Board determined that the defendant was a low risk to reoffend and indicated that there were no factors in the Scoring for Child Pornography Position Statement warranting an upward departure, assigned counsel never made an application for a downward departure from the presumptive level three sex offender designation. In determining that the defendant was a level three sex offender, the County Court expressly noted the defendant's failure to make an application for a downward departure. Under these circumstances, and especially given that the defendant was classified in the highest risk category, the defendant sufficiently established the absence of any strategic or legitimate explanation for his attorney's failure to, inter alia, request a downward departure (*see People v. Collins,* 156 A.D.3d at 830–831, 67 N.Y.S.3d 248; *People v. Willingham,* 101 A.D.3d 979, 956 N.Y.S.2d 165).

Finally, given that the defendant never requested a downward departure, it is improper for my colleagues in the majority to presuppose that any such request, based upon mitigating circumstances that were never presented, would have had little or no chance of success in lowering the defendant's level three classification. In the order appealed from, the County Court expressly noted that it did not consider a downward departure only because the defendant never requested one. The Board, which recommended that the defendant be classified a level one sex offender, utilized criteria set forth in its Scoring for Child Pornography Position Statement. Thus, notwithstanding the nature and number of the images possessed by the defendant, ***767** there is some indication in this record that there may be mitigating factors such that a level three designation "might lead to an excessive level of registration" (*People v. Gillotti,* 23 N.Y.3d at 860, 994 N.Y.S.2d 1, 18 N.E.3d 701). Given these circumstances, the defendant was entitled, at a minimum, to have assigned counsel request a downward departure.

Accordingly, I vote to reverse the order appealed from and remit the matter to the County Court, Suffolk County, for a new SORA hearing and a new risk level determination.

All Citations

194 A.D.3d 760, 147 N.Y.S.3d 119, 2021 N.Y. Slip Op. 02834

End of Document

121 A.D.3d 803
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Alvin CORBIN, appellant.

Oct. 8, 2014.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Foley, J., of attempted criminal possession of a weapon in the third degree, upon his guilty plea, and was sentenced to a term of imprisonment. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant knowingly and voluntarily waived right to appeal, and

[2] defendant's appellate waiver covered all aspects of case, including challenged suppression ruling.

Affirmed.

Balkin, J., filed a dissenting opinion.

West Headnotes (4)

[1] Criminal Law Plea of Guilty or Nolo Contendere

Defendant who entered guilty plea knowingly and voluntarily waived right to appeal his conviction for attempted criminal possession of a weapon in the third degree; when Supreme Court correctly advised defendant that some constitutional issues would survive his waiver, defendant indicated that he understood meaning of this information, he did not express any confusion or question court or his attorney regarding the waiver, nor did he inquire as to whether any particular issue would survive the waiver.

10 Cases that cite this headnote

[2] Criminal Law Ascertainment by court; advising and informing accused

During waiver inquiry, supreme court was not required to enumerate each and every potential appellate argument that defendant entering guilty plea might still possibly be able to raise despite his appellate waiver.

[3] Criminal Law Plea of Guilty or Nolo Contendere

There was no requirement that defendant convicted of attempted criminal possession of a weapon based on guilty plea expressly waive every potential claim or defense in order to produce a valid, unrestricted waiver of the right to appeal that was knowing, voluntary, and intelligent, and which encompassed all waivable issues; rather, no particular litany by the court was required.

14 Cases that cite this headnote

[4] Criminal Law Issues considered

Defendant's appellate waiver in connection with guilty plea, in which he gave up the right to appeal "any issue that may arise from this case except certain constitutional issues," covered all aspects of the case, including challenged suppression ruling.

3 Cases that cite this headnote

Attorneys and Law Firms

****747** Lynn W.L. Fahey, New York, N.Y. (Barry Stendig of counsel), for appellant.

Kenneth P. Thompson, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Sholom J. Twersky, and Arieh Schulman of counsel), for respondent.

WILLIAM F. MASTRO, J.P., RUTH C. BALKIN, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

***803** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Foley, J., at plea; Riviezzo, J., at sentencing), rendered April 27, 2012, convicting him of attempted criminal possession of a weapon in the third degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

[1] Contrary to the defendant's contention, he validly waived his right to appeal at the time he entered his plea of guilty. The record of the plea proceedings reveals that, after acknowledging the various trial rights that he was forfeiting as a consequence of his plea of guilty, the defendant allocuted to the offense of attempted criminal possession of a weapon in the third degree. The Supreme Court then questioned the defendant with regard to a printed waiver of appeal form that he had signed, ascertaining that the defendant had received a sufficient opportunity to discuss the waiver with his attorney, that he acknowledged that the waiver was not a legal requirement of every plea but had been negotiated as part of this particular plea, and that he understood that he was giving up the right to appeal "any issue that may arise from this case except certain constitutional issues." Likewise, the printed waiver form recited that the right to appeal was "separate and distinct" from the defendant's trial rights, and was not automatically waived by a plea of guilty, ****748** but that the waiver of appeal was a condition of this particular plea agreement and that the resultant conviction and sentence would be final. Based on its questioning, the court found that the defendant's ***804** waiver of the right to appeal was knowing, voluntary and intelligent, and it executed the form in open court.

Notwithstanding the foregoing, the defendant challenges the propriety of the Supreme Court's denial, after a hearing, of that branch of his omnibus motion which was to suppress certain physical evidence. In this regard, he contends that his waiver of the right to appeal was invalid because "the court never explained ... the constitutional issues that could be appealed despite the waiver, or the constitutional issues that were unappealable by virtue of the waiver" and, thus, it "created uncertainty concerning the constitutional issues forfeited by the appeal waiver." However, the record demonstrates that the waiver of appeal was valid and entitled to enforcement, since it establishes that the defendant appreciated the consequences of the waiver and knowingly and voluntarily accepted them (*see People v. Lopez,* 6 N.Y.3d 248, 256, 811 N.Y.S.2d 623, 844 N.E.2d 1145).

[2] **[3]** **[4]** When the Supreme Court correctly advised the defendant that some constitutional issues would survive his waiver (*see People v. DeSimone,* 80 N.Y.2d 273, 280, 590 N.Y.S.2d 46, 604 N.E.2d 108), the defendant indicated that he understood the meaning of this information. He did not express any confusion or question the court or his attorney (with whom he had an adequate opportunity to discuss the matter) regarding the waiver, nor did he inquire as to whether any particular issue would survive the waiver. Contrary to the defendant's contention, the court was not required to enumerate each and every potential appellate argument that the defendant might still possibly be able to raise despite the waiver, as nothing in the law places such an unrealistic burden upon the court. Similarly, there was no requirement that the defendant expressly waive every potential claim or defense (*see People v. Muniz,* 91 N.Y.2d 570, 574–575, 673 N.Y.S.2d 358, 696 N.E.2d 182; *People v. Abdul,* 112 A.D.3d 644, 645, 976 N.Y.S.2d 187) in order to produce a valid, unrestricted waiver of the right to appeal that was knowing, voluntary, and intelligent, and which encompassed all waivable issues (*see People v. Ceparano,* 96 A.D.3d 774, 775, 945 N.Y.S.2d 421; *People v. Galunas,* 93 A.D.3d 892, 893, 939 N.Y.S.2d 196). Rather, no particular litany by the court was required (*see People v. Bradshaw,* 18 N.Y.3d 257, 265, 938 N.Y.S.2d 254, 961 N.E.2d 645; *People v. Moissett,* 76 N.Y.2d 909, 910–911, 563 N.Y.S.2d 43, 564 N.E.2d 653), and the waiver herein clearly covered all aspects of the case (*see People v. Callahan,* 80 N.Y.2d 273, 280, 590 N.Y.S.2d 46, 604 N.E.2d 108), including the challenged suppression ruling (*see People v. Kemp,* 94 N.Y.2d 831, 833, 703 N.Y.S.2d 59, 724 N.E.2d 754).

Additionally, the Supreme Court did not merely rely on the defendant's execution of the printed waiver form, but conducted an adequate waiver inquiry on the record (*cf.* ***805** *People v. DeSimone,* 80 N.Y.2d at 282–283, 590 N.Y.S.2d 46, 604 N.E.2d 108). Moreover, the court took care not to group the right to appeal with the trial rights automatically forfeited as the consequence of a plea of guilty (*cf. People v. Lopez,* 6 N.Y.3d at 257, 811 N.Y.S.2d 623, 844 N.E.2d 1145). Accordingly, the defendant's valid waiver of his right to appeal precludes review of his contention that the hearing court erred in denying suppression (*see People v.* ****749** *Kemp,* 94 N.Y.2d at 833, 703 N.Y.S.2d 59, 724 N.E.2d 754; *People v. Mackey,* 109 A.D.3d 1008,

971 N.Y.S.2d 478; *People v. Bennett,* 102 A.D.3d 881, 957 N.Y.S.2d 905; *People v. Palmer,* 95 A.D.3d 1039, 943 N.Y.S.2d 775; *People v. Foy,* 89 A.D.3d 1103, 933 N.Y.S.2d 599).

MASTRO, J.P., SGROI and LaSALLE, JJ., concur.

BALKIN, J., dissents, and votes to reverse the judgment, grant that branch of the defendant's motion which was to suppress a handgun, and dismiss the indictment, with the following memorandum.

At the plea proceeding, the Supreme Court's explanation of the waiver of the right to appeal created a significant ambiguity as to the scope of the waiver. That ambiguity was never resolved, and I conclude that it renders the waiver unenforceable, thus permitting us to review the merits of the defendant's suppression claim. Moreover, I conclude that the defendant's suppression claim has merit. Accordingly, I respectfully dissent, and would reverse the judgment, allow the defendant to withdraw his plea of guilty, and grant the defendant's suppression motion.

To be sure, "no public policy preclud[es] defendants from waiving their rights to appeal as a condition of [a] plea" (*People v. Seaberg,* 74 N.Y.2d 1, 10, 543 N.Y.S.2d 968, 541 N.E.2d 1022). Nonetheless, to be enforceable, an appeal waiver must be voluntary, knowing and intelligent (*see id.* at 11, 543 N.Y.S.2d 968, 541 N.E.2d 1022; *People v. Callahan,* 80 N.Y.2d 273, 276, 590 N.Y.S.2d 46, 604 N.E.2d 108). "An appellate waiver meets this standard when a defendant has 'a full appreciation of the consequences' of such waiver" (*People v. Bradshaw,* 18 N.Y.3d 257, 264, 938 N.Y.S.2d 254, 961 N.E.2d 645, quoting *People v. Seaberg,* 74 N.Y.2d at 11, 543 N.Y.S.2d 968, 541 N.E.2d 1022; *see People v. Brown,* 122 A.D.3d 133, 135–37, 992 N.Y.S.2d 297, 2014 N.Y. Slip Op. 06101, *2 [2d Dept.2014]).

The majority relies heavily on the written waiver form, which recited that the "sentence and conviction will be final." As the majority also points out, however, the Supreme Court told the defendant, among other things, that he was surrendering the right to raise on appeal "any issue that may arise from this case except certain constitutional issues." There was no explanation of what those "certain constitutional issues" might have been. The majority, however, concludes that "the court was not required to enumerate each and every potential appellate argument that the defendant might still possibly be able to raise despite the waiver, as nothing in the law places such an unrealistic burden upon the court."

***806** I agree that the Supreme Court was not required to enumerate every constitutional issue that survives a waiver. But, viewed in the context of this case, the court's oral statement, which contradicted the written form, created an important ambiguity that needed to be resolved. The only contested issue in this case was the constitutional issue pertaining to the warrantless search that resulted in the seizure of the gun. Accordingly, I conclude that, in light of its statement that "certain constitutional issues" survived the waiver, the court was required to tell the defendant that his constitutional suppression issue would not survive.

The record does not reflect that the defendant had a "full appreciation of the consequences" of the waiver (*People v.* ****750** *Seaberg,* 74 N.Y.2d at 11, 543 N.Y.S.2d 968, 541 N.E.2d 1022), at least with respect to whether he retained his right to challenge the Supreme Court's suppression ruling. Accordingly, the defendant is not foreclosed from having his suppression claim reviewed on appeal.

I therefore turn to the merits of that constitutional claim. At the suppression hearing, the sole witness, a police officer, testified as to the events surrounding the stop of the defendant's automobile, the defendant's arrest, and the removal of the defendant's automobile to a police station. The officer also testified that, upon performing an "inventory search" of the automobile, he found a loaded semiautomatic handgun in the trunk. The court denied that branch of the defendant's motion which was to suppress that handgun.

Inventory searches of an automobile after the lawful arrest of the driver are permissible as an exception to the warrant requirement (*see People v. Padilla,* 21 N.Y.3d 268, 272, 970 N.Y.S.2d 486, 992 N.E.2d 414; *People v. Gonzalez,* 62 N.Y.2d 386, 388–389, 477 N.Y.S.2d 103, 465 N.E.2d 823). The purpose of an inventory search is not to find—i.e., search for—evidence, but "to properly catalogue the contents of the item searched. The specific objectives of an inventory search, particularly in the context of a vehicle, are to protect the property of the defendant, to protect the police against any claim of lost property, and to protect police personnel and others from any dangerous instruments" (*People v. Johnson,* 1 N.Y.3d 252, 256, 771 N.Y.S.2d 64, 803 N.E.2d 385; *see Florida v. Wells,* 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1).

Although the uncovering of incriminating evidence may not be the purpose of an inventory search, incriminating evidence found during a valid inventory search will not be suppressed (*see People v. Padilla,* 21 N.Y.3d at 272, 970 N.Y.S.2d 486, 992 N.E.2d 414; *People v. Johnson,* 1 N.Y.3d at 256, 771 N.Y.S.2d 64, 803 N.E.2d 385). In order to further the goals justifying the exception, "an inventory search should be conducted pursuant to 'an established procedure clearly limiting the conduct of individual ***807** officers that assures that the searches are carried out consistently and reasonably' " (*People v. Johnson,* 1 N.Y.3d at 256, 771 N.Y.S.2d 64, 803 N.E.2d 385, quoting *People v. Galak,* 80 N.Y.2d 715, 719, 594 N.Y.S.2d 689, 610 N.E.2d 362; *see People v. Gomez,* 13 N.Y.3d 6, 10, 884 N.Y.S.2d 339, 912 N.E.2d 555). The police procedure must be standardized so as to "limit the discretion of the officer in the field" (*People v. Galak,* 80 N.Y.2d at 719, 594 N.Y.S.2d 689, 610 N.E.2d 362). "Thus, two elements must be examined: first, the relationship between the search procedure adopted and the governmental objectives that justify the intrusion and, second, the adequacy of the controls on the officer's discretion" (*id.*). In other words, there must be evidence of the policy as to inventory searches and that the particular inventory search at issue complied with that policy; the court must evaluate the adequacy of the policy itself, to ensure that it furthers the proper goals of and limits on inventory searches (*see People v. Gomez,* 13 N.Y.3d at 11, 884 N.Y.S.2d 339, 912 N.E.2d 555; *People v. Galak,* 80 N.Y.2d at 719, 594 N.Y.S.2d 689, 610 N.E.2d 362). Although the written policy itself need not be entered into evidence, there must be some evidence of what the procedure requires (*see People v. Gomez,* 13 N.Y.3d at 11, 884 N.Y.S.2d 339, 912 N.E.2d 555; *People v. Taylor,* 92 A.D.3d 961, 962, 940 N.Y.S.2d 103), and the officer's compliance with it (*see People v. Padilla,* 21 N.Y.3d at 272, 970 N.Y.S.2d 486, 992 N.E.2d 414).

****751** Here, the officer who testified at the suppression hearing was not asked about whether the New York City Police Department had a policy with respect to the conduct of inventory searches, the content of any such policy, or the officer's compliance with it (*cf. People v. Taylor,* 92 A.D.3d at 962, 940 N.Y.S.2d 103). In the absence of any evidence satisfying the People's burden of establishing the lawfulness of the search of the trunk of the defendant's automobile, the Supreme Court should have granted that branch of the defendant's motion which sought suppression of the handgun found during that search (*see People v. Gomez,* 13 N.Y.3d at 10–11, 884 N.Y.S.2d 339, 912 N.E.2d 555; *People v. Russell,* 13 A.D.3d 655, 657, 788 N.Y.S.2d 139).

All Citations

121 A.D.3d 803, 993 N.Y.S.2d 746, 2014 N.Y. Slip Op. 06838

197 A.D.3d 1324
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Fabian J. CORLEY, appellant.

2018–00522
|
(Ind. No. 17–00256)
|
Submitted—September 9, 2021
|
September 29, 2021

Attorneys and Law Firms

Mary Zugibe Raleigh, Pine Bush, NY, for appellant.

David M. Hoovler, District Attorney, Goshen, N.Y. (Andrew R. Kass of counsel), for respondent.

HECTOR D. LASALLE, P.J., REINALDO E. RIVERA, COLLEEN D. DUFFY, WILLIAM G. FORD, JJ.

DECISION & ORDER

Appeal by the defendant from a judgment of the County Court, Orange County (Craig Stephen Brown, J.), rendered November ***901** 2, 2017, convicting him of manslaughter in the first degree and criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

The record does not establish that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v. Bradshaw,* 18 N.Y.3d 257, 264, 938 N.Y.S.2d 254, 961 N.E.2d 645). The County Court mischaracterized the nature of the right to appeal by stating that the defendant's conviction and sentence would be final (*see People v. Bisono,* 36 N.Y.3d 1013, 1017–1018, 140 **N.Y.S.3d** 433, 164 N.E.3d 239; *People v. Thomas,* 34 N.Y.3d 545, 564–566, 122 **N.Y.S.3d** 226, 144 N.E.3d 970), and the written waiver form did not overcome the deficiencies in the court's explanation of the right to appeal, as it did not contain clarifying language that appellate review remained available for select issues (*see People v. Thomas,* 34 N.Y.3d at 566, 122 **N.Y.S.3d** 226, 144 N.E.3d 970; *People v. Brown,* 195 **A.D.3d** 943, 146 **N.Y.S.3d** 514; *People v. Burbridge,* 194 **A.D.3d** 831, 147 **N.Y.S.3d** 129). Thus, the purported waiver does not preclude appellate review of the defendant's excessive sentence claim.

Nevertheless, the sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

LASALLE, P.J., RIVERA, DUFFY and FORD, JJ., concur.

All Citations

197 A.D.3d 1324, 151 N.Y.S.3d 900 (Mem), 2021 N.Y. Slip Op. 05129

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42 Misc.3d 140(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
Supreme Court, Appellate Term, New York.
Second Department, 9th and 10th Judicial Districts.

The **PEOPLE** of the State
of New York, Respondent,
v.
Maria **CULLEN**, Appellant.

Jan. 31, 2014.

Present: NICOLAI, P.J., LaSALLE and MARANO, JJ.

Opinion

***1** Appeal from a judgment of the Justice Court of the Town of Pelham, Westchester County (Stephen Huff, J., at trial; John De Chario, J., at sentence), rendered July 19, 2012. The judgment convicted defendant, upon a jury verdict, of criminal trespass in the second degree.

ORDERED that the judgment of conviction is reversed, on the law, and the matter is remitted for a new trial.

Following a jury trial, defendant was convicted of criminal trespass in the second degree (Penal Law § 140.15[1]).

Prior to the start of the trial, defendant asked the Justice Court to redact certain audio portions of a video which the **People** intended to introduce at trial. In support of the application, defense counsel highlighted the portion of the video showing defendant exiting from the complainant's house, which included audio of statements made by defendant and the complainant alluding to defendant's prior arrest, which statements, defendant argued, were prejudicial, as well as statements made by the complainant's husband, who had died prior to trial, which, defendant asserted, violated defendant's Sixth Amendment right to confront witnesses. The application was denied. At trial, the video was admitted into evidence and the **People** presented three witnesses, including the complainant, who testified, among other things, that they had observed defendant inside of the complainant's dwelling on the date in question, and that defendant had no permission or authority to enter or remain in the dwelling.

On appeal, defendant contends that she was denied a fair trial because, among other things, the Justice Court failed to redact the relevant audio portions of the video and instructed the jury that it should presume that the witnesses had testified truthfully[1].

The video in question (**People's** Exhibit 4) depicts defendant exiting the complainant's house and contains the voice of the complainant stating that, "Now there are charges against you once again." Defendant is shown stating, "Let the police come and arrest me. Let's do it all over again," and repeatedly stated, "Let's do it all over again." In addition, the complainant's husband can be heard, not seen, making angry comments. Although the contents of the video may show res gestae, the prejudicial impact of the audio portion of the video outweighed any probative value. Thus, the audio should have been redacted (*see e.g.* ***People*** *v. Ely,* 68 N.Y.2d 520 [1986]). In view of the foregoing, as well as the cumulative effect of the other errors committed by the Justice Court during trial, we find that defendant was deprived of a fair trial.

Accordingly, the judgment of conviction is reversed and the matter is remitted for a new trial.

NICOLAI, P.J., LaSALLE and MARANO, JJ., concur.

All Citations

42 Misc.3d 140(A), 986 N.Y.S.2d 867 (Table), 2014 WL 562607, 2014 N.Y. Slip Op. 50181(U)

Footnotes

1 We note that after defense counsel objected and moved for a mistrial, the court attempted to cure this error by providing the jury with a correct statement of the law.

164 A.D.3d 697
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Joseph DEFELICE, appellant.

2013–10722
|
(Ind.No. 2597/10)
|
Argued—June 11, 2018
|
August 15, 2018

Synopsis

Background: Defendant was convicted, following jury trial, in the County Court, Suffolk County, John J. Toomey, J., of murder in the second degree, criminal facilitation in the second degree, and hindering prosecution in the first degree. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that to extent material requested by defendant was produced to trial court for in camera review, it was properly part of record, as required for *Brady* claim to be reviewable on direct appeal.

Remitted.

West Headnotes (1)

[1] **Criminal Law** Remission to lower court for correction of defects

To extent that material requested by defendant, including police interviews of witnesses to whom codefendant had made statements regarding his involvement in shooting of defendant's girlfriend, was produced to trial court for in camera review, it was properly part of record, as required for *Brady* claim to be reviewable on direct appeal, and thus remittal for hearing to reconstruct record was warranted.

2 Cases that cite this headnote

Attorneys and Law Firms

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Timothy D. Sini, District Attorney, Riverhead, N.Y. (Karla Lato of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., RUTH C. BALKIN, SANDRA L. SGROI, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***697** Appeal by the defendant from a judgment of the County Court, Suffolk County (John J. Toomey, J.), rendered November 14, 2013, convicting him of murder in the second degree, criminal facilitation in the second degree, and hindering prosecution in the first degree, upon a jury verdict, and imposing sentence.

ORDERED that the matter is remitted to the County Court, Suffolk County, for a reconstruction hearing in accordance herewith and thereafter a report to this Court with all convenient speed, and the appeal is held in abeyance in the interim.

The defendant was charged, among other things, with acting in concert with a codefendant to commit murder in the second degree in connection with the death of ****91** the defendant's girlfriend. After a jury trial, the defendant was convicted of murder in the second degree, as well as criminal facilitation in the second degree and hindering prosecution in the first degree.

During the course of the trial, defense counsel informed the trial court that, according to the notes of an investigating police detective, the police had interviewed witnesses to whom the codefendant had made statements regarding his involvement in the shooting of the defendant's girlfriend. Defense counsel requested to be given the material reflecting those statements, arguing that it constituted *Brady* material (*see Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215). Alternatively, defense counsel requested that the court review the material to determine whether it should

be disclosed under *Brady.* The trial court agreed to review the material in camera. No material was ultimately disclosed to the defendant.

On appeal, the defendant argues that the failure to disclose the requested material constituted a *Brady* violation. The People were unable to provide to this Court any material they provided to the trial court for in camera review. They indicate that they have no record in their files of what material may have been submitted to the trial court. The People assert that, nevertheless, the defendant's *Brady* claim is based on matter dehors the record, and thus cannot be reviewed on direct appeal. However, to the extent that material was produced to the trial court for in camera review, it is properly part of the record, and the defendant's *Brady* claim would thus be reviewable on direct appeal. Under these circumstances, we deem it appropriate to remit the matter for a hearing to reconstruct the ***698** record as to what, if any, material was provided to the trial court for in camera review (*see People v. Yavru–Sakuk,* 98 N.Y.2d 56, 60–62, 745 N.Y.S.2d 787, 772 N.E.2d 1145), and thereafter to report to this Court with all convenient speed. The appeal is held in abeyance in the interim, and we do not decide any other issues at this time.

SCHEINKMAN, P.J., BALKIN, SGROI and LASALLE, JJ., concur.

All Citations

164 A.D.3d 697, 82 N.Y.S.3d 90, 2018 N.Y. Slip Op. 05781

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180 A.D.3d 700
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Joseph DEFELICE, Appellant.

2013–10722
|
(Ind. No. 2597/10)
|
Argued—June 11, 2018
|
February 5, 2020

Synopsis

Background: Defendant was convicted in the County Court, Suffolk County, John J. Toomey, J., of second-degree murder, second-degree criminal facilitation, and first-degree hindering of prosecution. Defendant appealed. The Supreme Court, Appellate Division, 164 A.D.3d 697, 82 N.Y.S.3d 90, remitted for hearing to reconstruct the record as to what material was provided to trial court for in camera review. The County Court, Suffolk County, William J. Condon, J., 2019 WL 4454525, filed report, and the Appellate Division proceeded with appeal.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant's statements to law enforcement officials were not the product of a custodial interrogation for *Miranda* purposes;

[2] portions of defendant's written statement related to uncharged drug crimes should not have been admitted at trial; but

[3] trial court's error in admitting portions of defendant's written statement related to uncharged drug crimes was harmless.

Affirmed.

West Headnotes (6)

[1] **Criminal Law** Particular cases or issues

Murder defendant's statements to law enforcement officials were not the product of a custodial interrogation, for *Miranda* purposes, where the statements were made during interview at defendant's home after he called 911 and reported that codefendant had shot and abducted defendant's girlfriend, and at police station after defendant voluntarily accompanied officers to assist in locating girlfriend.

1 Case that cites this headnote

[2] **Criminal Law** Homicide, mayhem, and assault with intent to kill

Criminal Law Homicide, mayhem, and assault with intent to kill

Portions of defendant's written statement related to uncharged drug crimes should not have been admitted at defendant's trial for second-degree murder; defendant's conduct related to drug sales and possession was not material to the murder of his girlfriend, was not required to complete the narrative of events, and was not necessary to explain the relationship between defendant and codefendant, the relevant aspects of which were otherwise set forth in the statement.

[3] **Criminal Law** Evidence of other offenses and misconduct

Trial court's error in admitting in second-degree murder prosecution portions of defendant's written statement related to uncharged drug crimes, which were immaterial to the charged crimes, was harmless, where proof of his guilt was overwhelming and there was no significant probability jury would have acquitted him if the evidence of uncharged crimes had not been admitted.

[4] **Criminal Law** Completing the narrative in general

In appropriate instances, evidence of uncharged crimes may be allowable as background or narrative because juries might wander helpless trying to sort out ambiguous but material facts.

[5] **Criminal Law** In general; examination of victim or witness

Criminal Law Constitutional obligations regarding disclosure

In general, defendants have the right to disclosure pursuant to *Rosario* and *Brady*, as well as the State Criminal Procedure Law. N.Y. CPLR § 245.

[6] **Criminal Law** Constitutional obligations regarding disclosure

To establish a *Brady* violation warranting a new trial a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material.

Attorneys and Law Firms

****492** Carol E. Castillo, East Setauket, N.Y. (Judah Serfaty of counsel), for appellant.

Timothy D. Sini, District Attorney, Riverhead, N.Y. (Karla Lato and Guy Arcidiacono of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., RUTH C. BALKIN, HECTOR D. LASALLE, PAUL WOOTEN, JJ.

DECISION & ORDER

***700** Appeal by the defendant from a judgment of the County Court, Suffolk County (John J. Toomey, J.), rendered November 14, 2013, convicting him of murder in the second degree, criminal facilitation in the second degree, and hindering prosecution in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements made to law enforcement officials. By decision and order dated August 15, 2018, this Court remitted the matter to the County Court, Suffolk County, for a hearing to reconstruct the record as to what, if any, material was provided to the trial court for in camera review, and thereafter a report to this Court, and the appeal was held in abeyance in the interim. A report has now been filed by the County Court, Suffolk County (William J. Condon, J.). Justice Wooten has been substituted for former Justice Sgroi (*see* 22 NYCRR 1250.1[b]).

ORDERED that the judgment is affirmed.

The defendant and the codefendant David Newbeck were charged, among other things, with acting in concert to commit murder in the second degree in connection with the death of the defendant's girlfriend. The defendant was also charged with criminal facilitation in the second degree and hindering prosecution in the first degree. At the conclusion of the defendant's trial, the jury found the defendant guilty on all counts, and the County Court imposed a sentence.

***701** **[1]** We agree with the County Court's determination denying that branch of the defendant's omnibus motion which was to suppress his statements made to law enforcement officials. The evidence at the suppression hearing supported the court's conclusion that the statements the defendant made prior to the administration of *Miranda* warnings were not the product of a custodial interrogation (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *People v. Yukl,* 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172; *People v. Jemmott,* 125 A.D.3d 1005, 1006, 5 N.Y.S.3d 447; *People v. Martin,* 68 A.D.3d 1015, 890 N.Y.S.2d 646). The statements were made during an interview at the defendant's home after he called the 911 emergency number and reported that the codefendant had shot and abducted the defendant's girlfriend, and also at the police station, after the defendant voluntarily accompanied the officers to assist the police in locating his girlfriend. Under those circumstances, a reasonable person, innocent of any crime, would not have believed that he was in custody (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; ****493** *People v. Yukl,* 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172; *People v. Jemmott,* 125 A.D.3d at 1006, 5 N.Y.S.3d 447; *People v. Martin,* 68 A.D.3d 1015, 890 N.Y.S.2d 646). The evidence at the suppression hearing concerning the nature and duration of the

interrogation that occurred after the defendant was advised of, and voluntarily waived, his *Miranda* rights, supported the court's further conclusion that the defendant's post-*Miranda* statements were voluntarily given (*see People v. Jin Cheng Lin,* 26 N.Y.3d 701, 27 N.Y.S.3d 439, 725, 47 N.E.3d 718; *People v. Glasper,* 160 A.D.2d 723, 724, 553 N.Y.S.2d 472).

Viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt (see *People v. Cahill,* 2 N.Y.3d 14, 57, 777 N.Y.S.2d 332, 809 N.E.2d 561; *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Moreover, upon our independent review of the record (see CPL 470.15[5]), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Mateo,* 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley,* 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

[2] **[3]** **[4]** The County Court improvidently exercised its discretion in declining to redact portions of the defendant's written statement which pertained to uncharged drug crimes. The court allowed the jury to consider the challenged portions of the statement on the ground that they served to complete the narrative of events and explain the nature of the relationship between the defendant and codefendant. "In appropriate instances, evidence of uncharged crimes may be allowable as background or narrative because juries might wander helpless trying to sort out ambiguous but material facts" (***702** *People v. Resek,* 3 N.Y.3d 385, 390, 787 N.Y.S.2d 683, 821 N.E.2d 108 [internal quotation marks omitted]). Here, the portions of the statement relating to drug sales and possession were not necessary to assist the jury in sorting out ambiguous but material facts. The uncharged conduct was not material to the incident at issue and the narrative of events was not incomplete absent reference to that conduct (*see id.* at 390, 787 N.Y.S.2d 683, 821 N.E.2d 108; *People v. Maier,* 77 A.D.3d 681, 682, 908 N.Y.S.2d 711; *People v. Wilkinson,* 71 A.D.3d 249, 254–255, 892 N.Y.S.2d 535). Additionally, the challenged portions of the statement were not necessary to explain the nature of the relationship between the defendant and the codefendant, as the facts about that relationship which were relevant to the crimes charged were otherwise set forth in the defendant's written statement. Accordingly, the evidence regarding the uncharged drug crimes should not have been admitted (*see People v. Mack,* 91 A.D.3d 794, 796, 936 N.Y.S.2d 320; *People v. Maier,* 77 A.D.3d at 682, 908 N.Y.S.2d 711; *People v. Wilkinson,* 71 A.D.3d at 254–255, 892 N.Y.S.2d 535). Nevertheless, the error was harmless, as the proof of the defendant's guilt was overwhelming and there is no significant probability that the jury would have acquitted the defendant had the uncharged crimes evidence not been admitted (*see People v. Crimmins,* 36 N.Y.2d 230, 241–242, 367 N.Y.S.2d 213, 326 N.E.2d 787).

[5] **[6]** In general, defendants have the right to disclosure pursuant to *People v. Rosario,* 9 N.Y.2d 286, 290–291, 213 N.Y.S.2d 448, 173 N.E.2d 881) and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215), as well as the CPL (*see* CPL former art 240; CPL art 245). "To establish a *Brady* violation warranting a new trial, '[the] defendant must show that (1) ****494** the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material' " (*People v. Ulett,* 33 N.Y.3d 512, 515, 105 N.Y.S.3d 371, 129 N.E.3d 909, quoting *People v. Hayes,* 17 N.Y.3d 46, 50, 926 N.Y.S.2d 382, 950 N.E.2d 118; *see People v. Giuca,* 33 N.Y.3d 462, 473, 104 N.Y.S.3d 577, 128 N.E.3d 655). In our prior decision and order in this matter, we directed the County Court, Suffolk County, to hold a reconstruction hearing to determine what, if any, material was provided to the trial court for in camera review in response to the defendant's mid-trial claim that he was entitled to the disclosure of additional *Brady* material (*see People v. DeFelice,* 164 A.D.3d 697, 697–698, 82 N.Y.S.3d 90). The County Court held a hearing in response to this Court's order, at which the County Court Judge who presided at the trial, and who has since retired, testified. The County Court has now filed a report in which it identifies the materials submitted for in camera review. We have reviewed that evidence, and we agree with the trial court that it did not contain *Brady* material.

The defendant was not deprived of the effective assistance of ***703** counsel. The defendant failed to show that the challenged tactics employed by trial counsel lacked a legitimate strategic basis (*see People v. Barboni,* 21 N.Y.3d 393, 405–407, 971 N.Y.S.2d 729, 994 N.E.2d 820; *People v. Windley,* 70 A.D.3d 1060, 1061, 896 N.Y.S.2d 376; *People v. Gonzalez,* 22 A.D.3d 597, 598, 801 N.Y.S.2d 757), and, viewing the record as a whole, the defendant received meaningful representation (*see People v. Benevento,* 91 N.Y.2d 708, 674 N.Y.S.2d 629, 697 N.E.2d 584; *People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400).

The sentence imposed was not excessive (*see People v. Suitte*, 90 A.D.2d 80, 455 N.Y.S.2d 675).

The defendant's remaining contentions are without merit.

SCHEINKMAN, P.J., BALKIN, LASALLE and WOOTEN, JJ., concur.

All Citations

180 A.D.3d 700, 119 N.Y.S.3d 491, 2020 N.Y. Slip Op. 00874

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120 A.D.3d 1429
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Angel DELVILLARTRON, appellant.

Sept. 24, 2014.

Synopsis

Background: After the Supreme Court, Queens County, Cooperman, J.H.O., denied defendant's motion to suppress his statements to law enforcement officials, and after the Supreme Court, Kohm, J., adhered to that denial, defendant was convicted, in the Supreme Court, Zayas, J., of second-degree burglary and third-degree criminal possession of stolen property. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] evidence was legally insufficient to establish third-degree criminal possession of stolen property, and

[2] officers lacked probable cause to arrest defendant.

Reversed and remitted.

LaSalle, J., filed an opinion concurring in part and dissenting in part.

West Headnotes (6)

[1] **Receiving Stolen Goods** Weight and sufficiency in general

Evidence was legally insufficient to establish third-degree criminal possession of stolen property; there was no evidence supporting a conclusion that defendant ever possessed the stolen property himself or acted in concert with two codefendants in their possession of the stolen property.

[2] **Criminal Law** Sufficiency of evidence

Pursuant to its jurisdiction to reverse a judgment in the interest of justice, Appellate Division of New York Supreme Court would reach defendant's appellate claim that the evidence was legally insufficient to establish third-degree criminal possession of stolen property, though defendant had not preserved the claim for appellate review. McKinney's CPL § 470.15(3)(c).

1 Case that cites this headnote

[3] **Criminal Law** Construction in favor of government, state, or prosecution

When reviewing the legal sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the prosecution.

[4] **Arrest** Information from Others

Police had probable cause to arrest co-defendants when robbery victims pointed at them upon the arrival of the police. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[5] **Arrest** Particular cases

Based on presence of two robbery suspects in defendant's parked car after suspects had fled from scene of robbery, officers reasonably suspected that defendant was involved in the crime as a getaway driver, as basis for forcibly stopping defendant and detaining him briefly for investigative purposes. U.S.C.A. Const.Amend. 4.

[6] **Arrest** Arrested person's presence or association

Officers lacked probable cause to arrest defendant, despite presence of two robbery suspects in defendant's parked car after suspects had fled from scene of robbery; defendant was sitting in driver's seat of lawfully parked car with

the engine off and the keys not in the ignition, the car was a full avenue away from, and not within sight of, victims' house, defendant did not resist police in any way, and his behavior, in fumbling with his keys in trying to place them in the ignition, was innocuous; under circumstances known to police at that point, it was just as likely that defendant was not complicit in criminal activity as that he was a getaway driver. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

Attorneys and Law Firms

****364** Lynn W.L. Fahey, New York, N.Y. (Casey Rose Scott and Leila Hull of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Ellen C. Abbot, and Danielle S. Fenn of counsel), for respondent.

RUTH C. BALKIN, J.P., LEONARD B. AUSTIN, HECTOR D. LaSALLE, and BETSY BARROS, JJ.

Opinion

***1430** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Zayas, J.), rendered June 18, 2012, convicting him of burglary in the second degree and criminal possession of stolen property in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review an order of the same court (Kohm, J.), dated March 15, 2011, which, upon reargument, adhered to a prior determination in an order of the dated January 7, 2011, denying, after a hearing (Cooperman, J.H.O.), that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

ORDERED that the judgment is reversed, on the law and as a matter of discretion in the interest of justice, upon reargument, that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials is granted, the count of the indictment charging the defendant with criminal possession of stolen property in the third degree is dismissed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings on the count of the indictment charging the defendant with burglary in the second degree.

[1] **[2]** We agree with the defendant that the evidence was legally insufficient to prove his guilt of criminal possession of stolen property in the third degree (*see People v. Spencer,* 257 A.D.2d 638, 638, 684 N.Y.S.2d 561; *cf. People v. Fecunda,* 150 A.D.2d 600, 601, 541 N.Y.S.2d 468). There was no evidence supporting a conclusion that the defendant ever possessed the stolen property himself or acted in concert with the codefendants Kenneth Myers and Kevin Santos in their possession of the stolen property. Although the defendant's claim as to this count is unpreserved for appellate review, we reach it in the exercise of our interest of justice jurisdiction (*see* CPL 470.15[3][c]; *People v. Curry,* 101 A.D.3d 743, 744, 959 N.Y.S.2d 495).

[3] The defendant's contention that the evidence was legally insufficient to prove his guilt of burglary in the second degree is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Hawkins,* 11 N.Y.3d 484, 492, 872 N.Y.S.2d 395, 900 N.E.2d 946; *People v. Pitre,* 108 A.D.3d 643, 643, 968 N.Y.S.2d 585; *People v. Cabrera,* 85 A.D.3d 942, 942, 925 N.Y.S.2d 166). In any event, viewing the evidence in the light most favorable to the prosecution ****365** (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of that crime (*see People v. Bacote,* 107 A.D.3d 641, 641, 967 N.Y.S.2d 727; ***1431** *People v. Horsey,* 304 A.D.2d 852, 853–854, 758 N.Y.S.2d 695; *People v. Anaya,* 206 A.D.2d 380, 381, 614 N.Y.S.2d 59; *People v. Poppel,* 143 A.D.2d 854, 533 N.Y.S.2d 132; *cf. People v. Taylor,* 141 A.D.2d 581, 581–582, 529 N.Y.S.2d 191). Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Delamota,* 18 N.Y.3d 107, 116–117, 936 N.Y.S.2d 614, 960 N.E.2d 383; *People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902; *People v. Medina,* 37 A.D.3d 240, 241, 830 N.Y.S.2d 76).

Despite the sufficiency of the evidence regarding the conviction of burglary in the second degree, reversal of the defendant's conviction on that count is required, because, upon reargument, the court should have granted that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. The hearing testimony established that at approximately 8:00 a.m. on June 10, 2009, the police received a radio transmission regarding a robbery in progress, perpetrated by two black males, at a Queens residence. The police activated their sirens and lights

and went to the specified house, arriving within two minutes of receiving the transmission. When the police arrived, two of the complainants, still gagged and partially bound, were on the porch of the house. The complainants used gestures to direct the officers' attention to two men, Myers and Santos, who were walking on the sidewalk, about four houses away. Myers and Santos, who were the only civilians on the block, started running, and the officers chased them. During the chase, Santos discarded an object, which the police later recovered and found to be a gun. When Myers and Santos turned a corner several blocks from the complainants' house, the officers lost sight of them briefly. When one of the officers turned the corner, he did not see any people, but saw the rear passenger door on a sport utility vehicle being closed. The vehicle was legally parked and the engine was off. The officer ran to the vehicle and peered inside through the tinted windows. After spotting Myers and Santos in the rear passenger seat, the officer "punched" the driver's side window to alert the driver not to drive away. The officer pulled the driver's door open and saw the defendant in the driver's seat, "fumbling" with the keys and trying to put them in the ignition. The officer pulled the defendant out of the car, placed him face-down on the ground, and handcuffed him. Eventually, the defendant was placed in a police car. At some point, one of the complainants, who had arrived at the scene of the arrest, happened to look into the police car and recognized the defendant as an acquaintance of his girlfriend. The defendant was later taken to the precinct, where, after being advised of his rights, he made inculpatory statements.

***1432** The judicial hearing officer (hereinafter the J.H.O.) recommended denial of the defendant's motion to suppress his statements under *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824. The J.H.O. concluded that, under the circumstances, the police had reasonable suspicion to forcibly detain the defendant and conduct a brief investigation. Further, the J.H.O. concluded that the police had probable cause to arrest the defendant when he was recognized by one of the complainants as an acquaintance of his girlfriend. The Supreme Court adopted the J.H.O.'s findings of fact and conclusions of law, and ****366** denied suppression. The defendant moved for leave to reargue his motion, and the Supreme Court granted reargument, but adhered to its initial determination.

[4] **[5]** **[6]** The evidence at the suppression hearing established that, under the circumstances, the police had probable cause to arrest Myers and Santos when the complainants pointed at them upon the arrival of the police (*see People v. Collado,* 169 A.D.2d 531, 531–532, 564 N.Y.S.2d 383). Additionally, based on the presence of Myers and Santos in the defendant's car after those two men fled, the police reasonably suspected that the defendant was involved in the crime as a getaway driver (*see People v. Sanchez,* 216 A.D.2d 207, 207, 629 N.Y.S.2d 215; *People v. Gianfrate,* 192 A.D.2d 970, 971, 596 N.Y.S.2d 933). Given this reasonable suspicion, the police were permitted to forcibly stop the defendant and detain him briefly for investigative purposes (*see People v. Moore,* 6 N.Y.3d 496, 498–499, 814 N.Y.S.2d 567, 847 N.E.2d 1141), but they did not have probable cause to arrest him at that juncture (*see People v. Shulman,* 6 N.Y.3d 1, 25–26, 809 N.Y.S.2d 485, 843 N.E.2d 125). When the police first encountered the defendant, he was sitting in the driver's seat of a lawfully parked car with the engine off and the keys not in the ignition, a full avenue away from, and not within sight of, the complainants' house. The defendant did not resist the police in any way and there was no evidence that he attempted or intended to evade them. The fact that the defendant fumbled with his keys in trying to place them in the ignition did not elevate reasonable suspicion to probable cause, because that behavior was innocuous. Under the circumstances known to the police at that point, it was just as likely that the defendant was not complicit in Myers's and Santos's criminal activity as that he was a getaway driver (*see People v. Vandover,* 20 N.Y.3d 235, 237, 958 N.Y.S.2d 83, 981 N.E.2d 784; *People v. Carrasquillo,* 54 N.Y.2d 248, 254, 445 N.Y.S.2d 97, 429 N.E.2d 775; *People v. Cash J.Y.,* 60 A.D.3d 1487, 1488–1489, 876 N.Y.S.2d 289; *People v. Wade,* 143 A.D.2d 703, 705, 533 N.Y.S.2d 83; *cf. People v. Bernier,* 245 A.D.2d 137, 137, 666 N.Y.S.2d 161).

The hearing record established, however, that even if the defendant was not under arrest when he was first taken out of his ***1433** car and handcuffed, he was certainly under arrest by the time the police transferred him to a police car (*see People v. Brnja,* 50 N.Y.2d 366, 372, 429 N.Y.S.2d 173, 406 N.E.2d 1066; *People v. Hairston,* 117 A.D.2d 618, 620, 498 N.Y.S.2d 161). Since that arrest was not supported by probable cause, the resulting inculpatory statements at the precinct should have been suppressed. Moreover, inasmuch as the evidence of the defendant's guilt without regard to his inculpatory statements was not overwhelming, there is no basis for consideration of the harmless error doctrine (*see People v. Crimmins,* 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 326 N.E.2d 787).

The People's remaining contention is without merit.

We need not address the defendant's remaining contentions, which have been rendered academic in light of our determination.

BALKIN, J.P., AUSTIN and BARROS, JJ., concur.

LaSALLE, J., concurs in part and dissents in part and votes to modify the judgment with the following memorandum.

I agree with majority to the extent that they hold that the evidence was legally insufficient to prove the defendant's guilt of criminal possession stolen property in ****367** the third degree. However, I respectfully dissent, and vote to modify the judgment, because I conclude that the police officer had probable cause to arrest the defendant for the crime of burglary in the second degree.

The events leading to the defendant's arrest are not in substantial dispute. On June 10, 2009, at approximately 8:00 a.m., the police received a radio transmission of an armed robbery in progress at a residence, perpetrated by two black males. Police officers arrived at the location of the home invasion within minutes of the radio transmission. Upon the officers' arrival at the residence, they observed two of the complainants on the porch, still gagged and partially bound. The complainants used gestures to direct the officers' attention to two men, later identified as Kenneth Myers and Kelvin Santos, who were walking on the sidewalk. Myers and Santos starting running, and three of the police officers, including Officer Soto, chased them. During the chase, Santos discarded an object which Officer Soto observed to be a gun when he ran past it, but Officer Soto did not stop to retrieve the gun at that time. Myers and Santos turned a corner, and Officer Soto lost sight of them for two to three seconds. Upon turning the corner, Officer Soto observed no one on the street, but saw a rear door to a vehicle being closed. Officer Soto approached the vehicle, and saw Myers and Santos in the back seat. Officer Soto approached the driver's side door, and observed the defendant fumbling with the car keys and attempting to put the key in the ignition. Officer Soto opened the driver's side door, pulled the defendant out, laid him ***1434** on the ground, and handcuffed him. Myers was handcuffed by another officer. Santos started running again, but was soon apprehended and taken into custody. The defendant was placed in the police car. Later, one of the complainants arrived at the scene of arrest, observed the defendant in the police car, and indicated that he recognized him as an acquaintance of his girlfriend. The defendant was subsequently taken to the precinct where, after being advised of his rights, he made inculpatory statements.

The issue presented in this case is whether Officer Soto had probable cause to arrest the defendant. I disagree with the majority, and would hold that under the undisputed facts and circumstances of the case, probable cause existed to arrest the defendant.

"Probable cause to arrest requires the existence of facts and circumstances which, when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been or is being committed, and that the defendant committed or is committing that offense" (*People v. Wright,* 8 A.D.3d 304, 306, 778 N.Y.S.2d 59; *see People v. Bigelow,* 66 N.Y.2d 417, 423, 497 N.Y.S.2d 630, 488 N.E.2d 451; *People v. Capela,* 97 A.D.3d 760, 760–761, 948 N.Y.S.2d 423). When determining whether a police officer has probable cause for an arrest, "the emphasis should not be narrowly focused on ... any ... single factor, but on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents" (*People v. Bothwell,* 261 A.D.2d 232, 234, 690 N.Y.S.2d 231 [internal quotation marks omitted]; *see People v. Graham,* 211 A.D.2d 55, 58, 626 N.Y.S.2d 95; *People v. Cabot,* 88 A.D.2d 556, 557, 450 N.Y.S.2d 489; *People v. Wright,* 8 A.D.3d at 307, 778 N.Y.S.2d 59). A determination of whether probable cause existed for an arrest is to be made "after considering all of the facts and circumstances together ... Viewed singly, these may not be persuasive, yet ****368** when viewed together the puzzle may fit and probable cause found" (*People v. Bigelow,* 66 N.Y.2d at 423, 497 N.Y.S.2d 630, 488 N.E.2d 451).

In this case, an evaluation of the totality of the circumstances fully supports the conclusion that probable cause existed for Officer Soto to arrest the defendant. After responding to a call for an armed robbery in progress, Officer Soto and his fellow officers found two individuals bound and gagged gesturing toward Myers and Santos, who began to flee on foot. Officer Soto observed Santos discard an object, which he moments later observed to be a handgun. Myers and Santos then entered the rear of a nearby vehicle, and Officer Soto observed the defendant fumbling with the keys, attempting to put them in the ignition.

***1435** Contrary to the conclusion of the majority, in evaluating the totality of the circumstances, I do not believe

the defendant's behavior can be viewed as "innocuous." Indeed, in my view, the totality of the facts and circumstances would lead a reasonable person possessing the same expertise as the arresting officer to conclude that the defendant was acting in concert with Myers and Santos, in attempting to assist them to flee the scene of the home invasion (*see People v. Wright,* 8 A.D.3d at 307, 778 N.Y.S.2d 59; *People v. Attebery,* 223 A.D.2d 714, 715, 637 N.Y.S.2d 194). Therefore, I would hold that the hearing court properly determined that there was probable cause for the defendant's arrest, and no basis to suppress his statements to law enforcement officials.

Accordingly, because I conclude that there was probable cause for the defendant's arrest, and because I determine the defendant's remaining contentions, apart from the contention that the evidence was legally insufficient to prove his guilt of criminal possession of stolen property in the third degree, are without merit, I would vote to modify the judgment, as a matter of discretion in the interest of justice, by vacating the conviction of criminal possession of stolen property in the third degree and the sentence imposed thereon, and to dismiss that count of the indictment.

All Citations

120 A.D.3d 1429, 992 N.Y.S.2d 363, 2014 N.Y. Slip Op. 06327

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181 A.D.3d 918
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Phylip DERIVAL, Appellant.

2017–00603
|
(Ind. No. 15-00245)
|
Argued - October 17, 2018
|
March 25, 2020

Synopsis

Background: Defendant was convicted, after nonjury trial, in the County Court, Rockland County, Victor J. Alfieri, J., of criminally negligent homicide following motor vehicle accident. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that state failed to prove beyond a reasonable doubt that defendant failed to perceive a substantial and unjustifiable risk which caused death of his passenger, and thus verdict of guilt was against the weight of the evidence.

Reversed and remitted.

LaSalle, J., dissented with opinion in which Chambers, J.P., concurred.

West Headnotes (9)

[1] **Criminal Law** Verdict supported by evidence

Criminal Law Inferences or hypotheses from evidence

In evaluating whether evidence presented at trial was legally sufficient, a court must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the factfinder on the basis of the evidence at trial.

[2] **Automobiles** Homicide

State failed to prove beyond a reasonable doubt that defendant failed to perceive a substantial and unjustifiable risk which caused the death of his passenger in motor vehicle accident involving three separate vehicles, and thus verdict of guilt in nonjury trial for criminally negligent homicide was against the weight of the evidence and reversal was warranted, where eyewitnesses and expert witnesses did not present a single consistent version of how accident occurred, state's experts each provided testimony that was at odd with the other's testimony, and facts on which experts based opinions conflicted with testimony of eyewitnesses present during accident. N.Y. Penal Law §§ 15.05(4), 125.10.

[3] **Criminal Law** Right of Defendant to Review

Criminal Law Weighing evidence

Upon a defendant's request, the Appellate Division must conduct a weight of the evidence review and, therefore, a defendant will be given one appellate review of adverse factual findings.

[4] **Criminal Law** Conclusiveness of Verdict

Weight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable; if so, the court must weigh conflicting testimony, review any rational inferences that may have been drawn from the evidence and evaluate the strength of such conclusions.

[5] **Criminal Law** Reasonable doubt

Based on the weight of credible evidence, appellate court decides whether the factfinder was justified in finding the defendant guilty beyond a reasonable doubt.

1 Case that cites this headnote

[6] **Criminal Law** Weighing evidence

Appellate court's power to conduct weight of the evidence review effectively allows the appellate court to serve as a second jury and decide which facts were proven at trial.

[7] **Criminal Law** Verdict unsupported by evidence or contrary to evidence

Criminal Law Rendering final judgment

If it appears upon weight of the evidence review that factfinder failed to give the evidence the weight it should be accorded, then appellate court may set aside the verdict and dismiss the accusatory instrument.

[8] **Homicide** Negligence

To sustain conviction for criminally negligent homicide, defendant's conduct must rise to a level of carelessness where its seriousness would be apparent to anyone who shares the community's sense of right and wrong; the conduct must create the risk, rather than simply not perceive the risk.

[9] **Automobiles** Homicide

In cases concerning charges of criminally negligent homicide arising out of automobile accidents involving excess rates of speed, it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding.

1 Case that cites this headnote

Attorneys and Law Firms

****80** David I. Goldstein, Chestnut Ridge, N.Y. (John S. Edwards of counsel), for appellant.

Thomas E. Walsh II, District Attorney, New City, N.Y. (Itamar J. Yeger of counsel), for respondent.

CHERYL E. CHAMBERS, J.P., LEONARD B. AUSTIN, SYLVIA O. HINDS–RADIX, HECTOR D. LASALLE, ANGELA G. IANNACCI, JJ.

DECISION & ORDER

***918** Appeal by the defendant from a judgment of the County Court, Rockland County (Victor J. Alfieri, Jr., J.), rendered December 5, 2016, convicting him of criminally negligent homicide, after a nonjury trial, and imposing sentence.

ORDERED that the judgment is reversed, on the facts, the indictment is dismissed, and the matter is remitted to the County Court, Rockland County, for further proceedings consistent with CPL 160.50.

This case arises out of collisions which occurred on August 14, 2013, at 11:45 p.m., among three vehicles traveling northbound on the Palisades Interstate Parkway (hereinafter the parkway), which has two lanes for vehicles traveling in that direction. The three vehicles involved were a Toyota Highlander (hereinafter the Toyota), which was traveling northbound in the right lane, a Dodge Durango (hereinafter the Durango), which was traveling northbound in the left lane, and the defendant's vehicle, which was attempting to pass the other two vehicles. Following the collisions, the defendant's vehicle traveled into the parkway's median situated between the lanes for northbound and southbound traffic and struck a tree, resulting in the death of the defendant's passenger. The defendant was indicted on one count of criminally negligent homicide.

During the nonjury trial, held almost three years after the collision occurred, the People presented testimony from Carly Rahal, 22 years old at the time of trial, who had been driving a ***919** vehicle traveling immediately behind the Durango and the Toyota. Rahal and her passengers knew the driver and the passengers in the Durango since they all worked as counselors at a summer camp. They had been at an end-of-summer celebration for the camp's personnel. Rahal was following the Durango because she had been unfamiliar with how to get to the parkway. In her testimony, she described the parkway as a highway with two lanes for northbound traffic with "no streetlights or anything."

Rahal testified that she was initially traveling in the left lane behind the Durango. Before she first observed the defendant's

****81** vehicle, another vehicle, which was red (hereinafter the red vehicle), sped by on the right side of her vehicle. After the red vehicle passed her vehicle and the Durango on the right, it moved in front of the Durango in order to pass the Toyota on the left.

Thereafter, the defendant's vehicle approached Rahal's vehicle from behind in the left lane. Rahal first heard the engine of the defendant's vehicle accelerating and then saw the vehicle in her rearview mirror. Rahal moved her vehicle from the left lane to the right lane to allow the defendant's vehicle to pass. The defendant's vehicle passed Rahal's vehicle on the left, then moved into the right lane, in front of Rahal, before attempting to move back into the left lane in front of the Durango in order to pass the Toyota. Rahal testified that, during this maneuver, the defendant's vehicle first hit the Toyota in front of it and then hit the Durango which was to the left. She also testified that, although she could not tell the distance between the Durango and the Toyota, the two vehicles appeared to be too close to each other to allow the defendant to safely pass.

On cross-examination, Rahal testified that she was traveling at 55 miles per hour, the same speed as the Durango. She recalled that her vehicle and the Durango had entered the parkway at Exit 5, and the collision occurred between Exits 6 and 7. The parties stipulated that, in her grand jury testimony, Rahal stated that there had been enough room for the defendant's vehicle to pass in front of her vehicle and that she did not need to apply pressure to her brakes for the defendant's vehicle to do so. At trial, Rahal acknowledged on cross-examination that, at some point before the defendant's vehicle moved back into the left lane, the defendant's vehicle was traveling at the same rate of speed as the Durango.

The People also presented testimony from Matthew Hochman, 21 years old at the time of trial, who was seated on the rear passenger side of the Durango. Hochman did not remember ***920** seeing a red vehicle pass the Durango and the Toyota before the accident. He testified that, just before the accident, the Toyota was traveling in the right lane just *behind* the Durango. He testified that he heard a loud engine noise, then saw the defendant's vehicle try to cut between the Toyota and the Durango, when there was not enough room to safely do so. Hochman testified that the defendant's vehicle first hit the Toyota and then hit the Durango, though he did not actually see the defendant's vehicle hit the Toyota. Hochman testified that he saw the defendant's vehicle after it hit the Durango, felt the contact of the impact, and saw sparks. Hochman remembered observing the defendant's vehicle "tumbling" toward the median. However, only a few hours after the incident, Hochman, in a supporting deposition provided to the police, stated that "I was not paying attention. All I remember are sparks flying."

Eric Kaplan, the Durango's front seat passenger, testified on behalf of the People that, just before the accident, the Toyota was in the right lane approximately four feet in front of the Durango. Kaplan testified that he heard the defendant's vehicle approaching but he did not see it in the side view mirror because it was dark and he was not paying attention. Kaplan stated that the defendant, while traveling at a high rate of speed, hit the Durango first and then hit the Toyota. After Kaplan heard the impact of the defendant's vehicle with the Durango, the Durango went into the median where it dodged three or four trees.

Kaplan testified that he never saw the red vehicle. Kaplan did not notice whether David DiNuzzo, the driver of the Durango, removed his foot from the gas pedal before the impact so that the Durango would decelerate. Kaplan also testified that he did not think that DiNuzzo applied the brakes. Kaplan testified that the impact caused the Durango to veer off of the road into the median.

Brian Shure, who was seated behind DiNuzzo, was called by the People as a witness. Shure testified that, prior to the accident, the Durango was traveling in the left lane and the Toyota was traveling in the right lane. A vehicle, which Shure ****82** could not describe, sped past the Durango and the Toyota without incident. He then saw the defendant's vehicle approaching in the right lane behind the Durango and that the defendant's vehicle was "going pretty fast." As it attempted to maneuver into the left lane in order to pass the Toyota, the defendant's vehicle hit the Durango's right front side before rebounding to the right and hitting the Toyota.

***921** During his testimony, Shure estimated that, at the time of impact, the Durango was traveling between 50 and 55 miles per hour. He stated that the Durango "had closed the distance" between itself and the Toyota between the time that the first vehicle had passed the Durango and the Toyota and the time that the defendant's vehicle attempted to pass those vehicles, and that, at the time of the collision between the Durango and the defendant's vehicle, the Toyota was about one car length in front of the Durango. Shure stated that the defendant's vehicle

may have slowed as it attempted to pass the Toyota by going from the right lane to the left lane. Shure did not think that DiNuzzo applied hard pressure to the Durango's brakes prior to the impact.

DiNuzzo, the driver of the Durango, was called by the People as a witness. DiNuzzo testified that he was only traveling on the parkway for three to five minutes before the collision occurred. He said that the portion of the road on which he was driving was straight with a slight incline, that the weather was clear, and that the road was not damp. DiNuzzo was driving the Durango in the left lane, and there was a Toyota ahead of the Durango in the right lane. DiNuzzo recalled that, before the accident, a vehicle sped by the Durango on the right, moved into the left lane in front of the Durango, and passed the Toyota at a high rate of speed. He estimated that he was traveling between 53 to 55 miles per hour when the first vehicle passed. As that first vehicle passed, DiNuzzo estimated that there were approximately three car lengths between the Durango and the Toyota, but at the time that the defendant's vehicle approached, there was only one-half a car length to one car length between the Durango and the Toyota.

DiNuzzo testified that he heard the defendant's vehicle's engine from behind before observing the defendant's vehicle through his passenger window. When he realized that the defendant was trying to pass, he applied the brake and decelerated the Durango's rate of speed to allow the defendant's vehicle to pass and move in front of the Durango. DiNuzzo recalled that the defendant's vehicle cleared the Durango's "nose," but then swerved to the right and hit the Toyota. DiNuzzo stated that the defendant's vehicle then "ricocheted off" of the Toyota and hit the Durango while DiNuzzo applied pressure to the brakes. The Durango then veered off of the left lane into the median, where it missed several trees and came to rest on the southbound side of the parkway.

On cross-examination, DiNuzzo reiterated that, before the collision, he had applied the brake and decelerated the ***922** Durango's rate of speed, thereby increasing the distance between the Durango and the Toyota. He also testified that, before the collision, the defendant passed and then moved in front of the Durango, so that the defendant's vehicle was "directly in front of me in the left lane."

The People called the driver of the Toyota, Marie Geffrard, who testified that she did not see the defendant's vehicle before she was hit from behind as the defendant's vehicle was trying to maneuver between her vehicle and the Durango. She also claimed to have been hit a second time and that her vehicle and the Durango were ****83** going roughly the same speed of 50 miles per hour.

The People presented testimony from Daniel Smith, an Investigator with the New York State Police Collision Reconstruction Unit, who was called to the scene of the collision to conduct an investigation. Smith explained that the speed limit for the area of the parkway where the accident occurred was 50 miles per hour. He explained that, based on information obtained from the Toyota's airbag deployment system, he determined that the Toyota had been traveling at 57 miles per hour three seconds before its airbags deployed. Because the Durango was not equipped with technology to record its speed, Smith determined its speed by analyzing, inter alia, the tire marks it left after the collision. Smith calculated that the Durango had been traveling at least 67 miles per hour when it left the roadway and went into the median. He testified that the damage to the defendant's vehicle had been so extensive that it prevented the air bag module from recording any data related to that vehicle's speed, and that the vehicle's speed could not otherwise be determined.

Smith described the accident as having occurred as the defendant's vehicle "squeezed" in between the Durango and the Toyota in the middle of the two lanes for northbound traffic. He concluded that the collision was caused by the defendant's unsafe lane change and unsafe speed. Smith did not refer to any of the eyewitnesses' testimony in formulating his opinion. However, Smith testified, as did the eyewitnesses, that there had been contact between the defendant's vehicle and the Durango in addition to the defendant's vehicle coming into contact with the Toyota, but he could not testify as to the sequence of the impacts. Moreover, Smith noted that there was no damage to the left side of the defendant's vehicle which would have been caused by the impact of that vehicle with another vehicle, and that the left side view mirror of the defendant's vehicle was undamaged.

***923** The People also presented testimony from Kevin Tully, an accredited accident reconstructionist. Unlike Smith, Tully believed that the speed of the defendant's vehicle could be determined. Tully testified that, based on his calculations, the defendant's vehicle was traveling at a minimum speed of 92 miles per hour when it struck the Toyota and that, after that impact, the defendant's vehicle slowed down to a minimum of 88 miles per hour as it traveled towards the

median. Based upon his review of crash test data which had been gathered by crashing known vehicles at known speeds under controlled laboratory crash testing conditions so that it could be determined what damage results at what speeds, Tully opined that the defendant's vehicle must have been traveling more than 40 miles per hour when it struck the tree.

Moreover, despite the testimony of DiNuzzo, the passengers of the Durango, and Rahal that the defendant's vehicle hit the Durango, Tully opined that, based on the physical evidence, the only collision that occurred was between the defendant's vehicle and the Toyota. When asked about the eyewitness testimony which contradicted his opinion that there was no contact between the defendant's vehicle and the Durango, Tully summarily testified that the eyewitnesses were all "wrong."

The People also called Laura Seijo Carbone, the Chief Medical Examiner of the Rockland County Medical Examiner's Office, who testified that the nature of the victim's injuries was consistent with a high-velocity impact, which she described as a primary impact in excess of or at least 50 miles per hour.

****84** The defendant called Nicholas Bellizzi, an accident reconstruction expert, who testified that when the defendant's vehicle moved to the left lane in front of the Durango, the defendant's vehicle came into contact with the Durango, which caused the defendant's vehicle to veer right and collide with the Toyota before rebounding into the median where it struck a tree. Bellizzi agreed with Smith, the Investigator from the Collision Reconstruction Unit, that, at the time of the collision, the Durango was traveling at least 67 miles per hour and the Toyota was traveling at approximately 57 miles per hour.

Bellizzi opined that, if the defendant's vehicle and the Durango were next to each other and the defendant accelerated to pass the Durango, the Durango must have accelerated as the defendant's vehicle was switching lanes or the defendant's vehicle and the Durango would not have made contact. Further, Bellizzi testified that, as there was "no rear end collision impact" with the Toyota, the entire right side of defendant's vehicle must have been along the left side of the Toyota, ***924** indicating that the defendant's vehicle had already passed the Durango. Bellizzi testified that he could not conclude, as Tully had, that the defendant's vehicle was traveling at least 40 miles per hour when it hit the tree. He opined that the crash test data relied upon by Tully in reaching that conclusion was inapplicable, as the accident did not occur in the same manner as the controlled crashes which were performed in a laboratory.

Bellizzi also testified that the medical examiner would be qualified to provide an opinion as to impact calculations only if she had expertise in bio-mechanical engineering. Bellizzi opined that the accident would not have occurred but for the Durango's acceleration.

The defendant testified at trial that his vehicle approached the Durango from behind, then moved into the right lane in order to pass. As the defendant did so, he slowed his vehicle by downshifting from fourth gear to third gear. This caused the engine's RPMs to increase, making a "louder engine noise." While he shifted gears he had one foot on the clutch and the other foot on the gas, not touching the brakes. At this point, his vehicle was beside the Durango, and going "about the same speed" as the Durango. He testified that there was enough room to pass the Durango, so he accelerated in order to do so. He passed the Durango, shifted back into fourth gear, then began to move back into the left lane. As he switched lanes, he felt an impact to the left front of his vehicle. He stated that the collision occurred because the Durango accelerated and made contact with his vehicle as it was switching lanes, though he did not see the Durango as it hit him. The defendant stated that the next thing he remembered was bouncing on the median and hitting a tree. The defendant did not remember making contact with the Toyota, or where his feet and hands were after making contact with the Durango or when his vehicle was on the median. The defendant testified that photographs of his gearshift taken after the accident showed that his vehicle was in fourth gear on his six-speed gearshift. The defendant denied driving 92 miles per hour or even 70 miles per hour on the parkway that night or making an unsafe lane change.

At the conclusion of the nonjury trial, the County Court found that the evidence demonstrated that the defendant was traveling more than 40 miles per hour above the posted speed limit of 50 miles per hour, and passed another vehicle on the right at a high rate of speed in violation of State law. The court also found that the defendant "attempt[ed] to enter the occupied ****85** ***925** passing lane at a high rate of speed, causing an impact first with the Toyota [ ] and secondarily with the Durango." Such conduct constituted a grave, substantial, and unacceptable risk supporting a conviction of criminally negligent homicide. On appeal, the defendant contends that the evidence was legally insufficient

to establish his guilt of criminally negligent homicide, and that the verdict was against the weight of the evidence.

[1] In evaluating whether evidence presented at trial was legally sufficient, a court must "determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial" (*People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672; *see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932). Contrary to the defendant's contention, viewing the evidence in the light most favorable to the prosecution, there was legally sufficient evidence to support the defendant's conviction of criminally negligent homicide (*see People v. Contes,* 60 N.Y.2d at 621, 467 N.Y.S.2d 349, 454 N.E.2d 932).

[2] [3] [4] [5] [6] [7] However, upon the exercise of our independent factual review power (*see* CPL 470.15[5]), we conclude that the verdict of guilt was against the weight of the evidence. "Upon [a] defendant's request, the Appellate Division must conduct a weight of the evidence review" and, therefore, "a defendant will be given one appellate review of adverse factual findings" (*People v. Danielson,* 9 N.Y.3d 342, 348, 849 N.Y.S.2d 480, 880 N.E.2d 1). "[W]eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may [have been] drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of ... credible evidence, the court then decides whether the [factfinder] was justified in finding the defendant guilty beyond a reasonable doubt" (*id.* at 348, 849 N.Y.S.2d 480, 880 N.E.2d 1). In effect, the Appellate Division serves as a "second jury" (*People v. Delamota,* 18 N.Y.3d 107, 117, 936 N.Y.S.2d 614, 960 N.E.2d 383) and "decides which facts were proven at trial" (*People v. Danielson,* 9 N.Y.3d at 348, 849 N.Y.S.2d 480, 880 N.E.2d 1). "If it appears that the factfinder failed to give the evidence the weight it should be accorded, then this Court may set aside the verdict and dismiss the accusatory instrument" (*People v. Joyner,* 126 A.D.3d 1002, 1005, 7 N.Y.S.3d 160; *see* CPL 470.20[5]).

"A person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person" (Penal Law § 125.10). A person acts with criminal negligence when "he [or she] fails to perceive a substantial ***926** and unjustifiable risk that such result will occur or that such [a] circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation" (Penal Law § 15.05[4]).

[8] The defendant's conduct must rise to a level of carelessness where its "seriousness would be apparent to anyone who shares the community's ... sense of right and wrong" (*People v. Conway,* 6 N.Y.3d 869, 872, 816 N.Y.S.2d 731, 849 N.E.2d 954 [internal quotation marks omitted]; *see People v. Cabrera,* 10 N.Y.3d 370, 376, 858 N.Y.S.2d 74, 887 N.E.2d 1132). Moreover, the conduct must create the risk, rather than simply not perceive the risk (*see People v. Cabrera,* 10 N.Y.3d at 377, 858 N.Y.S.2d 74, 887 N.E.2d 1132; ****86** *People v. Boutin,* 75 N.Y.2d 692, 696, 556 N.Y.S.2d 1, 555 N.E.2d 253).

[9] In cases concerning charges of criminally negligent homicide arising out of automobile accidents involving excess rates of speed, "it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding" (*People v. Cabrera,* 10 N.Y.3d at 377, 858 N.Y.S.2d 74, 887 N.E.2d 1132 [internal quotation marks omitted]).

Here, the People failed to establish, beyond a reasonable doubt, that the defendant "fail[ed] to perceive a substantial and unjustifiable risk" (Penal Law § 15.05[4]) which caused the death of his passenger. From the testimony of the People's eyewitnesses and expert witnesses, no single consistent version of how this accident occurred emerges. DiNuzzo's testimony, as highlighted herein and by our dissenting colleagues, is, at best, contradictory and inconsistent, leaving significant doubt as to whether the defendant's actions rose to the level of criminal negligence. Most telling is that the People's experts each provided testimony that was at odds with the other's testimony. The testimony of Smith and Tully presented conflicting versions as to how the accident occurred.

Moreover, the facts on which Smith and Tully based their opinions conflicted with the testimony of the eyewitnesses who were present during the accident (*see generally People v. Danielson,* 9 N.Y.3d at 349, 849 N.Y.S.2d 480, 880 N.E.2d 1). Smith ignored the testimony of DiNuzzo, the driver of the Durango, as to the speed of the Durango, and the testimony of Geffrard, the driver of the Toyota, as to the speed of the Toyota. In formulating his opinion that there was contact among the vehicles, Smith failed to consider the testimony of the Durango's passengers or Rahal. This negatively impacts

the weight to be given his opinion, since the absence of any sign of impact on the left side of the defendant's vehicle confirms DiNuzzo's and the defendant's testimony that the defendant had already passed the Durango and was moving into the left lane. Tully eschewed the testimony of the eyewitnesses ***927** and rejected it as "wrong" in favor of controlled laboratory crash tests. It is disconcerting that the People's evidence provided no consistent, reliable basis for the County Court's determination.

With respect to the issue of the rate of speed at which the defendant's vehicle had been traveling at the time of impact, the County Court's finding that the defendant was operating his vehicle more than 40 miles per hour above the posted speed limit is not supported by the evidence. Tully was the only witness who testified that the defendant was traveling at that speed prior to impact. However, the People's other expert witness, Smith, testified that it was not possible to determine the speed at which the defendant's vehicle had been traveling at either the point of impact or immediately thereafter given the manner in which this collision occurred. Further, Tully acknowledged that he rendered his opinion as to the speed of the defendant's vehicle based on data from crash tests which were not performed under conditions similar to those in which this collision occurred.

Moreover, Tully's estimate was in direct conflict with the testimony of the eyewitnesses who were operating vehicles at the time of the accident. Rahal, DiNuzzo, and Geffrard each testified that their respective vehicles were traveling at approximately 55 miles per hour at the time that the defendant's vehicle drove up behind them. At some point close in time to the collision, the defendant's vehicle was traveling behind the Durango, albeit for a short period of time, before moving over to the right lane behind the Toyota, which ****87** was traveling at 57 miles per hour. Given the placement of the Toyota and the Durango vis-a-vis each other prior to the collision, it would have been impossible for the defendant's vehicle to have been traveling at a rate of speed of 92 miles per hour without causing a heavy rear-end collision with the Toyota or significant passenger-side damage to the Durango; neither of which occurred here. In addition, Rahal testified that the defendant was able to move his vehicle without incident from the left lane to the right lane in front of her vehicle prior to the accident, a move which, according to Tully's testimony, the defendant would not have been able to accomplish if his vehicle was traveling at 92 miles per hour. While Kaplan, a passenger in the Durango, testified that the defendant's vehicle was traveling at a high rate of speed, serious doubt exists as to Kaplan's perception of the relative speed of the vehicles and their distance from one another given the testimony provided by DiNuzzo at trial and Rahal before the grand jury. Further, ***928** while our dissenting colleagues rely on Hochman's recollection at trial, nearly three years after the accident occurred, that the defendant's vehicle had been "going very fast," such reliance ignores the significance of Hochman's statement provided on the night of the accident that he was not paying attention to the details of the accident as it unfolded.

As to the trial court's finding that the defendant improperly changed lanes, Smith's explanation that the defendant tried to squeeze his vehicle in between the Toyota and the Durango as those two vehicles were driving side by side was inconsistent with the testimony of all of the eyewitnesses, upon which Smith acknowledged he did not rely to form his opinion.

Most significant, DiNuzzo, the driver of the Durango, who was called as a witness by the prosecution, testified that the contact between his vehicle and the defendant's vehicle occurred after the defendant's vehicle had cleared the Durango's "nose" and moved "directly in front of" the Durango in the left lane. This establishes that there was enough room for the defendant's vehicle to pass in front of the Durango without contact. Such testimony calls into question the reliability of the opinions of the People's experts that the defendant's movement of his vehicle to the left lane was dangerous. DiNuzzo's testimony also lends credence to the testimony of the defendant and his expert Bellizzi, who respectively testified and opined that the impact with the Durango resulted from the Durango's acceleration as the defendant was in the process of passing the Toyota by moving to the left lane in front of the Durango.

Our dissenting colleagues suggest that the testimony supports a finding of criminal negligence. We cannot agree. To the contrary, the credible evidence demonstrates to a reasonable extent that DiNuzzo failed to yield to the defendant's vehicle, which had passed his vehicle, and then came into contact with the defendant's vehicle thereby setting off the sequence of tragic events which followed.

Further, all four occupants of the Durango, and Rahal, the driver of the vehicle immediately behind the Durango and the Toyota, testified that there was an impact between the defendant's vehicle and the Durango. Tully's opinion that only the Toyota was struck by the defendant's vehicle is not credible in light of this testimony. When confronted with the

eyewitnesses's testimony that the Durango was also hit by the defendant's vehicle, Tully asserted dismissively that the eyewitnesses's testimony was "wrong."

Upon the exercise of our factual review power (*see* CPL 470.15[5]), we determine that an acquittal of criminally negligent homicide would not have been unreasonable (*see generally People v. Rodgers,* 174 A.D.3d 924, 925, 103 N.Y.S.3d 599). Based on this evidence, we find that the verdict of guilt was against the weight of the credible evidence (*see People v. Bailey,* 102 A.D.3d 701, 703, 958 N.Y.S.2d 173), and the judgment of conviction must be reversed and the indictment dismissed.

AUSTIN, HINDS–RADIX and IANNACCI, JJ., concur.

LASALLE, J., dissents, and votes to affirm the judgment of conviction, with the following memorandum, in which CHAMBERS, J.P., concurs:

Just before midnight on August 14, 2013, two vehicles, a Dodge Durango (hereinafter the Durango) and a Toyota Highlander (hereinafter the Toyota), were traveling northbound on a two-lane road in close proximity, the Durango in the left lane and the Toyota, slightly ahead, in the right lane, when the defendant, while operating a Nissan Infiniti (hereinafter the Infiniti) and coming from behind at a high rate of speed, attempted to drive through the narrow gap between the other two vehicles while straddling the right and left lanes. After colliding with the Toyota, the defendant's vehicle veered to the left, leaving approximately 112 feet of friction tire marks on the roadway. The defendant's vehicle then careened off the road and traveled another 401 feet on the grassy median before striking a tree with enough force to shear the metal and tear the vehicle into two large pieces. Justin Goings, the passenger in the defendant's vehicle, was instantly killed as a result of multiple blunt force impact injuries, which the medical examiner described as consistent with a high-velocity impact.

The defendant's decision to pass the two vehicles when it was clearly unsafe to do so, coupled with the dangerous speeding, created as unjustifiable risk which ultimately caused the death of his passenger. Our colleagues in the majority disagree, and choose to credit the views of the defendant's expert—which are not only inconsistent with the physical evidence but also directly contradicted by the defendant's own account of the accident.

Specifically, the defendant's expert, Nicholas Bellizzi, concluded that David DiNuzzo, who was driving the Durango, caused the accident by accelerating and striking the defendant's Infiniti. In support of his opinion that DiNuzzo caused the accident, Bellizzi repeated on numerous occasions throughout his testimony that the Infiniti had successfully changed lanes:

> "So we know the Infinit[i] had gotten over to the left, so it was on the left side of the Toyota....That means it had to have gone from the right lane into the left lane, because the right side of the Infinit[i] had to be clear of the left side of the Toyota in order for it to hit the Toyota."
>
> "The entire right side of the Infinit[i] has to be to the left of the entire left side of the Toyota."
>
> "During that time, during that lane change, the Durango, ... which the Infinit[i] passed, had to then drive and catch up to it. It had to."
>
> "If the Infinit[i] were to try and change lanes with the Durango to its left, they would hit. They would collide. There would be a different collision. So the Infinit[i], in order to hit the Durango, first has to be abreast of it, then has to be ahead of it. Once it's ahead of it, then it can begin that several hundred feet lane change process. So it can't begin until it's passed. So, we know the Infinit[i] passed the Durango."
>
> "The complete right side of the Infinit[i] had to be completely to the left of the left side of the Toyota."
>
> "[T]he Infinit[i] is completely clear of the Toyota when it hits it. That means it had to have made the lane change.... [T]he Infinit[i] had to be clear of the left side of the Toyota."

When asked if the Infiniti had actually completed the maneuver and now was in the left lane, Bellizzi responded, "[c]orrect." Bellizzi also testified that the Durango "sped up, hit the Infiniti," and "caused the Infiniti to hit the Toyota."

The critical flaw in Bellizzi's theory is that his conclusions not only contradict the testimony of the six eyewitnesses called by the People, but also the physical evidence, and the defendant's own version of how the accident occurred.

Indeed, not one of the three passengers in the Durango ever indicated that DiNuzzo accelerated his vehicle as the defendant was attempting to change lanes—and DiNuzzo

himself testified that he *decelerated* when he realized that the defendant was trying to pass him. Additionally, had the defendant's vehicle successfully completed its lane change as Bellizzi opined, the Durango, upon accelerating, would have struck the defendant's vehicle in the rear—not the left front side.

Curiously, when asked during cross-examination to explain the physical evidence of contact between the Durango and the defendant's vehicle, Bellizzi pointed to the apparent damage on the driver's side of the Infiniti, and a gouge on the passenger side of the Durango. Such damage, however, would seem, if anything, to be consistent with the defendant's recitation of how the accident happened.

Critically, the defendant testified that, after changing lanes ***931** and passing a vehicle driven by Carly Rahal, he came up next to the Durango, intending to pass that vehicle. The Toyota was ahead of him, but traveling at a slower speed than him. He accelerated to switch from the right lane to the left lane, and *as he was straddling both lanes,* he felt an impact on the front left corner of his vehicle. Thus, consistent with the testimony of the People's witnesses and inconsistent with the opinion of his own expert, the defendant testified that the accident occurred while he was straddling the two lanes.

Rahal observed in her rear view mirror the headlights from the defendant's vehicle, and testified that she saw the "car speeding up towards me" and heard the acceleration of the vehicle's engine. She testified that the defendant's vehicle attempted to pass the Durango, but that there "wasn't as much space between" the Durango and the Toyota as there had been when an earlier vehicle had passed, and that there was "definitely not enough room for safe passing over to the left lane."

Consistent with Rahal's testimony, Matthew Hochman, a passenger in the rear seat of the Durango, also heard the defendant's vehicle accelerating prior to impact, and described it as "a loud engine noise." Hochman testified that, prior to the defendant's vehicle striking the Toyota, it "split in between [the Durango and the Toyota] going very fast." Hochman further testified that, at that time, the Durango and the Toyota "were in a space where a car would not fit between them."

Eric Kaplan, the front seat passenger in the Durango, also testified that the defendant's vehicle was speeding, indicating that it was "coming at high speeds." He estimated that when the defendant's vehicle attempted to change lanes, there was only approximately four feet of distance between the Toyota and the Durango, which was essentially consistent with the testimony of Rahal and Hochman that there was ****90** not enough room for the defendant's vehicle to pass between the Toyota and the Durango.

Brian Shure, the other rear seat passenger in the Durango, testified that the defendant's vehicle "came speeding," that it "seemed to be going a lot faster than the car that previously sped by us," and that "it was going pretty fast." Shure observed that, just prior to the accident, the defendant's vehicle was "trying to go around us," and the Toyota was "maybe about one car length ahead of us." Crucially, when asked if there was enough room for another vehicle to pass in between the Durango and the Toyota, Shure indicated, "[t]here was not."

Marie Geffrard, the driver of the Toyota, testified "I heard a ***932** loud car coming ... [t]hen all of a sudden I got hit." Geffrard described the defendant's vehicle as "the car who tried to get cross between the two cars.... [T]he car come from the back, tried to get in between the other car and mine." She further described the defendant's vehicle as "the car who tried to come over me, who tried to pass through between the other car and I." When asked by defense counsel if the defendant's vehicle was "[i]n the middle of the roadway, half of that car in the left lane, half of that car in the right lane," Geffrard responded, "[y]es."

Like Rahal and Hochman, DiNuzzo, the driver of the Durango, heard the defendant's vehicle accelerating, and then saw the defendant's vehicle "trying to pass myself or split, if you will, myself in the left lane and the [Toyota] in the right." He indicated that "it happened so quickly, I heard the [defendant's vehicle], and by the time I even turned my head slightly to the right the [defendant's vehicle] was already visible through my windshield." Upon seeing the defendant's vehicle, DiNuzzo decelerated, because "there was just no room. It's a two lane highway. And the [Toyota] just ahead of me in the right lane and myself being in the left staggered, there was clearly not enough room to pass." DiNuzzo repeatedly stated during his testimony, as did the other witnesses, that there was not enough room for the defendant's vehicle to pass when it was changing lanes.

The totality of the testimony of these six eyewitnesses consistently established that the defendant caused this accident when, while driving his vehicle at an excessive rate

of speed, he dangerously attempted to change lanes and pass the Toyota and the Durango at a point when there was not enough room, and it was unsafe to do so. However, in addition to these six eyewitness accounts, the People also presented the testimony of two expert witnesses who determined that the physical evidence corroborated the eyewitnesses' accounts of the accident.

Daniel Smith, an Investigator with the New York State Police who was assigned to the Collision Reconstruction Unit, opined that the accident occurred when the defendant's vehicle "squeezed in between" the Durango and the Toyota, causing it to strike both vehicles, although he described the collision between the Infiniti and the Durango as a "slight impact." Smith testified that the air bag control module on the defendant's Infiniti was damaged and therefore a speed reading could not be obtained, however, he calculated the speed loss of the vehicle by looking at the tire and furrow marks it left behind, and the distance that it traveled both before and after it struck a ***933** tree. He determined that the speed loss of the Infiniti was 66 miles per hour. This calculation, however, did not include the energy the vehicle lost by striking the tree. Smith explained that the Infiniti had to be traveling much faster than 66 miles per hour, and indicated that ****91** "if the vehicle was traveling at 60 miles an hour over the length of the tire marks on the grass and came to the tree, the vehicle would have stopped. But the vehicle was traveling at a much [higher] speed, because it went to the tree, split the vehicle in half and continued to travel." Based on the physical evidence, Smith opined that the factors which contributed to the accident were "[u]nsafe lane change and an unsafe speed."

Kevin Tully, an accredited accident reconstructionist called as a witness by the People, opined that, just prior to the accident, the three vehicles were essentially abreast of each other, and the Infiniti was in the middle of the other two vehicles and straddling the two lanes of the parkway. He agreed with Smith's speed loss calculations for the defendant's vehicle. He also indicated that there were 401 feet of tire furrow marks in the grassy area of the median. Using the various speed loss calculations he determined that the Infiniti entered the grass at approximately 75 miles per hour. He then explained that, prior to departing the roadway and entering the grassy median, the Infiniti left approximately 112 feet of friction tire marks in the roadway, which dissipated additional speed from the vehicle. During the collision with the Toyota the speed loss was approximately four miles per hour, and therefore Tully calculated that, at the start of the collision, the Infiniti was traveling at a minimum of 92 miles per hour. Tully testified that he determined this speed in part based upon data retrieved from the Toyota which indicated that the vehicle sustained a change in velocity of 3.7 miles per hour, the weights of the vehicles, the length of the tire tracks, the distance of the furrows through the grass, speed loss calculations, the damage sustained by the vehicles, and crash test data from vehicles that were similar to the Infiniti driven by the defendant.

Tully described the extraordinary damage sustained by the Infiniti and indicated that "[t]he crush intrusion was massive and ultimately the force was exceeded to the point where the car actually tore into two pieces." When the vehicle split in half there was a dissipation of energy by the "significant crush and tearing" of the vehicle. Crucially, Tully indicated that the two halves of the vehicle separated and left the tree at a speed of approximately 20 miles per hour. When considering that this was after the vehicle had skidded more than 100 feet on the ***934** roadway, traveled more than 400 feet on the grassy median, and impacted the tree—shearing the metal and tearing the vehicle in two pieces—it is clear that the weight of the physical evidence indeed supports the 92 miles per hour speed estimation that Tully opined the defendant's vehicle was traveling at the time of the accident.

We do not believe, as do our colleagues in the majority, that Tully's opinion is discredited by his belief that there was no contact between the defendant's vehicle and the Durango. Tully's opinion in that regard was not fundamentally at odds with Smith's view that the contact between the Durango and the Infiniti was slight compared to the much heavier impact between the Infiniti and the Toyota. Moreover, Tully's opinion was supported by the physical evidence, which showed little damage to the Durango.

In any event, regardless of whether there was an impact between the Durango and the Infiniti, the opinions of Smith and Tully as to what caused the accident were indeed consistent with each other, as well as the accounts of the several eyewitnesses: the accident resulted from the combination of the defendant driving at an excessive and unsafe speed, coupled with his dangerous and unsafe lane change.

****92** Moreover, the evidence provided by the medical examiner who performed the autopsy on Goings, although minimized by the majority, also supports the theory that the defendant's vehicle was traveling at a high rate of speed when the accident occurred. Laura Seijo Carbone, the

Chief Medical Examiner of the Rockland County Medical Examiner's Office, testified regarding the findings from the autopsy performed on Goings. The cause of death was determined to be "multiple blunt force impact injuries of [the] head, torso and extremities with skeletal fractures, organ lacerations and hemorrhage" resulting from the collisions. Carbone described the injuries as "high velocity injuries" typically sustained in motor vehicle accidents occurring at speeds of over 50 miles per hour. She identified that the victim had multiple fractures of very dense bones—including the femur, the pelvis, and the spine in the lower back—and that these bones required tremendous force to fracture. She indicated that the victim's brain was torn at two points, and indicated this was a "rapid-deceleration" or high-impact injury. Additionally, the autopsy revealed a "straight-across tear" of the esophagus. Carbone explained that the esophagus is very elastic and resilient in nature, and requires tremendous force to achieve such a tear. Indeed, she had only seen injuries like this in cases of very high-velocity impact collisions. ***935** These catastrophic injuries sustained by Goings, coupled with the extraordinary physical damage to the defendant's vehicle, clearly demonstrate that the Infiniti was still traveling at a very high rate of speed when it hit the tree—after having skidded more than 100 feet on the roadway and traveled more than 400 feet on the grassy median.

Both the weight of the physical evidence and eyewitness testimony established that the defendant was operating his vehicle at an excessive rate of speed, and most importantly, that he attempted to change lanes by dangerously going in between the Toyota and the Durango when there was not enough room for a vehicle to pass. This attempted maneuver by the defendant was risk-creating behavior which transformed his speeding into dangerous speeding (*see People v. Cabrera,* 10 N.Y.3d 370, 377, 858 N.Y.S.2d 74, 887 N.E.2d 1132; *People v. Boutin,* 75 N.Y.2d 692, 696, 556 N.Y.S.2d 1, 555 N.E.2d 253), and the weight of the credible evidence established beyond a reasonable doubt that the defendant failed to perceive a substantial and unjustifiable risk, which caused the death of Goings.

Upon our review of the weight of the evidence, we find that the County Court correctly weighed the evidence when it convicted the defendant of criminally negligent homicide. Accordingly, we vote to affirm the judgment of conviction.

All Citations

181 A.D.3d 918, 122 N.Y.S.3d 78, 2020 N.Y. Slip Op. 02072

127 A.D.3d 831
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

John DeWOODY, appellant.

April 8, 2015.

Synopsis

Background: Defendant appealed order of the County Court, Dutchess County, Greller, J., which designated him a level three sex offender pursuant to the Sex Offender Registration Act (SORA).

[Holding:] The Supreme Court, Appellate Division, held that defendant's admission established, by clear and convincing evidence, the facts underlying an aggravating factor that warranted an upward departure.

Affirmed.

West Headnotes (6)

[1] Mental Health Proceedings

Defendant's admission that he sexually abused two young girls eight years before his commission of the sex offenses underlying proceeding to determine his risk level pursuant to the Sex Offender Registration Act (SORA) established, by clear and convincing evidence, the facts underlying an aggravating factor that warranted an upward departure. McKinney's Correction Law § 168 et seq.

1 Case that cites this headnote

[2] Mental Health Scores and risk levels

Hearing court is permitted to depart from the presumptive risk level in a proceeding to determine a defendant's risk level pursuant to the Sex Offender Registration Act (SORA) if special circumstances warrant departure, but an upward departure is permitted only if the court concludes that there exists an aggravating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the risk assessment guidelines. McKinney's Correction Law § 168 et seq.

5 Cases that cite this headnote

[3] Mental Health Proceedings

In determining whether an upward departure is permissible in a proceeding to determine a defendant's risk level pursuant to the Sex Offender Registration Act (SORA), and, if permissible, appropriate, court must engage in a multi-step inquiry, first determining whether the People have articulated, as a matter of law, a legitimate aggravating factor, and then determining whether the People have established, by clear and convincing evidence, the facts supporting the existence of that aggravating factor in the case before it; upon the People's satisfaction of these two requirements, an upward departure becomes discretionary. McKinney's Correction Law § 168 et seq.

3 Cases that cite this headnote

[4] Mental Health Scores and risk levels

If, upon examining, in a proceeding to determine a defendant's risk level pursuant to the Sex Offender Registration Act (SORA), all of circumstances relevant to defendant's risk of reoffense and danger to the community, hearing court concludes that the presumptive risk level would result in an underassessment of the risk or danger of reoffense, it may upwardly depart. McKinney's Correction Law § 168 et seq.

[5] Mental Health Scores and risk levels

A defendant's commission of uncharged sex crimes may constitute an appropriate aggravating factor for purposes of an upward departure in a proceeding to determine a defendant's risk level pursuant to the Sex Offender Registration Act (SORA), if those

uncharged sex crimes have not been accounted for in the Risk Assessment Instrument (RAI). McKinney's Correction Law § 168 et seq.

5 Cases that cite this headnote

[6] **Mental Health** Scores and risk levels

Hearing court did not improvidently exercise its discretion, in proceeding to determine defendant's risk level pursuant to the Sex Offender Registration Act (SORA), in concluding that the presumptive risk level underassessed defendant's risk of reoffense, such that an upward departure was warranted, where defendant admitted that he sexually abused two young girls eight years before his commission of the sex offenses underlying the SORA proceeding. McKinney's Correction Law § 168 et seq.

3 Cases that cite this headnote

Attorneys and Law Firms

****291** Thomas N.N. Angell, Poughkeepsie, N.Y. (Steven Levine of counsel), for appellant.

William V. Grady, District Attorney, Poughkeepsie, N.Y. (Kristen A. Rappleyea of counsel), for respondent.

RUTH C. BALKIN, J.P., LEONARD B. AUSTIN, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

***831** Appeal by the defendant from an order of the County Court, Dutchess County (Greller, J.), dated February 7, 2014, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

[1] In this proceeding pursuant to the Sex Offender Registration Act (hereinafter SORA) (*see* Correction Law § 168 *et seq.*), the defendant was assessed a total of 100 points under the Risk Assessment Instrument. That total point assessment was near the top of the range for a presumptive level two designation. The County Court, however, upwardly departed from the presumptive risk level and designated the defendant a level three offender. The court predicated its departure on the evidence in the record, established by the defendant's own admissions, that the defendant had sexually abused two young girls eight years before his commission of the sex offenses that were the basis of this SORA proceeding.

[2] **[3]** **[4]** A court is permitted to depart from the presumptive risk level if "special circumstances" warrant departure (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). An upward departure is permitted only if ***832** the court concludes "that there exists an aggravating ... factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (*id.* at 4; *see People v. Gillotti,* 23 N.Y.3d 841, 861, 994 N.Y.S.2d 1, 18 N.E.3d 701; *People v. Worley,* 57 A.D.3d 753, 754, 870 N.Y.S.2d 385; *People v. Fiol,* 49 A.D.3d 834, 834, 854 N.Y.S.2d 219; *People v. Burgos,* 39 A.D.3d 520, 520, 834 N.Y.S.2d 224). In determining whether an upward departure is permissible and, if permissible, appropriate, a SORA court must engage in a multi-step inquiry. First, the court must determine whether the People have articulated, as a matter of law, a legitimate aggravating factor. Next, the court must determine whether the People have established, by clear and convincing evidence, the facts supporting the existence of that ****292** aggravating factor in the case before it. Upon the People's satisfaction of these two requirements, an upward departure becomes discretionary. If, upon examining all of circumstances relevant to the offender's risk of reoffense and danger to the community, the court concludes that the presumptive risk level would result in an underassessment of the risk or danger of reoffense, it may upwardly depart (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4; *see also People v. Gillotti,* 23 N.Y.3d at 861, 994 N.Y.S.2d 1, 18 N.E.3d 701; *People v. Ologbonjaiye,* 109 A.D.3d 804, 805, 971 N.Y.S.2d 126).

[5] Here, the People satisfied their burden. An offender's commission of uncharged sex crimes may constitute an appropriate aggravating factor for purposes of an upward departure if, as here, those uncharged sex crimes have not been accounted for in the Risk Assessment Instrument (*see People v. Gillotti,* 23 N.Y.3d at 858, 994 N.Y.S.2d 1, 18 N.E.3d 701; *People v. Zimmerman,* 101 A.D.3d 1677, 1678, 957 N.Y.S.2d 525; *People v. Jenkins,* 34 A.D.3d 352, 352, 824 N.Y.S.2d 281; *People v. Seils,* 28 A.D.3d 1158, 1158, 813 N.Y.S.2d 594; *People v. Hammonds,* 27 A.D.3d 441, 442, 811 N.Y.S.2d 102; *cf. People v. Cruz,* 111 A.D.3d 685, 685–686, 974 N.Y.S.2d 538; *People v. Geier,* 56

A.D.3d 539, 540–541, 867 N.Y.S.2d 185; *People v. Fredlund,* 38 A.D.3d 636, 636, 832 N.Y.S.2d 592). Moreover, the defendant's own admission that he committed the uncharged sex crimes established the facts underlying the aggravating factor by clear and convincing evidence. The defendant's contention that expert testimony was required to establish that the defendant's commission of the earlier, uncharged sex crimes against young children indicated an increased risk of reoffense is without merit. The SORA Guidelines themselves recognize that the number of victims is related to the risk of reoffense (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 1, 10).

[6] Finally, the SORA court did not improvidently exercise its discretion in concluding that the presumptive risk level ***833** underassessed the defendant's risk of reoffense and thus that an upward departure was warranted (*see People v. Jenkins,* 34 A.D.3d at 352, 824 N.Y.S.2d 281; *People v. Seils,* 28 A.D.3d at 1158, 813 N.Y.S.2d 594; *People v. Hammonds,* 27 A.D.3d at 442, 811 N.Y.S.2d 102).

All Citations

127 A.D.3d 831, 6 N.Y.S.3d 290, 2015 N.Y. Slip Op. 02946

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123 A.D.3d 844
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

John FOX, appellant.

Dec. 10, 2014.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Konviser, J., of manslaughter in the second degree as a hate crime, attempted robbery in the first degree as a hate crime, and attempted robbery in the second degree as a hate crime. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant was not in custody during eight minutes in which police questioned him prior to providing him *Miranda* warnings, and

[2] defendant voluntarily and intelligently waived his *Miranda* rights.

Affirmed.

West Headnotes (3)

[1] Criminal Law Particular cases or issues

Defendant was not in custody during eight minutes in which police questioned him prior to providing him *Miranda* warnings, where detectives woke defendant in his dorm room about 2:00 in the morning, he voluntarily accompanied them to the station, they did not ask him any questions about incident involving attack on victim or discuss it until 2:52 a.m., defendant was not handcuffed or searched, detective asked defendant if he had been in certain city over the weekend, defendant never asked if he could go or protested the questioning, and questioning was stopped after eight minutes when detective became suspicious of defendant's answers and provided *Miranda* warnings.

[2] Criminal Law Particular Cases

Defendant voluntarily and intelligently waived his *Miranda* rights during questioning by police, where defendant voluntarily accompanied detectives to station, he was not handcuffed or searched, he was questioned for eight minutes before detective became suspicious of defendant's answers and provided *Miranda* warnings, and defendant implicated himself in attack on victim.

[3] Criminal Law Evidence wrongfully obtained

The credibility determinations of the Supreme Court, which saw and heard the witnesses at a suppression hearing, are entitled to great weight on appeal, and will not be disturbed unless they are unsupported by the record.

1 Case that cites this headnote

Attorneys and Law Firms

****440** Norman A. Olch, New York, N.Y., for appellant.

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RUTH C. BALKIN, J.P., JOHN M. LEVENTHAL SYLVIA O., HINDS–RADIX, and HECTOR D. LaSALLE, JJ.

Opinion

***844** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Konviser, J.), rendered November 20, 2007, convicting him of manslaughter in the second degree as a hate crime, attempted robbery in the first degree as a hate crime, and attempted robbery in the second degree as a hate crime, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion

which was to suppress his statements to law enforcement officials.

****441** ORDERED that the judgment is affirmed.

On the evening of October 8, 2006, the then–19–year–old defendant and his friends devised a plan to obtain marijuana, or money to buy marijuana, by luring a gay man to their neighborhood and stealing marijuana or money from him. As part of the scheme, the defendant and his friends visited an Internet chat room for gay men, using the defendant's screen name, and struck up an instant messaging conversation with a 29–year old gay man (hereinafter the victim) who happened to be visiting the chat room at that time. During the chat, the victim agreed to meet the defendant. Although the original plan did not involve the use of force, matters escalated when the defendant and the victim reached Plumb Beach in Brooklyn, where, unbeknownst to the victim, the defendant's friends were awaiting them. One member of the group, the codefendant Ilya Shurov, suddenly attacked the victim and, with the defendant following close behind, chased the victim as he ran back to his car and attempted to flee. Shurov pulled him out of his car, and the struggle continued as the victim fled onto a nearby highway and across two lanes, with Shurov and the defendant still in pursuit. While attempting to evade his attackers, the victim entered the third lane and was fatally injured by a passing vehicle.

The defendant and codefendant Anthony Fortunato were tried together, with separate juries. Fortunato, unlike the defendant, testified in his own defense. The defendant contends that he was deprived of his constitutional right to be present at a material stage of the trial since he and his jury were not present ***845** when Fortunato testified. This contention is without merit since the portion of Fortunato's trial at which the defendant was not present " was not a critical stage of [the defendant's] trial, as it was unrelated to his prosecution" (*People v. Morris,* 187 A.D.2d 460, 461, 590 N.Y.S.2d 104; *see People v. Warren,* 20 N.Y.3d 393, 397–398, 960 N.Y.S.2d 716, 984 N.E.2d 914; *People v. Irizarry,* 83 N.Y.2d 557, 611 N.Y.S.2d 807, 634 N.E.2d 179; *People v. Bogan,* 78 A.D.3d 855, 911 N.Y.S.2d 166; *People v. Rolle,* 4 A.D.3d 542, 543, 771 N.Y.S.2d 704; *People v. Jackson,* 219 A.D.2d 675, 631 N.Y.S.2d 424; *cf. People v. Ricardo B.,* 73 N.Y.2d 228, 538 N.Y.S.2d 796, 535 N.E.2d 1336).

[1] **[2]** **[3]** The Supreme Court properly denied that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. "The credibility determinations of the Supreme Court, which saw and heard the witnesses at the suppression hearing, are entitled to great weight on appeal, and will not be disturbed unless they are unsupported by the record" (*People v. Timmons,* 54 A.D.3d 883, 885, 864 N.Y.S.2d 111; *see People v. Oliver,* 87 A.D.3d 1035, 1036, 929 N.Y.S.2d 182). The record developed at the suppression hearing establishes that police detectives woke the defendant in his dorm room at about 2:00 a.m. on October 10, 2006, and that he voluntarily accompanied the detectives to a precinct station house. They did not ask him any questions pertaining to the incident, or discuss the incident, until 2:52 a.m., and the defendant was not handcuffed or searched while en route or at the station house. At 2:52 a.m., an interview at the station house began with Detective Frank Byrnes asking the defendant whether he had been in Brooklyn over the weekend. Under these circumstances, "a reasonable person, innocent of any crime, would [not] have believed that [he] was in police custody" (*People v. Delfino,* 234 A.D.2d 382, 383, 651 N.Y.S.2d 553; *see People v. Thomas,* 292 A.D.2d 549, 550, 739 N.Y.S.2d 732; ****442** *People v. Ellerbe,* 265 A.D.2d 569, 570, 697 N.Y.S.2d 643). Although the defendant was never told that he was free to leave, he neither asked if he could do so, nor protested the questioning (*see People v. Delfino,* 234 A.D.2d at 383, 651 N.Y.S.2d 553). Significantly, the defendant was questioned for only eight minutes before the questioning was stopped because Detective Byrnes became suspicious of the defendant's answers, and his *Miranda* warnings (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) were administered (*see People v. Delfino,* 234 A.D.2d at 383, 651 N.Y.S.2d 553; *People v. Reaves,* 209 A.D.2d 647, 648, 619 N.Y.S.2d 132; *People v. Mosley,* 196 A.D.2d 893, 893–894, 601 N.Y.S.2d 1021). The defendant's contentions concerning suppression are based solely on his own testimony at the suppression hearing, which the court found to be "inconsistent and incredible." There is no basis for rejecting the hearing court's credibility determination, and we conclude that the evidence supports its conclusion, based on the testimony of several detectives, that the defendant was not taken into custody until he ***846** was "provided with *Miranda* warnings and implicat[ed] himself in the attack on the [victim]." The evidence also supports the court's conclusion, based upon its credibility determination, "that the defendant was advised of and knowingly, voluntarily and intelligently waived his *Miranda* rights not just once but on three separate occasions" before providing the inculpatory statements at issue.

The defendant's contention that the Supreme Court's charge to the jury did not adequately instruct the jury on intoxication is unpreserved for appellate review (*see* CPL 470.05[2]). In any event, the charge, when reviewed in its entirety, adequately instructed the jury on intoxication. The court instructed the jury twice, explicitly, once with regard to the first count, charging the defendant with murder in the second degree as a hate crime, and again with regard to the second count, charging the defendant with murder in the second degree, that it could consider "evidence of the defendant's intoxication ... whenever it is relevant to negate an element of a crime charged," and that, in determining "whether the defendant had the intent necessary to commit a crime, you may consider whether the defendant's mind was affected by intoxicants to such degree that he was incapable of forming the intent necessary for the commission of that crime." Although the court did not provide the same instruction again, it may be presumed that, when the court repeated the charge for "intent" with regard to the counts on which the defendant was convicted, including the "hate" element of manslaughter in the second degree as a hate crime, the jury "[had] 'sufficient intelligence' to make [the] elementary logical inferences" (*People v. Samuels,* 99 N.Y.2d 20, 25–26, 750 N.Y.S.2d 828, 780 N.E.2d 513; *see People v. Radcliffe,* 232 N.Y. 249, 254, 133 N.E. 577) that here, too, it could consider the defendant's level of intoxication in determining whether "the required intent [could] be inferred beyond a reasonable doubt from the facts [it found] to have been proven." The cases relied upon by the defendant are distinguishable from the instant case since, in those cases, the court read from section 15.25 of the Penal Law, which provides the general intoxication charge, but did not explain the charge or relate it "in any manner ... to the evidence" (*People v. Valentine,* 54 A.D.2d 568, 568, 387 N.Y.S.2d 25; *see People v. Lawrence,* 78 A.D.2d 702, 432 N.Y.S.2d 508; *People v. Summer,* 64 A.D.2d 658, 659, 407 N.Y.S.2d 53). Here, in contrast, the court related the effect of intoxication to the specific element of intent in connection with the first and second counts, instructed that the jury could consider ****443** evidence of intoxication whenever relevant to negate an element of "a crime charged," and provided a specific definition of the required intent with regard to the counts on which the defendant was convicted.

***847** The defendant's contention that the evidence was legally insufficient to establish his guilt of a hate crime beyond a reasonable doubt is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Hawkins,* 11 N.Y.3d 484, 872 N.Y.S.2d 395, 900 N.E.2d 946). In any event, viewing the evidence in the light most favorable to the People (*see People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of the three hate crimes of which he was convicted beyond a reasonable doubt (*see People v. Assi,* 14 N.Y.3d 335, 340, 902 N.Y.S.2d 6, 928 N.E.2d 388; *People v. Fortunato,* 75 A.D.3d 557, 903 N.Y.S.2d 910). Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel under the United States Constitution (*see Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674). Moreover, the defendant was not deprived of the effective assistance of counsel under the New York Constitution since, viewing defense counsel's performance in totality, counsel provided meaningful representation (*see People v. Benevento,* 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584; *People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400).

The sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

The defendant's contentions that he was deprived of his constitutional rights to present evidence and to a fair trial are unpreserved for appellate review and, in any event, without merit. The defendant's remaining contentions are without merit.

Motion by the respondent to strike stated material on page 39 of the appellant's main brief on an appeal from a judgment of the Supreme Court, Kings County, rendered November 20, 2007, on the ground that it refers to matter dehors the record. By decision and order dated March 31, 2014, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is granted, and the sentence on page 39 of the appellant's main brief which references the defendant's motion pursuant to CPL 440.10 and the following

sentence are deemed stricken and have not been considered in the determination of the appeal (*see* ***848** *People v. Stocks,* 101 A.D.3d 1049, 1052, 957 N.Y.S.2d 356).

All Citations

123 A.D.3d 844, 998 N.Y.S.2d 440, 2014 N.Y. Slip Op. 08661

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197 A.D.3d 1324
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Thomas R. GERALD, appellant.

2019–01157
|
(S.C.I. No. 45/18)
|
Submitted—March 24, 2021
|
September 29, 2021

Synopsis

Background: Defendant pleaded guilty in the County Court, Suffolk County, Stephen L. Braslow, J., to attempted criminal possession of a weapon in the second degree and, after denial of his application to withdraw his plea, was sentenced to 3 1/2 years' imprisonment followed by 5 years of postrelease supervision. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] denial of application to withdraw plea without hearing was improper, and

[2] application would be granted on appeal in interest of justice.

Reversed; application granted.

Chambers, J., filed opinion concurring in part and dissenting in part, in which LaSalle, P.J., concurred.

West Headnotes (10)

[1] **Criminal Law** Voluntary Character

To be valid and enforceable, a guilty plea must be entered voluntarily, knowingly, and intelligently.

[2] **Criminal Law** Voluntary Character

Guilty plea is voluntary only if it represents informed choice freely made by defendant among other valid alternatives.

[3] **Criminal Law** Voluntary Character

The trial court determines that a guilty plea meets the requirements for enforceability by considering all the relevant facts and circumstances, including the nature and terms of the agreement and the age, experience, and background of the accused.

[4] **Criminal Law** Plea or demurrer

Criminal Law Plea bargain

An unfair plea bargain or one coerced to conceal error or misconduct is subject to vacatur on direct appeal or by appropriate posttrial proceedings.

[5] **Criminal Law** Discretion of court

Criminal Law Amendments and rulings as to indictment or pleas

Decision as to whether to permit defendant to withdraw previously entered plea of guilty rests within sound discretion of court and generally will not be disturbed absent improvident exercise of discretion. N.Y. CPL § 220.60(3).

1 Case that cites this headnote

[6] **Criminal Law** Grounds for Allowance

In general, motion to withdraw previously entered plea of guilty must be premised upon some evidence of possible innocence or of fraud, mistake, coercion, or involuntariness in taking of plea. N.Y. CPL § 220.60(3).

1 Case that cites this headnote

[7] **Criminal Law** Grounds for Allowance

In deciding whether to grant defendant's motion to withdraw guilty plea, court should consider prejudice, if any, that would result to the State if motion to withdraw plea is granted. N.Y. CPL § 220.60(3).

[8] Criminal Law Withdrawal

Trial court improperly denied without a hearing defendant's application to withdraw his plea of guilty to attempted criminal possession of a weapon in the second degree; defendant's application was based on his statements to the court and his prior evidentiary submissions, which tended to substantiate his contention that he had not understood the concept of constructive possession or the nature of the State's evidence at the time that he pleaded guilty, and the State did not allege any prejudice that would have resulted had the court permitted defendant to withdraw his guilty plea. N.Y. CPL § 220.60(3); N.Y. Penal Law §§ 110.00, 265.03(3).

[9] Criminal Law Arraignment and plea

Supreme Court, Appellate Division, would not consider State's arguments that defendant's application to withdraw his plea was properly denied without a hearing because it constituted an impermissible attempt at hybrid representation and because the defendant failed to comply with rule governing motions that affect prior orders, where the arguments were raised by the State for the first time on appeal. N.Y. CPLR § 2221.

[10] Criminal Law Decision in General

Supreme Court, Appellate Division, in the interest of justice, would grant defendant's application to withdraw his plea of guilty to attempted criminal possession of a weapon in the second degree, on appeal from the trial court's denial of the application without a hearing, in which application defendant argued that he pleaded guilty due to a misunderstanding of the legal definition of constructive possession and that he misunderstood the evidence of his guilt due to the ineffective assistance of his prior attorney. U.S. Const. Amend. 6; N.Y. CPL § 220.60(3); N.Y. Penal Law §§ 110.00, 265.03(3).

Attorneys and Law Firms

****590** Matthew Muraskin, Port Jefferson, NY, for appellant.

Timothy D. Sini, District Attorney, Riverhead, N.Y. (Nicole L. Gallo of counsel), for respondent.

HECTOR D. LASALLE, P.J., CHERYL E. CHAMBERS, ROBERT J. MILLER, COLLEEN D. DUFFY, PAUL WOOTEN, JJ.

DECISION & ORDER

***1324** Appeal by the defendant from a judgment of the County Court, Suffolk County (Stephen L. Braslow, J.), rendered November 8, 2018, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is reversed, on the law, on the facts, and as a matter of discretion in the interest of justice, the defendant's application to withdraw his plea of guilty is granted, the plea is vacated, and the matter is remitted to the County Court, Suffolk County, for further proceedings on the superior court information.

***1325** The defendant was charged with various crimes, including, as relevant here, criminal possession of a weapon in the second degree. The defendant entered into a plea agreement pursuant to which he agreed to plead guilty to attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03[3]), in exchange for a promised sentence of 3½ years of imprisonment to be followed by a period of 5 years of postrelease supervision.

Prior to his sentencing date, the defendant made a written motion to withdraw his plea of guilty pursuant to CPL 220.60(3). The defendant argued, in essence, that he pleaded guilty due to a misunderstanding of the legal definition of constructive possession, and due to a further misunderstanding of the People's evidence of his guilt. The

defendant asserted that these misunderstandings were due to the ineffective assistance of his prior attorney. The People opposed the defendant's motion. In an order dated September 25, 2018, the County Court denied the defendant's motion, without holding a hearing.

After the defendant's written motion was denied, he sent the County Court a letter in which he again asserted his innocence and provided additional facts relevant to that claim. At his sentencing proceeding, the defendant orally alleged that he was innocent, and that he had only pleaded guilty due to the ineffective assistance of his attorneys. The People made no response to the defendant's application to withdraw his plea at the sentencing proceeding. The court declined to address the defendant's arguments or inquire further into his allegations, in effect, denying his application. The court sentenced the defendant, in accordance with the plea agreement, to a term of imprisonment of 3½ years to be followed by a period of postrelease supervision of 5 years.

On appeal, the defendant contends that the County Court should have granted his application to withdraw his plea of guilty at the sentencing proceeding. We agree.

As an initial matter, the People contend that the defendant validly waived his right to appeal and they seek to enforce that purported waiver on this appeal. However, since the only substantive arguments raised on the defendant's appeal concern the validity of his plea, this Court "need not reach the People's contention regarding the validity of the defendant's appeal waiver" (****591** *People v. Adames,* 173 **A.D.3d** 1058, 1058, 100 **N.Y.S.3d** 567; *see People v. Henriquez,* 168 **A.D.3d** 876, 876, 89 **N.Y.S.3d** 912; *People v. Bernard,* 155 **A.D.3d** 1059, 1059, 65 **N.Y.S.3d** 457; *see also People v. Fontanet,* 126 **A.D.3d** 723, 723, 2 **N.Y.S.3d** 371).

[1] **[2]** "[I]n order to be valid and enforceable, a guilty plea must be ***1326** entered voluntarily, knowingly and intelligently" (*People v. Brown,* 14 N.Y.3d 113, 116, 897 N.Y.S.2d 674, 924 N.E.2d 782). "A guilty plea is voluntary only if it represents an informed choice freely made by defendant among other valid alternatives" (*id.* at 116, 897 N.Y.S.2d 674, 924 N.E.2d 782; *see North Carolina v. Alford,* 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162; *People v. Grant,* 61 **A.D.3d** 177, 182, 873 N.Y.S.2d 355).

[3] **[4]** "The trial court determines that [a plea] meets those requirements by considering all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused" (*People v. Seaberg,* 74 N.Y.2d 1, 11, 543 N.Y.S.2d 968, 541 N.E.2d 1022; *see People v. Selikoff,* 35 N.Y.2d 227, 235, 360 N.Y.S.2d 623, 318 N.E.2d 784). "Manifestly, an unfair bargain or one coerced to conceal error or misconduct does not meet these standards and is subject to vacatur on direct appeal or by appropriate posttrial proceedings" (*People v. Seaberg,* 74 N.Y.2d at 11, 543 N.Y.S.2d 968, 541 N.E.2d 1022).

Even after a defendant pleads guilty, the Criminal Procedure Law provides that "[a]t any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty ... to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea, is restored" (CPL 220.60[3]; *see People v. Hollmond,* 191 **A.D.3d** 120, 136, 135 **N.Y.S.3d** 449).

[5] **[6]** "The decision as to whether to permit a defendant to withdraw a previously entered plea of guilty rests within the sound discretion of the court and generally will not be disturbed absent an improvident exercise of discretion" (*People v. Jacob,* 94 **A.D.3d** 1142, 1143, 942 N.Y.S.2d 627; *see People v. Alexander,* 97 N.Y.2d 482, 485, 743 N.Y.S.2d 45, 769 N.E.2d 802). In general, "such a motion must be premised upon some evidence of possible innocence or of fraud, mistake, coercion or involuntariness in the taking of the plea" (*People v. De Jesus,* 199 A.D.2d 529, 530, 606 N.Y.S.2d 255; *see People v. Nettles,* 30 N.Y.2d 841, 841–842, 335 N.Y.S.2d 83, 286 N.E.2d 467; *People v. Englese,* 7 N.Y.2d 83, 87, 195 N.Y.S.2d 641, 163 N.E.2d 869; *People v. Swain,* 192 **A.D.3d** 827, 143 **N.Y.S.3d** 104; *People v. Haffiz,* 77 **A.D.3d** 767, 768, 909 N.Y.S.2d 490, *affd* 19 N.Y.3d 883, 951 N.Y.S.2d 690, 976 N.E.2d 216; *People v. Smith,* 54 **A.D.3d** 879, 880, 863 N.Y.S.2d 818).

[7] "In deciding whether to grant a defendant's motion to withdraw a guilty plea, additional factors may be relevant" (*People v. Hollmond,* 191 **A.D.3d** at 137, 135 **N.Y.S.3d** 449). "For instance, the time that has elapsed between the guilty plea and the motion to vacate it has been described as a 'significant' factor" (*id.,* quoting *People v. Nixon,* 21 N.Y.2d 338, 355, 287 N.Y.S.2d 659, 234 N.E.2d 687). In addition, a court should consider the prejudice, if any, that would result to the People if the motion to withdraw the plea is granted (*see People v. Leslie,* 98 A.D.2d 977, 470 N.Y.S.2d 259; ***1327** *People v. Griffin,* 77 A.D.2d 666, —— N.Y.S.2d ——; *People v. Arcuri,* 64 A.D.2d 1028, 1028–1029, 409 N.Y.S.2d 319; *People v. McIntyre,* 40 A.D.2d 1038,

338 N.Y.S.2d 1011, 1012; *People v. East,* 39 A.D.2d 606, 332 N.Y.S.2d 396).

****592** **[8]** Here, the defendant secured new counsel and made a written motion to withdraw his plea a little more than four months after he pleaded guilty. The County Court denied the defendant's motion, without a hearing or any further inquiry into the defendant's claims. At the subsequent sentencing proceeding, the defendant again asserted his innocence and again asked the court to permit him to withdraw his plea based on his attorneys' failure to provide meaningful representation. The defendant's application to withdraw his plea at the sentencing proceeding was based on his statements to the court and his prior evidentiary submissions, which tended to substantiate his contention that he had not understood the concept of constructive possession or the nature of the People's evidence at the time that he pleaded guilty. These submissions were sufficient to cast doubt on his guilt and the validity of his plea (*cf. People v. Davis,* 187 **A.D.3d** 1291, 1292, 131 **N.Y.S.3d** 447). The People did not allege any prejudice that would have resulted had the court permitted the defendant to withdraw his plea of guilty at that time (*see People v. Hollmond,* 191 **A.D.3d** at 143, 135 **N.Y.S.3d** 449).

[9] Nor do the People allege any prejudice on this appeal. Rather, the People contend that the defendant's application to withdraw his plea was properly denied without a hearing because it constituted an impermissible attempt at hybrid representation, and because the defendant failed to comply with CPLR 2221. These arguments are improperly raised by the People for the first time on appeal, and we decline to consider them (*see generally* CPL 470.05[2]; *People v. Maher,* 89 N.Y.2d 456, 460 n. 1, 654 N.Y.S.2d 1004, 677 N.E.2d 728). Contrary to the People's further contention, the arguments raised by the defendant at the sentencing proceeding were adequately preserved for appellate review (*see People v. Blanford,* 179 **A.D.3d** 1388, 1391, 118 **N.Y.S.3d** 294; *see also People v. Davis,* 187 **A.D.3d** at 1292, 131 **N.Y.S.3d** 447).

The Court of Appeals has stated that "[w]here, after a plea of guilty has been entered, and before sentence, defendant states to the court he is not guilty, or that he believes he is not guilty, the rule has developed that the court should not, except in extraordinary circumstances, then impose sentence, but either grant an application to allow the plea to be withdrawn; or conduct a hearing to determine whether the application has merit" (*People v. McKennion,* 27 N.Y.2d 671, 672–673, 313 N.Y.S.2d 876, 261 N.E.2d 910; *see People v. McClain,* 32 N.Y.2d 697, 697–698, 343 N.Y.S.2d 601, 296 N.E.2d 454; *People v. Nixon,* 21 N.Y.2d at 355, 287 N.Y.S.2d 659, 234 N.E.2d 687). The County Court's failure to follow this rule ***1328** at the sentencing proceeding in this case constituted error as matter of law (*see People v. Nixon,* 21 N.Y.2d at 355, 287 N.Y.S.2d 659, 234 N.E.2d 687).

[10] Given the record before the County Court at the sentencing proceeding and the other circumstances of this case, we conclude that "the interest of justice will be best served by permitting the defendant to withdraw his plea and proceed to trial" (*People v. De Jesus,* 199 A.D.2d at 531, 606 N.Y.S.2d 255; *see People v. Leslie,* 98 A.D.2d 977, 470 N.Y.S.2d 259; *People v. Arcuri,* 64 A.D.2d at 1028–1029, 409 N.Y.S.2d 319; *People v. McIntyre*, 40 A.D.2d 1038, 338 N.Y.S.2d 1011, 1012; *People v. East,* 39 A.D.2d 606, 332 N.Y.S.2d 396). Accordingly, we grant the defendant's application as a matter of discretion in the interest of justice (*see People v. De Jesus,* 199 A.D.2d at 530, 606 N.Y.S.2d 255; *People v. Leslie,* 98 A.D.2d 977, 470 N.Y.S.2d 259; *People v. Arcuri,* 64 A.D.2d at 1028–1029, 409 N.Y.S.2d 319; ****593** *People v. McIntyre*, 40 A.D.2d 1038, 338 N.Y.S.2d 1011, 1012; *People v. East,* 39 A.D.2d 606, 332 N.Y.S.2d 396; *see also People v. Shipman,* 14 N.Y.2d 883, 883, 252 N.Y.S.2d 88, 200 N.E.2d 773; *cf. People v. Swain,* 192 **A.D.3d** 827, 143 **N.Y.S.3d** 104; *People v. Hollmond,* 170 **A.D.3d** 1193, 1194, 97 **N.Y.S.3d** 148).

In light of the foregoing, we need not reach the parties' remaining contentions.

MILLER, DUFFY and WOOTEN, JJ., concur.

CHAMBERS, J., concurs in part and dissents in part, and votes to reverse the judgment, on the law, on the facts, and as a matter of discretion in the interest of justice, and to remit the matter to the County Court, Suffolk County, for further proceedings on the defendant's application to withdraw his plea of guilty, with the following memorandum, in which LASALLE, P.J., concurs:

I respectfully dissent, in part. While I agree with my colleagues in the majority that the County Court erred in summarily denying the defendant's application to withdraw his plea of guilty and that the judgment appealed from should be reversed on that ground, the record before us does not warrant granting the defendant's application outright.

Therefore, I would instead remit the matter to the County Court, Suffolk County, for further proceedings consistent with *People v. Tinsley,* 35 N.Y.2d 926, 365 N.Y.S.2d 161, 324 N.E.2d 544 and, thereafter, a new determination of the defendant's application.

The defendant admitted that on November 22, 2017, at approximately 6:00 a.m., he possessed a loaded Hi–Point model JCP .40 caliber handgun at a specified address in Mastic, and that the loaded weapon was in the room in which he was sleeping. He further admitted that the weapon was not registered in his name, and defense counsel stipulated to the weapon's operability. Based on the foregoing allocution, the County Court accepted the defendant's plea of guilty.

The defendant timely moved to withdraw his plea. In a supporting affidavit, he denied owning or renting the house where ***1329** the weapon was recovered and averred he was merely there to use drugs. Moreover, he claimed the weapon he was charged with possessing "was hidden," was "not in plain view," and that he "never possessed; never touched; never knew that [a] weapon was in th[e] room." He further averred that the weapon "was not loaded," that "there was no ammunition recovered with the weapon," and that all of the ammunition in the house was found in a safe located in a different room. The basis for many of the factual allegations contained in the defendant's affidavit is not known. The County Court summarily denied the defendant's motion.

Prior to the imposition of sentence, the defendant sent a lengthy, handwritten letter to the County Court, claiming, inter alia, that he only entered the plea of guilty because his former counsel misadvised him that he had no viable defense to the charged crime. The defendant repeated his claims at sentencing, and the court, in effect, denied the defendant's application to withdraw his plea, and imposed the bargained-for sentence.

To be sure, the defendant's application should not have been summarily denied (*see People v. Tinsley,* 35 N.Y.2d 926, 365 N.Y.S.2d 161, 324 N.E.2d 544). However, in my view, the record is not so clear as to conclude, as the majority does, that the defendant's application should have been granted outright without further inquiry (*see e.g. People v. Shipman,* 14 N.Y.2d 883, 252 N.Y.S.2d 88, 200 N.E.2d 773; *People v. Wedgewood,* 106 A.D.2d 674, 483 N.Y.S.2d 440). Therefore, upon reversing the judgment of conviction, I would remit the matter ****594** for further proceedings consistent with *People v. Tinsley,* 35 N.Y.2d 926, 365 N.Y.S.2d 161, 324 N.E.2d 544 and, thereafter, a new determination of the defendant's application (*see People v. Beasley,* 25 N.Y.2d 483, 307 N.Y.S.2d 39, 255 N.E.2d 239; *People v. Swain,* 192 **A.D.3d** 827, 143 **N.Y.S.3d** 104).

All Citations

197 A.D.3d 1324, 153 N.Y.S.3d 588, 2021 N.Y. Slip Op. 05130

188 A.D.3d 1108
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, Respondent,

v.

Kevin GUALLPA–LEMA, Appellant.

2019–06783

Submitted—June 3, 2020

November 18, 2020

Attorneys and Law Firms

James D. Licata, New City, N.Y. (Lois Cappelletti of counsel), for appellant.

Thomas E. Walsh II, District Attorney, New City, N.Y. (Jacob B. Sher of counsel), for respondent.

WILLIAM F. MASTRO, J.P., JOHN M. LEVENTHAL, ROBERT J. MILLER, COLLEEN D. DUFFY, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***1108** Appeal by the defendant from an order of the County Court, Rockland County (Kevin F. Russo, J.), entered June 3, 2019, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

After a hearing on May 17, 2019, the defendant was designated a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6–C; hereinafter SORA), based on his conviction, upon a plea of guilty, of rape in the third degree (Penal Law § 130.25[3]).

In establishing an offender's appropriate risk level assessment under SORA, the People bear "the burden of proving the facts supporting the determinations sought by clear and convincing evidence" (Correction Law § 168–n[3]; *see People v. Wyatt,* 89 A.D.3d 112, 117–118, 931 N.Y.S.2d 85; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5 [2006] [hereinafter Guidelines]). "In assessing points, evidence may be derived from the defendant's admissions, the ***1109** victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders (hereinafter the Board), or any other reliable source, including reliable hearsay" (*People v. Crandall,* 90 A.D.3d 628, 629, 934 N.Y.S.2d 446; *see People v. Mingo,* 12 N.Y.3d 563, 573, 883 N.Y.S.2d 154, 910 N.E.2d 983).

We agree with the County Court's designation of the defendant as a level two sex offender. Contrary to the defendant's contentions, the court properly assessed points against the defendant under risk factors 4, 6, and 8. The People demonstrated by clear and convincing evidence, which included the defendant's statements in the presentence report (hereinafter PSR), a case summary prepared by the Board, and ****649** a transcript of the testimony of the investigating detective during a preliminary hearing in the underlying criminal proceeding, that points were properly assessed under risk factor 4 because the evidence indicated that the defendant engaged in a continuing course of sexual contact with the victim (*see People v. Lucius,* 122 A.D.3d 819, 819, 996 N.Y.S.2d 659; *People v. McPherson,* 114 A.D.3d 653, 653, 979 N.Y.S.2d 658). The court also properly assessed points under risk factor 6 since the PSR and case summary indicated that the 11–year–old victim was sleeping when the sexual misconduct took place and therefore was physically helpless (*see People v. Morrison,* 156 A.D.3d 831, 831, 67 N.Y.S.3d 246). Moreover, the court properly assessed points under risk factor 8 because the defendant was less than 20 years old when he engaged in his first sex crime (*see* Guidelines at 13; *People v. Quinn,* 99 A.D.3d 776, 776, 952 N.Y.S.2d 235).

The defendant's remaining contentions are without merit.

MASTRO, J.P., LEVENTHAL, MILLER, DUFFY and LASALLE, JJ., concur.

All Citations

188 A.D.3d 1108, 132 N.Y.S.3d 648 (Mem), 2020 N.Y. Slip Op. 06819

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145 A.D.3d 915
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Maurice HALL, appellant.

Dec. 21, 2016.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Tomei, J.,of murder in the first degree, attempted murder in the second degree, and criminal possession of a weapon in the second degree. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that defendant's statements made to law enforcement officials after he was advised of his *Miranda* rights were not involuntary.

Affirmed.

West Headnotes (3)

[1] Criminal Law What constitutes voluntary statement, admission, or confession

A court generally must look to the totality of the circumstances to determine the voluntariness of an inculpatory statement; the factors to be weighed include the duration and conditions of detention, the manifest attitude of the police towards the defendant, the existence of threat or inducement, and the age, physical state, and mental state of the defendant.

2 Cases that cite this headnote

[2] Criminal Law Effect; revocation

Where a person in police custody was issued *Miranda* warnings and waived those rights voluntarily and intelligently, it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody has remained continuous.

4 Cases that cite this headnote

[3] Criminal Law Particular cases

Murder defendant's statements made to law enforcement officials after he was advised of his *Miranda* rights were not involuntary.

4 Cases that cite this headnote

Attorneys and Law Firms

****102** Mark Diamond, New York, N.Y., for appellant.

Eric Gonzalez, Acting District Attorney, Brooklyn, N.Y. (Leonard Joblove and Jill Oziemblewski of counsel), for respondent.

RUTH C. BALKIN, J.P., THOMAS A. DICKERSON, HECTOR D. LaSALLE, and FRANCESCA E. CONNOLLY, JJ.

Opinion

***915** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Tomei, J.), rendered December 19, 2013, convicting him of murder in the first degree (two counts), attempted murder in the second degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

ORDERED that the judgment is affirmed.

[1] [2] [3] Contrary to the defendant's contention, the Supreme Court properly denied that branch of his omnibus motion which was to suppress statements he made to law enforcement officials after he was advised of his *Miranda* rights (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694). "A court generally must look to the totality of the circumstances ****103** to determine the voluntariness of an inculpatory statement" (*People v. Brown,* 113 A.D.3d 785, 785, 978 N.Y.S.2d 862). "The factors to be weighed include the duration and conditions of detention, the manifest attitude

of the ***916** police towards the defendant, the existence of threat or inducement, and the age, physical state, and mental state of the defendant" (*People v. Sakadinsky,* 239 A.D.2d 443, 443, 657 N.Y.S.2d 754). "Where ... a person in police custody was issued *Miranda* warnings and waived those rights voluntarily and intelligently, 'it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody has remained continuous' " (*People v. Petronio,* 34 A.D.3d 602, 604, 825 N.Y.S.2d 99, quoting *People v. Glinsman,* 107 A.D.2d 710, 710, 484 N.Y.S.2d 64). The record supports the court's determination that, under the circumstances presented here, the defendant's statements were not involuntary (*see People v. Gega,* 74 A.D.3d 1229, 1231, 904 N.Y.S.2d 716; *People v. Petronio,* 34 A.D.3d at 604, 825 N.Y.S.2d 99; *People v. Dishaw,* 30 A.D.3d 689, 690, 816 N.Y.S.2d 235; *People v. Foster,* 193 A.D.2d 692, 693, 598 N.Y.S.2d 36; *People v. Abreu,* 184 A.D.2d 707, 585 N.Y.S.2d 222; *cf. People v. Zappulla,* 282 A.D.2d 696, 697–698, 724 N.Y.S.2d 433).

The defendant's contention that the evidence was legally insufficient to support his convictions is unpreserved for appellate review (*see People v. Hawkins,* 11 N.Y.3d 484, 492, 872 N.Y.S.2d 395, 900 N.E.2d 946; *People v. Finger,* 95 N.Y.2d 894, 716 N.Y.S.2d 34, 739 N.E.2d 290). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to prove the defendant's guilt beyond a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

The defendant's challenge to his adjudication as a second violent felony offender is unpreserved for appellate review and, in any event, without merit (*see* CPL 470.05[2]; *People v. Wolmart,* 140 A.D.2d 733, 529 N.Y.S.2d 40). Moreover, the sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

All Citations

145 A.D.3d 915, 44 N.Y.S.3d 102, 2016 N.Y. Slip Op. 08541

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165 A.D.3d 849
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Craig HITCHCOCK, appellant.

2017–08505
|
Submitted - May 18, 2018
|
October 10, 2018

Synopsis

Background: Defendant appealed from an order of the Supreme Court, Westchester County, Susan Cacace, J., designating defendant as a level three sex offender under the Sex Offender Registration Act.

[Holding:] The Supreme Court, Appellate Division, held that defendant was properly assessed as a level three sex offender under the Act.

Affirmed.

West Headnotes (3)

[1] Mental Health Proceedings

In establishing an offender's appropriate risk level under the Sex Offender Registration Act, he People bear the burden of proving the facts supporting the determinations by clear and convincing evidence. N.Y. Correction Law § 168-n(3).

2 Cases that cite this headnote

[2] Mental Health Proceedings

In assessing points for purpose of establishing an offender's appropriate risk level under the Sex Offender Registration Act, evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders, or any other reliable source, including reliable hearsay. N.Y. Correction Law § 168-n(3).

2 Cases that cite this headnote

[3] Mental Health Scores and risk levels

Defendant was properly designated by the trial court as a level three sex offender under the Sex Offender Registration Act, where the People presented clear and convincing evidence that defendant had a history of drug and alcohol abuse and had engaged in unsatisfactory conduct by engaging in sexual misconduct while confined or supervised, and defendant failed to identify and establish the existence of an appropriate mitigating factor that tended to establish a lower likelihood of reoffense or danger to the community. N.Y. Correction Law § 168-n(3).

3 Cases that cite this headnote

****190** Appeal by the defendant from an order of the Supreme Court, Westchester County (Susan Cacace, J.), entered July 28, 2017, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

Attorneys and Law Firms

Clare J. Degnan, White Plains, N.Y. (Debra A. Cassidy of counsel), for appellant.

Anthony A. Scarpino, Jr., District Attorney, White Plains, N.Y. (Brian C. Pouliot and William C. Milaccio of counsel), for respondent.

SHERI S. ROMAN, J.P., SANDRA L. SGROI, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***849** ORDERED that the order is affirmed, without costs or disbursements.

[1] **[2]** In establishing an offender's appropriate risk level under the Sex Offender Registration Act (*see* Correction Law art 6–C; hereinafter SORA), "[t]he People 'bear the burden of proving the facts supporting the determinations' by clear and convincing evidence" (*People v. Pettigrew,* 14 N.Y.3d 406, 408, 901 N.Y.S.2d 569, 927 N.E.2d 1053, quoting Correction Law § 168–n[3]; *see* SORA: Risk Assessment Guidelines and Commentary at 5 [2006; hereinafter Guidelines]; *People v. Mingo,* 12 N.Y.3d 563, 571, 883 N.Y.S.2d 154, 910 N.E.2d 983). "In assessing points, evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders ... or any other reliable source, including reliable hearsay" (*People v. Crandall,* 90 A.D.3d 628, 629, 934 N.Y.S.2d 446; *see* Guidelines at 5 [2006]; *People v. Mingo,* 12 N.Y.3d at 571–572, 883 N.Y.S.2d 154, 910 N.E.2d 983).

[3] The defendant's contention that the Supreme Court improperly assessed him 15 points under risk factor 11 of the risk assessment instrument based on a history of drug or alcohol abuse is unpreserved for appellate review (*see People v. Lowery,* 140 A.D.3d 1141, 1142, 35 N.Y.S.3d 684; *People v. Game,* 131 A.D.3d 460, 460, 13 N.Y.S.3d 900). In any event, the People presented clear and convincing evidence that the defendant had a history of drug and alcohol abuse (*see People v. Reali,* 159 A.D.3d 1030, 1031, 70 N.Y.S.3d 392; *People v. Dipilato,* 155 A.D.3d 792, 793, 63 N.Y.S.3d 525). Similarly, the court's assessment of 20 points under risk factor 13 was proper. The People provided clear ****191** and convincing evidence that the defendant engaged in unsatisfactory conduct by engaging in sexual misconduct while confined or supervised (*see People v. Anderson,* 151 A.D.3d 767, 768, 56 N.Y.S.3d 240; *People v. Dallas,* 122 A.D.3d 698, 699, 995 N.Y.S.2d 618).

***850** We agree with the Supreme Court's denial of the defendant's application for a downward departure from his presumptive risk level designation, as he failed to identify and establish the existence of an appropriate mitigating factor that "tends to establish a lower likelihood of reoffense or danger to the community" and was not adequately taken into account by the Guidelines (*People v. Uphael,* 140 A.D.3d 1143, 1144, 35 N.Y.S.3d 194 [internal quotation marks omitted]; *see People v. Santiago,* 137 A.D.3d 762, 26 N.Y.S.3d 339; *People v. Benjamin,* 105 A.D.3d 926, 963 N.Y.S.2d 336; *People v. Martinez,* 104 A.D.3d 924, 924–925, 962 N.Y.S.2d 336).

ROMAN, J.P., SGROI, MALTESE and LASALLE, JJ., concur.

All Citations

165 A.D.3d 849, 86 N.Y.S.3d 189, 2018 N.Y. Slip Op. 06773

183 A.D.3d 840
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Shaheim HOEDOUGLAS, Appellant.

2017–03677
|
Ind.No. 759/16
|
Submitted - January 21, 2020
|
May 20, 2020

Attorneys and Law Firms

Joseph A. Hanshe, Sayville, N.Y. (Pablo Lopez of counsel), for appellant.

Timothy D. Sini, District Attorney, Riverhead, N.Y. (Timothy P. Finnerty and Thomas C. Costello of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., LEONARD B. AUSTIN, SYLVIA O. HINDS–RADIX, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***840** Appeal by the defendant from a judgment of the County Court, Suffolk County (John B. Collins, J.), rendered March 7, 2017, convicting him of attempted assault in the second degree, assault in the third degree, strangulation in the second degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was convicted of attempted assault in the second degree, assault in the third degree, strangulation in the second degree, and endangering the welfare of a child based upon evidence that he struck and strangled the complainant in the presence of their infant child.

The defendant's contention that his conviction of endangering the welfare of a child is not supported by legally sufficient evidence is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Hawkins,* 11 N.Y.3d 484, 872 N.Y.S.2d 395, 900 N.E.2d 946). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of endangering the welfare of a child beyond a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt as to each of the charges of which the defendant was convicted was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

Contrary to the defendant's contention, the County Court did not err in denying his *Batson* challenge with respect to the prosecutor's peremptory challenge of one African–American member of the venire (*see Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69). "To establish a prima facie case of discrimination in the selection of jurors under *Batson v. Kentucky,* the defendant asserting the claim of unlawful discrimination must show 'that the prosecution exercised its peremptory challenges to remove one or more members of a cognizable racial group from the ****559** venire and that there exist facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenges to exclude potential jurors because of their race' " (*People v. Jenkins,* 84 N.Y.2d 1001, 1002, 622 N.Y.S.2d 509, 646 N.E.2d 811 [citation omitted], quoting *People v. Childress,* 81 N.Y.2d 263, 266, 598 N.Y.S.2d 146, 614 N.E.2d 709). "It is not until that prima facie showing has been made that the burden shifts to the prosecution to come forward with ***841** a race-neutral explanation for its peremptory challenges" (*People v. Jenkins,* 84 N.Y.2d at 1002–1003, 622 N.Y.S.2d 509, 646 N.E.2d 811).

Here, the defendant did not demonstrate a pattern of discriminatory strikes or questions by the prosecution, or that a disproportionate number of strikes was used against African–Americans (*see People v. Childress,* 81 N.Y.2d at 267, 598 N.Y.S.2d 146, 614 N.E.2d 709). In addition, defense counsel did not compare the challenged juror to similarly situated unchallenged prospective jurors, point to factors in the challenged juror's background that made him likely to be pro-prosecution, or enunciate any factor that suggested that the prosecutor exercised the challenge due to the prospective juror's race (*see People v. MacShane,* 11 N.Y.3d 841, 842, 872 N.Y.S.2d 695, 901 N.E.2d 186). The defendant's contention that the challenged juror should not have been excused

because he indicated no reason why he could not serve fairly, standing alone, was insufficient to establish a prima facie case of discrimination (*see id.* at 842, 872 N.Y.S.2d 695, 901 N.E.2d 186; *People v. Childress,* 81 N.Y.2d at 267–268, 598 N.Y.S.2d 146, 614 N.E.2d 709).

The defendant's contention that the People elicited improper bolstering testimony from a paramedic is without merit. The complainant's statements to the paramedic regarding how she sustained her injuries were relevant to treatment and were properly admitted as an exception to the rule against hearsay (*see People v. Spicola,* 16 N.Y.3d 441, 452–453, 922 N.Y.S.2d 846, 947 N.E.2d 620; *People v. Buie,* 86 N.Y.2d 501, 511, 634 N.Y.S.2d 415, 658 N.E.2d 192).

The defendant's remaining contentions are without merit.

SCHEINKMAN, P.J., AUSTIN, HINDS–RADIX and LASALLE, JJ., concur.

All Citations

183 A.D.3d 840, 122 N.Y.S.3d 558 (Mem), 2020 N.Y. Slip Op. 02938

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172 A.D.3d 748
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,
v.
Andrew JACKSON, Appellant.

2014–06453
|
(Ind.No. 7407/11)
|
Argued—February 8, 2019
|
May 1, 2019

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Neil Jon Firetog, J.), rendered June 10, 2014, convicting him of kidnapping in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement authorities.

Attorneys and Law Firms

Paul Skip Laisure, New York, N.Y. (Alexis A. Ascher and Melissa Lee of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Victor Barall, and Joyce Adolfsen of counsel), for respondent.

CHERYL E. CHAMBERS, J.P., JOSEPH J. MALTESE, HECTOR D. LASALLE, BETSY BARROS, JJ.

DECISION & ORDER

***748** ORDERED that the judgment is affirmed.

The defendant was arrested and charged with, inter alia, murder in the second degree, kidnapping in the first degree, and robbery in the first degree. The charges stem from the abduction of the ****494** victim from a Brooklyn street by the defendant and accomplices. During the abduction, the victim suffered a heart attack, from which he ultimately died. The defendant and his accomplices left the victim lying on a sidewalk and fled on foot from the scene.

Contrary to the defendant's contention, the record of the pretrial *Huntley* hearing (*see People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179) shows that at the outset of a custodial interview by the police, the defendant made an intelligent, knowing, and voluntary waiver of his *Miranda* rights (*see* ***749** *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694), and that his statements to the police were not the product of coercion (*see People v. Mateo*, 2 N.Y.3d 383, 413–414, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bethea*, 159 A.D.3d 710, 71 N.Y.S.3d 589; *People v. Booker*, 49 A.D.3d 658, 658, 854 N.Y.S.2d 430; *People v. Sepulveda*, 40 A.D.3d 1014, 1014, 837 N.Y.S.2d 220).

We agree with the Supreme Court's determination to deny the defendant's request to instruct the jury on the affirmative defense of duress. Viewing the evidence in the light most favorable to the defendant, no reasonable view of the evidence supported charging the jury with this affirmative defense (*see People v. Butts*, 72 N.Y.2d 746, 750, 536 N.Y.S.2d 730, 533 N.E.2d 660; *People v. Watts*, 57 N.Y.2d 299, 301, 456 N.Y.S.2d 677, 442 N.E.2d 1188; *People v. Fraser*, 134 A.D.3d 734, 735, 22 N.Y.S.3d 70). Contrary to the defendant's contention, no reasonable view of the evidence supported a finding that he was subjected to "the use or threatened imminent use of unlawful physical force upon him" (Penal Law § 40.00[1]; *see People v. Fraser*, 134 A.D.3d at 735, 22 N.Y.S.3d 70). The defendant failed to present any evidence of an immediate threat from his accomplices (*see People v. Morrison*, 133 A.D.3d 892, 893, 19 N.Y.S.3d 436; *People v. Morson*, 42 A.D.3d 505, 506, 839 N.Y.S.2d 229).

The sentence imposed was not excessive (*see People v. Suitte*, 90 A.D.2d 80, 85–86, 455 N.Y.S.2d 675).

CHAMBERS, J.P., MALTESE, LASALLE and BARROS, JJ., concur.

All Citations

172 A.D.3d 748, 97 N.Y.S.3d 493 (Mem), 2019 N.Y. Slip Op. 03365

153 A.D.3d 934
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Andre JONES, appellant.

Aug. 30, 2017.

Synopsis

Background: Defendant was convicted in the County Court, Westchester County, Warhit, J., of kidnapping in the second degree, robbery in the first degree, and robbery in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] questioning of defendant at police station constituted custodial interrogation such that *Miranda* warnings were required, but

[2] error in admitting the incriminating statements was harmless.

Affirmed.

West Headnotes (2)

[1] Criminal Law Particular cases or issues

Questioning of defendant at police station constituted custodial interrogation such that *Miranda* warnings were required; innocent person would not have believed that he was free to leave the police station at time defendant made his oral statements. U.S.C.A. Const.Amend. 5.

1 Case that cites this headnote

[2] Criminal Law Acts, admissions, declarations, and confessions of accused

Trial court's error in admitting defendant's incriminating statements, obtained in violation of *Miranda*, was harmless, where proof of defendant's guilt, without reference to improperly admitted statements, was overwhelming. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

Attorneys and Law Firms

****445** Merrick Dammar, Bronx, NY, for appellant.

Anthony A. Scarpino, Jr., District Attorney, White Plains, N.Y. (John J. Carmody and Steven A. Bender of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., HECTOR D. LaSALLE, VALERIE BRATHWAITE NELSON, and LINDA CHRISTOPHER, JJ.

Opinion

***934** Appeal by the defendant from a judgment of the County Court, Westchester County (Warhit, J.), rendered February 20, 2015, convicting him of kidnapping in the second degree, robbery in the first degree (two counts), and robbery in the second degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Neary, J.), of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

ORDERED that the judgment is affirmed.

[1] The defendant contends that the hearing court should have suppressed his statements to law enforcement officials as the product of custodial interrogation conducted without the benefit of *Miranda* warnings (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694). Here, even giving deference to the hearing court's credibility determinations (*see People v. Baggett,* 57 A.D.3d 1093, 1094, 868 N.Y.S.2d 423), the court's conclusion that the defendant was not in police custody when he made his statements to the police is not supported by the record. The evidence presented at the suppression hearing established that a reasonable, innocent person would not have believed that he or she was free to leave the police station at the time the defendant made his oral statements ****446** (*see People v. Yukl,* 25 N.Y.2d 585, 589, 307 N.Y.S.2d 857, 256 N.E.2d 172; *People v. Reardon,* 124 A.D.3d 681, 683–684, 1 N.Y.S.3d 289; *People*

v. Tavares–Nunez, 87 A.D.3d 1171, 1172, 930 N.Y.S.2d 589; *People v. Payne,* 41 A.D.3d 512, 513, 838 N.Y.S.2d 123). Further, the hearing court erred in concluding that the defendant's inculpatory statements were admissible because they were spontaneous, and not the result of interrogation or its functional equivalent (*see People v. Tavares–Nunez,* 87 A.D.3d at 1172, 930 N.Y.S.2d 589; *cf. People v. Rivers,* 56 N.Y.2d 476, 453 N.Y.S.2d 156, 438 N.E.2d 862; *People v. McClough,* 135 A.D.3d 880, 23 N.Y.S.3d 365; *People v. Davis,* 32 A.D.3d 445, 821 N.Y.S.2d 217; *People v. Harrison,* 251 A.D.2d 681, 677 N.Y.S.2d 794; *People v. Pryor,* 194 A.D.2d 749, 600 N.Y.S.2d 81).

[2] Although the defendant's statements, including his videotaped statement, should have been suppressed (*see People v. Payne,* 41 A.D.3d at 513–514, 838 N.Y.S.2d 123), the admission into evidence of these statements was harmless error (*see People v. Crimmins,* 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787). The proof of the defendant's guilt, without ***935** reference to the improperly admitted statements, was overwhelming, and there is no reasonable possibility that the jury would have acquitted him had it not been for this constitutional error (*see People v. Reardon,* 124 A.D.3d at 684, 1 N.Y.S.3d 289; *People v. Tavares–Nunez,* 87 A.D.3d at 1174–1175, 930 N.Y.S.2d 589; *People v. Payne,* 41 A.D.3d at 514, 838 N.Y.S.2d 123).

Contrary to the People's contention, the defendant preserved for appellate review his contention that the County Court, after a mid-trial hearing, improperly denied his application to suppress physical evidence consisting of his cell phone (*see* CPL 470.05[2]). However, the contention is without merit (*cf. People v. Giler,* 148 A.D.3d 1053, 49 N.Y.S.3d 748; *People v. Arnold,* 139 A.D.3d 748, 30 N.Y.S.3d 333).

All Citations

153 A.D.3d 934, 60 N.Y.S.3d 445, 2017 N.Y. Slip Op. 06374

145 A.D.3d 922
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

John KOHOUT, appellant.

Dec. 21, 2016.

Synopsis

Background: Defendant appealed from an order of the Supreme Court, Queens County, Margulis, J., which designated him a level two sex offender pursuant to the Sex Offender Registration Act (SORA).

[Holding:] The Supreme Court, Appellate Division, held that lower court providently exercised its discretion in declining to downwardly depart from defendant's presumptive level two sex offender risk level under SORA.

Affirmed.

West Headnotes (3)

[1] Mental Health Scores and risk levels

Court providently exercised its discretion in designating the defendant a level two sex offender under the Sex Offender Registration Act (SORA) Guidelines and in declining to downwardly depart from that presumptive risk level and designating defendant a level one sex offender, following his conviction in federal court of a crime relating to his possession of child pornography. McKinney's Correction Law § 168 et seq.

12 Cases that cite this headnote

[2] Mental Health Proceedings

To obtain downward departure from the presumptive risk level under Sex Offender Registration Act (SORA), the defendant must prove the existence of a mitigating factor in the case by a preponderance of the evidence. McKinney's Correction Law § 168 et seq.

14 Cases that cite this headnote

[3] Mental Health Proceedings

If the defendant satisfies the burden of identifying and proving the existence of an appropriate mitigating factor, the court may then, as a matter of discretion, downwardly depart from the presumptive risk level under the Sex Offender Registration Act (SORA), and in determining whether to exercise that discretion in favor of a downward departure, the court must examine all the relevant circumstances in determining whether a designation at the presumptive risk level would result in an overassessment of the risk and danger of reoffense. McKinney's Correction Law § 168 et seq.

16 Cases that cite this headnote

Attorneys and Law Firms

****471** Seymour W. James, Jr., New York, N.Y. (Steven J. Miraglia of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, Roni C. Piplani, and Meredith D'Angelo of counsel), for respondent.

RUTH C. BALKIN, J.P., LEONARD B. AUSTIN, SANDRA L. SGROI, and HECTOR D. LaSALLE, JJ.

Opinion

***922** Appeal by the defendant from an order of the Supreme Court, Queens County (Margulis, J.), dated January 23, 2013, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

[1] This appeal arises from the defendant's risk level designation under New York's Sex Offender Registration Act (*see* Correction Law § 168 *et seq.;* hereinafter SORA)

following his conviction in federal court of a crime relating to his possession of child pornography. After a hearing, the Supreme Court assessed the defendant 95 points on the Risk Assessment Instrument, within the range for a presumptive designation as a level two sex offender. The defendant contends that the Supreme Court should have downwardly departed from the ***923** presumptive risk level and found him to be a level one sex offender.

[2] **[3]** In seeking a downward departure from the presumptive risk level, a defendant first must identify an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the SORA Guidelines (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [2006]). The defendant must then prove the existence of that factor in the case by a preponderance ****472** of the evidence (*see People v. Gillotti,* 23 N.Y.3d 841, 861, 994 N.Y.S.2d 1, 18 N.E.3d 701; *People v. Marsh,* 116 A.D.3d 680, 681–682, 983 N.Y.S.2d 91; *People v. Wyatt,* 89 A.D.3d 112, 128, 931 N.Y.S.2d 85). If the defendant satisfies the burden of identifying and proving the existence of an appropriate mitigating factor, the court may then, as a matter of discretion, downwardly depart from the presumptive risk level. In determining whether to exercise that discretion in favor of a downward departure, the court must examine all the relevant circumstances in determining whether a designation at the presumptive risk level would result in an overassessment of the risk and danger of reoffense (*see People v. Gillotti,* 23 N.Y.2d at 861, 994 N.Y.S.2d 1, 18 N.E.3d 701; *People v. Marsh,* 116 A.D.3d at 682, 983 N.Y.S.2d 91; *People v. Wyatt,* 89 A.D.3d at 128, 931 N.Y.S.2d 85).

Here, we conclude that the Supreme Court providently exercised its discretion in designating the defendant a level two sex offender under the SORA Guidelines and in declining to downwardly depart from the presumptive risk level (*see People v. Rossano,* 140 A.D.3d 1042, 1043, 35 N.Y.S.3d 364).

All Citations

145 A.D.3d 922, 44 N.Y.S.3d 470, 2016 N.Y. Slip Op. 08551

195 A.D.3d 1042
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Amin LABORIEL, appellant.

2019–03799
|
(Ind. No. 2068/17)
|
Submitted—January 20, 2021
|
June 30, 2021

Motion by the defendant for leave to reargue the defendant's appeal, as limited ****811** by his motion, from a sentence of the Supreme Court, Queens County, imposed March 6, 2019, which was determined by decision and order of this Court dated February 10, 2021.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is

ORDERED that the motion is granted, and, upon reargument, the decision and order of this Court dated February 10, 2021 (*People v. Laboriel,* 191 A.D.3d 802, 138 N.Y.S.3d 365) in the above-entitled action is recalled and vacated, and the following decision and order is substituted therefor:

Attorneys and Law Firms

Paul Skip Laisure, New York, N.Y. (Lisa Napoli of counsel), for appellant.

Melinda Katz, District Attorney, Kew Gardens, N.Y. (Johnnette Traill and Hannah X. Scotti of counsel), for respondent.

HECTOR D. LASALLE, P.J., WILLIAM F. MASTRO, ROBERT J. MILLER, COLLEEN D. DUFFY, PAUL WOOTEN, JJ.

DECISION & ORDER ON MOTION

***1043** Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Richard L. Buchter, J.), imposed March 6, 2019, upon his plea of guilty, on the grounds that the sentence was illegal and excessive.

ORDERED that the sentence is affirmed.

The sentence imposed was not illegal (*see People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility,* 36 N.Y.3d 187, 140 N.Y.S.3d 124, 163 N.E.3d 1041; *People ex rel. McCurdy v. Warden, Westchester County Corr. Facility,* 36 N.Y.3d 251, 140 N.Y.S.3d 170, 163 N.E.3d 1087) or excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675). To the extent that the defendant challenges the validity of his plea of guilty, this contention is improperly raised on this excessive sentence appeal (*see* 22 NYCRR 670.11[b]).

LASALLE, P.J., MASTRO, MILLER, DUFFY and WOOTEN, JJ., concur.

All Citations

195 A.D.3d 1042, 146 N.Y.S.3d 810 (Mem), 2021 N.Y. Slip Op. 04150

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136 A.D.3d 1005
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

David LAGVILLE, appellant.

Feb. 24, 2016.

Synopsis

Background: Defendant appealed order of the Supreme Court, Richmond County, Rienzi, J., which designated him a level three sexually violent offender pursuant to the Sex Offender Registration Act (SORA).

Holdings: The Supreme Court, Appellate Division, held that:

[1] clear and convincing evidence of defendant's pedophilia supported designation as level three sex offender, and

[2] defendant failed to establish that his response to treatment while incarcerated was exceptional.

Affirmed.

West Headnotes (3)

[1] Mental Health Proceedings

Designation of defendant as level three sex offender under Sex Offender Registration Act (SORA) was supported by clear and convincing evidence that defendant had been diagnosed with pedophilia, and had psychological, physical, or organic abnormality that decreased his ability to control impulsive sexual behavior. McKinney's Correction Law § 168–n(3).

6 Cases that cite this headnote

[2] Mental Health Proceedings

The People bear the burden of proving the applicability of a particular override to a sex offender's presumptive risk assessment under the Sex Offender Registration Act (SORA) by clear and convincing evidence. McKinney's Correction Law § 168 et seq.

6 Cases that cite this headnote

[3] Mental Health Scores and risk levels

Defendant failed to establish, by a preponderance of the evidence, that his response to treatment while incarcerated was exceptional, as required to establish his entitlement, under the Sex Offender Registration Act (SORA), to a downward departure from the presumptive risk level on such basis. McKinney's Correction Law § 168 et seq.

5 Cases that cite this headnote

Attorneys and Law Firms

****317** Seymour W. James, Jr., New York, N.Y. (Lawrence T. Hausman of counsel), for appellant.

Michael E. McMahon, District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart and Anne Grady of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., THOMAS A. DICKERSON, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

Opinion

***1006** Appeal by the defendant from an order of the Supreme Court, Richmond County (Rienzi, J.), dated September 28, 2012, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

[1] [2] "The Risk Assessment Guidelines and Commentary promulgated by the Board of Examiners of Sex Offenders contain four overrides that automatically result in a presumptive risk assessment of level three" (*People v. Lobello,* 123 A.D.3d 993, 994, 999 N.Y.S.2d 179; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3 [2006] [hereinafter the Guidelines]; *People*

v. Schiavoni, 107 A.D.3d 773, 966 N.Y.S.2d 690). "The People bear the burden of proving the applicability of a particular override by clear and convincing evidence" (*People v. Lobello,* 123 A.D.3d at 994, 999 N.Y.S.2d 179; *see* Correction Law § 168–n[3]; *People v. Schiavoni,* 107 A.D.3d at 773, 966 N.Y.S.2d 690). Contrary to the defendant's contention, the People established by clear and convincing evidence the applicability of the fourth override, namely, that there has been "a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior" (Guidelines at 4). The People proved that the defendant was diagnosed with pedophilia and that an override to a presumptive level three designation was appropriate (*see People v. Long,* 129 A.D.3d 687, 688, 10 N.Y.S.3d 336; *People v. Ledbetter,* 82 A.D.3d 858, 858, 918 N.Y.S.2d 358; *People v. Hoffman,* 62 A.D.3d 976, 976, 880 N.Y.S.2d 122).

[3] Contrary to the defendant's further contention, he was not entitled to a downward departure from his presumptive risk level. The defendant identified an appropriate mitigating factor that could provide a basis for a discretionary downward departure, as the Guidelines recognize that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (Guidelines at 17; *see People v. Morgan,* 124 A.D.3d 742, 998 N.Y.S.2d 660). The defendant, however, failed to establish facts in support of this mitigating factor by a preponderance of the evidence, as he did not establish that his response to treatment was exceptional (*see People v. Tisman,* 116 A.D.3d 1018, 1019, 984 N.Y.S.2d 604).

Accordingly, the defendant was properly designated a level three sex offender.

All Citations

136 A.D.3d 1005, 26 N.Y.S.3d 316, 2016 N.Y. Slip Op. 01306

175 A.D.3d 509
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Owen LARMAN, Appellant.

2017–05844
|
(Ind.No. 2725/15)
|
Argued—April 22, 2019
|
August 7, 2019

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Guy J. Mangano, Jr., J., of grand larceny in second degree, offering false instrument for filing in first degree, criminal possession of forged instrument in second degree, and bribery in third degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] alternate juror's participation in deliberations with 11 sworn members of jury while 12th sworn juror was absent violated defendant's right to trial by jury of 12, and

[2] trial court's instructions did not cure error.

Reversed and remitted.

West Headnotes (7)

[1] **Jury** Application of constitution in general
Jury Number of Jurors

New York Constitution guarantees every criminal defendant trial by jury, which includes right to jury of 12 members. N.Y. Const. art. 1, § 2.

[2] **Jury** Right to particular juror or jury

Defendant has state constitutional right to trial by particular jury chosen according to law, in whose selection defendant has had voice. N.Y. Const. art. 1, § 2.

[3] **Criminal Law** Deliberations in General

At the heart of state constitutional right to jury trial is the need to ensure that jury deliberations are conducted in secret, and not influenced or intruded upon by outside factors. N.Y. Const. art. 1, § 2.

[4] **Jury** Jury of less than twelve persons

Violation of defendant's state constitutional right to trial with jury of 12 members is fundamental defect in judicial proceedings. N.Y. Const. art. 1, § 2.

[5] **Jury** Discharge of juror or jury pending trial

Failure to comply with statutory requirement of obtaining defendant's written, signed consent to substituting alternate juror for regular juror during jury deliberations infringes defendant's fundamental, state constitutional right to trial by jury of 12 members. N.Y. Const. art. 1, § 2; N.Y. CPL § 270.35.

[6] **Jury** Jury of less than twelve persons

Alternate juror's participation in deliberations with 11 sworn members of jury while 12th sworn juror was absent from jury room violated defendant's state constitutional right to trial by jury of 12. N.Y. Const. art. 1, § 2; N.Y. CPL §§ 270.30, 270.35.

[7] **Jury** Jury of less than twelve persons

Violation of defendant's state constitutional right to trial by jury of 12 when alternate juror participated in deliberations with 11 sworn

members of jury while 12th sworn juror was absent from jury room was not cured by trial court's instructions to reconstituted jury that all deliberations that had taken place with alternate juror were to be disregarded by jury, and that deliberations were to start anew. N.Y. Const. art. 1, § 2; N.Y. CPL §§ 270.30, 270.35.

Attorneys and Law Firms

****62** Lipman & Booth, LLC, New York, N.Y. (Christopher Booth of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Victor Barall, and Jordan Cerruti of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., JEFFREY A. COHEN, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***509** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Guy J. Mangano, Jr., J.), rendered May 31, 2017, convicting him of grand larceny in the second degree, offering a false instrument for filing in the first degree (11 counts), criminal possession of a forged instrument in the second degree (11 counts), and bribery in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law, and a new trial is ordered.

During the trial in this matter, after deliberations had commenced, the jury sent a note requesting that it be provided with some of the documentary evidence. After an undefined period of time, it became apparent to the Supreme Court that an alternate juror briefly participated in deliberations with 11 sworn members of the jury while the 12th sworn juror was absent from the jury room. The court then replaced the alternate juror with the 12th sworn juror and sent the jury back to deliberate before breaking for the day. The defendant moved for a mistrial, and the court reserved decision. The next day, the court questioned each of the first 11 sworn jurors, individually, about their ability to disregard the prior deliberations and start deliberations anew. Each juror assured the court that he or she could do so, and the court instructed each of them to start deliberations from the beginning. The court then denied the defendant's motion for a mistrial. After deliberations, the jury returned a verdict of guilty. The defendant appeals.

[1] **[2]** **[3]** **[4]** "The New York Constitution guarantees every criminal defendant a trial by jury," which includes the right to a jury of 12 (*People v. Davis,* 161 A.D.3d 1003, 1003, 77 N.Y.S.3d 434; *see* CPL 270.05; *People v. Page,* 88 N.Y.2d 1, 5, 643 N.Y.S.2d 1, 665 N.E.2d 1041; *People v. McDuffie,* 95 A.D.3d 1036, 1037, 943 N.Y.S.2d 594). "A defendant has a constitutional right to a trial by a particular jury ****63** chosen according to law, in whose ***510** selection [the defendant] has had a voice" (*People v. Anderson,* 70 N.Y.2d 729, 730, 519 N.Y.S.2d 957, 514 N.E.2d 377 [internal quotation marks omitted]; *People v. Rodriguez,* 71 N.Y.2d 214, 524 N.Y.S.2d 422, 519 N.E.2d 333). "At the heart of this right is the need to ensure that jury deliberations are conducted in secret, and not influenced or intruded upon by outside factors" (*People v. Rivera,* 15 N.Y.3d 207, 211, 906 N.Y.S.2d 785, 933 N.E.2d 183). The violation of a defendant's right to a jury trial of 12 is a "*fundamental* defect[ ] in judicial proceedings" (*People v. Agramonte,* 87 N.Y.2d 765, 770, 642 N.Y.S.2d 594, 665 N.E.2d 164; *see People v. Page,* 88 N.Y.2d at 10, 643 N.Y.S.2d 1, 665 N.E.2d 1041).

[5] CPL 310.10(1) provides, inter alia, that "[f]ollowing the court's charge, ... the jury must retire to deliberate upon its verdict." Pursuant to CPL 270.30, after the jury has retired to deliberate, the court must either (1) with the consent of the defendant and the People, discharge the alternate jurors, or (2) direct the alternate jurors not to discuss the case and further direct that they be kept separate and apart from the regular jurors. Once deliberations begin, a regular juror may be replaced by an alternate juror only with the defendant's written consent (*see* CPL 270.35). "[F]ailure to comply with the statutory requirement of written, signed consent results in substitution of an alternate juror during deliberations without an effective, constitutional waiver. Such substitution directly contravenes *[People v.] Ryan* and infringes the defendant's fundamental, constitutional right to trial by a jury of 12" (*People v. Page,* 88 N.Y.2d at 10, 643 N.Y.S.2d 1, 665 N.E.2d 1041, citing *People v. Ryan,* 19 N.Y.2d 100, 278 N.Y.S.2d 199, 224 N.E.2d 710).

[6] **[7]** The error here violated these statutory provisions and deprived the defendant of his fundamental right to a trial by jury of 12 (*see People v. Page,* 88 N.Y.2d at 10, 643

N.Y.S.2d 1, 665 N.E.2d 1041; *People v. Davis,* 161 A.D.3d at 1004, 77 N.Y.S.3d 434). The error was not cured by the Supreme Court's instructions to the reconstituted jury (*see People v. Davis,* 161 A.D.3d at 1004, 77 N.Y.S.3d 434). Accordingly, the judgment must be reversed and the matter remitted to the Supreme Court, Kings County, for a new trial.

In light of our determination, the defendant's remaining contentions need not be considered (*see People v. Spencer,* 29 N.Y.3d 302, 312, 56 N.Y.S.3d 494, 78 N.E.3d 1178).

SCHEINKMAN, P.J., COHEN, MALTESE and LASALLE, JJ., concur.

All Citations

175 A.D.3d 509, 107 N.Y.S.3d 61, 2019 N.Y. Slip Op. 06097

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162 A.D.3d 1068
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Michael LATHAM, Appellant.

2016–10667
|
(Ind. No. 1539/16)
|
Submitted—May 16, 2018
|
June 27, 2018

Synopsis

Background: Defendant pleaded guilty in the Supreme Court, Kings County, Cassandra Mullen, J., to one count of attempted criminal possession of a weapon in the third degree, and was sentenced to an indeterminate term of imprisonment of two to four years. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant did not knowingly, intelligently, or voluntarily waive his right to appeal sentence, but

[2] sentence was not excessive.

Affirmed.

West Headnotes (2)

[1] Criminal Law Issues considered

Defendant did not knowingly, intelligently, or voluntarily waive his right to appeal sentence for attempted criminal possession of a weapon in the third degree, even though record reflected that defendant signed written appeal waiver form; trial court did not provide the defendant with an explanation of the nature of the right to appeal or explain the consequences of waiving that right, nothing in record indicated that defendant understood distinction between right to appeal and other trial rights forfeited incident to his plea of guilty, defense counsel did not sign appeal waiver, and court's colloquy was simple confirmation that the defendant signed the waiver, and conclusory statement that the defendant understood the waiver and was executing it knowingly and voluntarily. N.Y. Penal Law §§ 110.00, 265.02(1).

7 Cases that cite this headnote

[2] Sentencing and Punishment Weapons and explosives

Sentence of indeterminate term of imprisonment of two to four years, in prosecution for attempted criminal possession of a weapon in the third degree, was not excessive, where defendant was sentenced as second felony offender. N.Y. Penal Law §§ 110.00, 265.02(1).

1 Case that cites this headnote

Attorneys and Law Firms

Paul Skip Laisure, New York, N.Y. (Samuel Barr of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Victor Barall of counsel; Robert Ho on the memorandum), for respondent.

REINALDO E. RIVERA, J.P., ROBERT J. MILLER, COLLEEN D. DUFFY, HECTOR D. LASALLE, JJ.

****129** DECISION & ORDER

***1068** Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Cassandra Mullen, J.), imposed September 21, 2016, upon his plea of guilty, on the ground that the sentence was excessive.

ORDERED that the sentence is affirmed.

The defendant pleaded guilty to one count of attempted criminal possession of a weapon in the third degree (*see* Penal Law §§ 110.00, 265.02[1]). He was sentenced, as a second felony offender, to an indeterminate term of imprisonment of two to ***1069** four years. On appeal, the defendant contends that his sentence of imprisonment was excessive. The People argue that the defendant's contention is precluded by the defendant's waiver of his right to appeal.

A defendant who has validly waived the right to appeal cannot invoke this Court's interest of justice jurisdiction to obtain a reduced sentence (*see People v. Lopez,* 6 N.Y.3d 248, 255, 811 N.Y.S.2d 623, 844 N.E.2d 1145). Here, however, this Court is not precluded from exercising its interest of justice jurisdiction because the defendant's purported waiver of his right to appeal was invalid.

A waiver of the right to appeal "is effective only so long as the record demonstrates that it was made knowingly, intelligently and voluntarily" (*People v. Lopez,* 6 N.Y.3d at 256, 811 N.Y.S.2d 623, 844 N.E.2d 1145; *see People v. Bradshaw,* 18 N.Y.3d 257, 264, 938 N.Y.S.2d 254, 961 N.E.2d 645; *People v. Brown,* 122 A.D.3d 133, 136, 992 N.Y.S.2d 297). Although the Court of Appeals has repeatedly observed that there is no mandatory litany that must be used in order to obtain a valid waiver of appellate rights (*see People v. Johnson,* 14 N.Y.3d 483, 486, 903 N.Y.S.2d 299, 929 N.E.2d 361), "[t]he best way to ensure that the record reflects that the right is known and intentionally relinquished by the defendant is to fully explain to the defendant, on the record, the nature of the right to appeal and the consequences of waiving it" (*People v. Brown,* 122 A.D.3d at 142, 992 N.Y.S.2d 297; *see People v. Rocchino,* 153 A.D.3d 1284, 59 N.Y.S.3d 715; *People v. Blackwood,* 148 A.D.3d 716, 716, 48 N.Y.S.3d 709).

"[A] thorough explanation should include an advisement that, while a defendant ordinarily retains the right to appeal even after he or she pleads guilty, the defendant is being asked, as a condition of the plea agreement, to waive that right" (*People v. Brown,* 122 A.D.3d at 144, 992 N.Y.S.2d 297). "[A] defendant should [also] ... receive an explanation of the nature of the right to appeal, which essentially advises that this right entails the opportunity to argue, before a higher court, any issues pertaining to the defendant's conviction and sentence and to have that higher court decide whether the conviction or sentence should be set aside based upon any of those issues ... [and] that appellate counsel will be appointed in the event that he or she were indigent" (*id.*). Finally, "trial courts should then explain the consequences of waiving the right to appeal, i.e., that the conviction and sentence will not receive any further review, and shall be final" (*id.*).

[1] The Supreme Court did not provide the defendant with an explanation of the nature of the right to appeal or explain the consequences of waiving that right. In addition, nothing in the record shows that the defendant understood the distinction between the right to appeal and other trial rights forfeited ***1070** incident to his plea of guilty (*see People v. Santeramo,* 153 A.D.3d 1286, 61 N.Y.S.3d 295; *People v. Black,* 144 A.D.3d 935, 935–936, 41 N.Y.S.3d 126; ****130** *People v. Pacheco,* 138 A.D.3d 1035, 1036, 28 N.Y.S.3d 627; *People v. Gordon,* 127 A.D.3d 1230, 1230, 5 N.Y.S.3d 900; *People v. Cantarero,* 123 A.D.3d 841, 841, 996 N.Y.S.2d 724; *People v. Bennett,* 115 A.D.3d 973, 973, 982 N.Y.S.2d 554). While the defendant was represented by counsel during the plea proceedings, counsel did not participate during the proceedings other than to acknowledge to the court that he was the defendant's attorney, and counsel did not sign the defendant's written appeal waiver form. Furthermore, although the record on appeal reflects that the defendant signed the written appeal waiver form, a written waiver "is not a complete substitute for an on-the-record explanation of the nature of the right to appeal" (*People v. Bradshaw,* 76 A.D.3d 566, 569, 906 N.Y.S.2d 93, *affd* 18 N.Y.3d 257, 938 N.Y.S.2d 254, 961 N.E.2d 645; *see People v. Cuevas–Alcantara,* 136 A.D.3d 650, 23 N.Y.S.3d 902; *People v. Brown,* 122 A.D.3d at 138–139, 992 N.Y.S.2d 297; *People v. Keiser,* 100 A.D.3d 927, 928, 954 N.Y.S.2d 184). The court's colloquy amounted to nothing more than a simple confirmation that the defendant signed the waiver and a conclusory statement that the defendant understood the waiver or was executing it knowingly and voluntarily (*see People v. Burnett–Hicks,* 133 A.D.3d 773, 774, 19 N.Y.S.3d 181; *People v. Cantarero,* 123 A.D.3d at 841–842, 996 N.Y.S.2d 724; *People v. Brown,* 122 A.D.3d at 140, 992 N.Y.S.2d 297). Under the circumstances here, we conclude that the defendant did not knowingly, voluntarily, and intelligently waive his right to appeal (*see People v. Brown,* 122 A.D.3d 133, 992 N.Y.S.2d 297; *see generally People v. Bradshaw,* 18 N.Y.3d at 264–267, 938 N.Y.S.2d 254, 961 N.E.2d 645; *People v. Ramos,* 7 N.Y.3d 737, 738, 819 N.Y.S.2d 853, 853 N.E.2d 222; *People v. Lopez,* 6 N.Y.3d at 255, 811 N.Y.S.2d 623, 844 N.E.2d 1145).

[2] Nevertheless, contrary to the defendant's contention, the sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

RIVERA, J.P., MILLER, DUFFY and LASALLE, JJ., concur.

All Citations

162 A.D.3d 1068, 80 N.Y.S.3d 128, 2018 N.Y. Slip Op. 04753

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151 A.D.3d 982
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Darrius LEE, appellant.

June 21, 2017.

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Hollie, J., of robbery in the first degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, and resisting arrest. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] officers' testimony recounting the location of defendant's bedroom in a house that was searched did not violate defendant's rights under the Confrontation Clause;

[2] defendant was not prejudiced by trial court's admission of alleged hearsay testimony;

[3] trial court properly declined to charge jury on the unreliability of cross-racial identification.

Affirmed.

West Headnotes (3)

[1] Criminal Law Out-of-court statements and hearsay in general

Police officers' testimony, at trial on robbery and weapons charges, recounting the location of the defendant's bedroom in a house that was searched, based on information given to them by a nontestifying witness, did not violate defendant's rights under the Confrontation Clause. U.S.C.A. Const.Amend.6.

[2] Criminal Law Admissions, declarations, and hearsay; confessions

Defendant was not prejudiced by trial court's admission of alleged hearsay testimony by police officers as to location of defendant's bedroom, based on information given to the police witnesses by the nontestifying witness, at trial for robbery and weapons offenses, where jury was specifically instructed not to consider the description for its truth.

1 Case that cites this headnote

[3] Criminal Law Identification evidence

Trial court properly declined to charge jury on the unreliability of cross-racial identification, as defendant never placed the issue in evidence during trial on robbery and weapons charges, and the court's charge correctly conveyed the applicable legal principles on witness credibility and identification testimony.

Attorneys and Law Firms

****36** Lynn W.L. Fahey, New York, NY (Nao Terai and Dina Zloczower of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Ellen C. Abbot, and Antara D. Kanth of counsel), for respondent.

L. PRISCILLA HALL, J.P., SANDRA L. SGROI, JOSEPH J. MALTESE, and HECTOR D. LaSALLE, JJ.

Opinion

***982** Appeal by the defendant from a judgment of the Supreme ***983** Court, Queens County (Hollie, J.), rendered March 18, 2013, convicting him of robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree, and resisting arrest, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

[1] **[2]** The defendant contends that the testimony of police witnesses recounting the location of the defendant's bedroom in the house that was searched, based on information given to them by a nontestifying witness, violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. This contention is unpreserved for appellate review, as the defendant did not object to the testimony on those grounds (*see People v. Walker,* 70 A.D.3d 870, 871, 894 N.Y.S.2d 156; *People v. Chandler,* 59 A.D.3d 562, 872 N.Y.S.2d 283). The contention is, in any event, without merit (*see People v. Walker,* 70 A.D.3d at 871, 894 N.Y.S.2d 156; *People v. Speaks,* 124 A.D.3d 689, 691–692, 1 N.Y.S.3d 257, *affd.* 28 N.Y.3d 990, 42 N.Y.S.3d 644, 65 N.E.3d 673). The defendant's contentions that the testimony about the location of his bedroom given by one detective constituted improper bolstering is also unpreserved for appellate review, as the defendant did not object to the testimony on that ground (*see People v. Walker,* 70 A.D.3d at 871, 894 N.Y.S.2d 156; *People v. Chandler,* 59 A.D.3d 562, 872 N.Y.S.2d 283), and it is, in any event, without merit (*see People v. Speaks,* 124 A.D.3d at 692, 1 N.Y.S.3d 257). Additionally, with respect to the hearsay objection which was raised to the testimony about the location of the defendant's bedroom based on information given to the police witnesses by the nontestifying witness, the jury was specifically instructed not to consider the description for its truth. The jury is presumed to have followed that instruction, alleviating any possible prejudice suffered by the defendant related to the admission of the description (*see People v. Berg,* 59 N.Y.2d 294, 464 N.Y.S.2d 703, 451 N.E.2d 450).

[3] The Supreme Court properly declined to charge the jury on the unreliability of cross-racial identification, as the defendant never placed the issue in evidence during the trial (*see People v. Boone,* 129 A.D.3d 1099, 11 N.Y.S.3d 687, *lv. granted* ****37** 26 N.Y.3d 1086, 23 N.Y.S.3d 642, 44 N.E.3d 940; *People v. Best,* 120 A.D.3d 707, 708, 991 N.Y.S.2d 441; *cf. People v. Alexander,* 94 N.Y.2d 382, 385, 705 N.Y.S.2d 551, 727 N.E.2d 109), and the court's charge correctly conveyed the applicable legal principles on witness credibility and identification testimony (*see People v. Boone,* 129 A.D.3d 1099, 11 N.Y.S.3d 687; *People v. Washington,* 56 A.D.3d 258, 259, 867 N.Y.S.2d 63; *People v. Applewhite,* 298 A.D.2d 136, 137, 748 N.Y.S.2d 4).

The sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

The defendant's remaining contentions are without merit.

All Citations

151 A.D.3d 982, 59 N.Y.S.3d 35, 2017 N.Y. Slip Op. 05102

140 A.D.3d 1141
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,
v.
Richard LOWERY, appellant.

June 29, 2016.

Synopsis

Background: The Supreme Court, Kings County, Balter, J., designated defendant as level two sex offender, and defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that clear and convincing evidence supported trial court's assessment of 15 points based on defendant's history of substance abuse in calculating his risk level.

Affirmed.

West Headnotes (3)

[1] Mental Health Proceedings

In establishing defendant's risk level pursuant to Sex Offender Registration Act (SORA), People bear burden of establishing, by clear and convincing evidence, facts supporting determinations sought. McKinney's Correction Law § 168–n(3).

6 Cases that cite this headnote

[2] Mental Health Proceedings

In establishing defendant's risk level pursuant to Sex Offender Registration Act (SORA), evidence may be derived from defendant's admissions, victim's statements, evaluative reports completed by supervising probation officer, parole officer, or corrections counselor, case summaries prepared by Board of Examiners of Sex Offenders, or any other reliable source, including reliable hearsay. McKinney's Correction Law § 168–n(3).

3 Cases that cite this headnote

[3] Mental Health Scores and risk levels

Clear and convincing evidence supported trial court's assessment of 15 points based on defendant's history of substance abuse in calculating defendant's risk level pursuant to Sex Offender Registration Act (SORA), where case summary prepared by Board of Examiners of Sex Offenders stated that defendant admitted to abuse of marijuana and hashish starting at age of 16 and using up until age of 21, and that defendant was referred to substance abuse treatment program based on his history of substance abuse coupled with his elevated Michigan Alcohol Screening Test (MAST) score. McKinney's Correction Law § 168–n(3).

9 Cases that cite this headnote

Attorneys and Law Firms

****684** Seymour W. James, Jr., New York, NY (Shane Tela of counsel), for appellant.

Kenneth P. Thompson, District Attorney, Brooklyn, NY (Leonard Joblove, Morgan J. Dennehy, and Julian Joiris of counsel), for respondent.

RANDALL T. ENG, P.J., SHERI S. ROMAN, HECTOR D. LaSALLE, and BETSY BARROS, JJ.

Opinion

***1141** Appeal by the defendant from an order of the Supreme Court, Kings County (Balter, J.), dated October 30, 2014, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

Correction Law § 168–n(3) requires a court making a risk level determination pursuant to the Sex Offender Registration Act (Correction Law art 6–C; hereinafter SORA) to "render an order setting forth its determinations and the findings of

fact and conclusions of law on which the determinations are based" (Correction Law § 168–n[3]). Here, the Supreme Court did not adequately set forth its findings of ****685** fact and conclusions of law in its order. However, since the record is sufficient for this ***1142** Court to make its own findings of fact and conclusions of law, remittal is not required (*see People v. Jordan,* 136 A.D.3d 697, 698, 24 N.Y.S.3d 389; *People v. Vegh,* 134 A.D.3d 1084, 1084, 21 N.Y.S.3d 719).

[1] **[2]** In establishing a defendant's risk level pursuant to SORA, the People bear the burden of establishing, by clear and convincing evidence, the facts supporting the determinations sought (*see* Correction Law § 168–n[3]; *People v. Tigre,* 134 A.D.3d 687, 687, 19 N.Y.S.3d 778; *People v. Wyatt,* 89 A.D.3d 112, 117–118, 931 N.Y.S.2d 85). "In assessing points, evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders (hereinafter the Board) or any other reliable source, including reliable hearsay" (*People v. Crandall,* 90 A.D.3d 628, 629, 934 N.Y.S.2d 446; *see People v. Mingo,* 12 N.Y.3d 563, 573, 883 N.Y.S.2d 154, 910 N.E.2d 983).

[3] Here, contrary to the defendant's contention, the Supreme Court properly assessed 20 points against him under risk factor 4 for engaging in a continuing course of sexual misconduct against the complainant. The assessment of these points was supported by clear and convincing evidence in the record, including the presentence report and the complainant's grand jury testimony, which was consistent with the indictment (*see People v. Mingo,* 12 N.Y.3d at 573, 883 N.Y.S.2d 154, 910 N.E.2d 983; *People v. McPherson,* 114 A.D.3d 653, 653, 979 N.Y.S.2d 658). The defendant's contention that the court erred in assessing him 15 points under risk factor 11 based on his history of substance abuse is unpreserved for appellate review (*see People v. Jones,* 130 A.D.3d 601, 601, 10 N.Y.S.3d 894). In any event, the assessment of these points was supported by clear and convincing evidence. The case summary prepared by the Board stated that the defendant "admitted ... to the abuse of marijuana and hashish starting at the age of 16 and using up until the age of 21," and that the defendant was referred to a substance abuse treatment program "based on his history of substance abuse coupled with his elevated MAST [Michigan Alcohol Screening Test] score" (*see People v. Aldarondo,* 136 A.D.3d 770, 770–771, 24 N.Y.S.3d 531; *People v. Jones,* 130 A.D.3d at 601, 10 N.Y.S.3d 894; *People v. Finizio,* 100 A.D.3d 977, 978, 954 N.Y.S.2d 636; *cf. People v. Rohoman,* 121 A.D.3d 876, 877, 994 N.Y.S.2d 389).

The Supreme Court properly denied the defendant's application for a downward departure from his presumptive risk level designation, as he failed to identify and establish the existence of a mitigating factor which was not adequately taken into account by the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (*see People v. Gillotti,* 23 N.Y.3d 841, 861, 994 N.Y.S.2d 1, 18 N.E.3d 701).

***1143** Accordingly, the Supreme Court properly designated the defendant a level two sex offender.

All Citations

140 A.D.3d 1141, 35 N.Y.S.3d 684, 2016 N.Y. Slip Op. 05133

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125 A.D.3d 735
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,
v.
Wilberto MARTINEZ, appellant.

Feb. 11, 2015.

Synopsis

Background: Defendant appealed from an order of the County Court, Suffolk County, Kahn, J., which designated him a level two sex offender pursuant to Sex Offender Registration Act (SORA).

[Holding:] The Supreme Court, Appellate Division, held that court properly assessed defendant ten points pursuant to the forcible compulsion risk factor.

Affirmed.

West Headnotes (2)

[1] Mental Health Persons and offenses included

The court is not limited to considering only the crime of which the defendant was convicted in making its determination under the Sex Offender Registration Act (SORA). McKinney's Correction Law § 168–n(3).

5 Cases that cite this headnote

[2] Mental Health Scores and risk levels

Court properly assessed defendant ten points under the Sex Offender Registration Act (SORA) pursuant to the forcible compulsion risk factor, even though forcible compulsion was not an element of the underlying crime of forcible touching of which he was convicted; written statement to the police made by the mother of the five–year–old complainant and defendant's admissions at the plea allocution demonstrated that the 44–year–old defendant wrapped his arm around the complainant's waist, which prevented the complainant from moving away from the defendant and enabled him to commit the crime of forcible touching. McKinney's Correction Law § 168–n(3); McKinney's Penal Law §§ 130.00(8), 130.52.

7 Cases that cite this headnote

Attorneys and Law Firms

****409** Robert C. Mitchell, Riverhead, N.Y. (James H. Miller III or counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Karla Lato of counsel), for respondent.

PETER B. SKELOS, J.P., ROBERT J. MILLER, SYLVIA O. HINDS–RADIX, and HECTOR D. LaSALLE, JJ.

Opinion

***735** Appeal by the defendant from an order of the County Court, ***736** Suffolk County (Kahn, J.), dated March 18, 2014, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

[1] The defendant contends that the County Court improperly assessed him 10 points under risk Factor 1 for "forcible compulsion," since this was not an element of the underlying crime of which he was convicted (*see* Penal Law § 130.52). However, "the court was not limited to considering only the crime of which the defendant was convicted in making its determination" (*People v. Feeney,* 58 A.D.3d 614, 615, 871 N.Y.S.2d 340). "[E]vidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders ... or any other reliable source, including reliable hearsay" (*People v. Crandall,* 90 A.D.3d 628, 629, 934 N.Y.S.2d 446; *see* Correction Law § 168–n[3]). Further, "[f]acts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence

and shall not be relitigated" (Correction Law § 168–n [3]; *see People v. Holmes,* 111 A.D.3d 686, 687–688, 974 N.Y.S.2d 558).

The Sex Offender Registration Act: Risk Assessment Guidelines and Commentary define the term "forcible compulsion" consistent with the Penal Law (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 8 [2006]; hereinafter Guidelines). Accordingly, "[f]orcible compulsion means to compel by either '(a) use of physical force or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped' " (Guidelines at 8, quoting Penal Law § 130.00 [8]). "Discrepancies in age, size, or strength are relevant factors in determining whether there was such compulsion" (Guidelines, at 8; *see People v. Cobb,* 188 A.D.2d 308, 308, 591 N.Y.S.2d 153; ****410** *People v. Yeaden,* 156 A.D.2d 208, 208, 548 N.Y.S.2d 468).

[2] Here, contrary to the defendant's contention, the People demonstrated the element of forcible compulsion by clear and convincing evidence (*see* Guidelines at 8 [2006]). The written statement to the Suffolk County Police Department made by the mother of the 5–year–old complainant and the defendant's admissions at the plea allocution demonstrated that the 44–year–old defendant wrapped his arm around the complainant's waist, which prevented the complainant from moving away ***737** from the defendant and enabled him to commit the crime of forcible touching (*People v. Cobb,* 188 A.D.2d at 308, 591 N.Y.S.2d 153; *see People v. Yeaden,* 156 A.D.2d at 209, 548 N.Y.S.2d 468; *see also People v. Fuller,* 50 N.Y.2d 628, 636, 431 N.Y.S.2d 357, 409 N.E.2d 834; *People v. Samuel,* 239 A.D.2d 527, 528, 658 N.Y.S.2d 959; *People v. Hodges,* 204 A.D.2d 739, 739, 612 N.Y.S.2d 420; *cf. People v. Mack,* 18 N.Y.3d 929, 932, 942 N.Y.S.2d 457, 965 N.E.2d 959). Accordingly, the County Court properly assessed the defendant 10 points under risk factor 1 for forcible compulsion.

All Citations

125 A.D.3d 735, 3 N.Y.S.3d 408, 2015 N.Y. Slip Op. 01252

121 A.D.3d 660
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,
v.
Milton A. MENJIVAR, appellant.

Oct. 1, 2014.

Synopsis

Background: Defendant, having been convicted of second-degree criminal sexual act based upon his act of engaging in oral sexual conduct with his 14–year–old niece, appealed order of the Supreme Court, Queens County, Buchter, J., which designated him a level two sex offender pursuant to the Sex Offender Registration Act (SORA).

[Holding:] The Supreme Court, Appellate Division, held that clear and convincing evidence did not support finding that defendant's misconduct involved two victims.

Reversed.

West Headnotes (5)

[1] **Mental Health** Proceedings

Clear and convincing evidence did not support finding, in risk assessment determination under Sex Offender Registration Act (SORA), that defendant's misconduct involved two victims, as would warrant assessment of an additional 20 points to the risk assessment instrument and render defendant a presumptive level two sex offender; although defendant engaged in oral sexual conduct with his 14–year–old niece while a two-year-old child was present, there was no evidence that the two-year old was the victim of any sexual misconduct, or that she witnessed or was aware of the sexual conduct between defendant and his niece. McKinney's Correction Law § 168 et seq.

2 Cases that cite this headnote

[2] **Mental Health** Proceedings

The People must submit clear and convincing evidence in support of the assessment of points in a risk level determination pursuant to the Sex Offender Registration Act (SORA). McKinney's Correction Law § 168 et seq.

2 Cases that cite this headnote

[3] **Mental Health** Proceedings

Any ground for an upward departure from the presumptive risk level in a risk level determination pursuant to the Sex Offender Registration Act (SORA) must be established by clear and convincing evidence. McKinney's Correction Law § 168 et seq.

[4] **Mental Health** Scores and risk levels

Number of victims factor in a risk level determination pursuant to the Sex Offender Registration Act (SORA) focuses upon the number of victims underlying the instant conviction, and the victims must be associated with the current offense. McKinney's Correction Law § 168 et seq.

1 Case that cites this headnote

[5] **Mental Health** Scores and risk levels

Court is not limited, in a risk level determination pursuant to the Sex Offender Registration Act (SORA), to consideration of the charges to which defendant pleaded guilty. McKinney's Correction Law § 168 et seq.

1 Case that cites this headnote

Attorneys and Law Firms

****167** Grunwald & Seman, P.C., Garden City, N.Y. (Milton Grunwald of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, Jennifer Hagan, and Christine DiSalvo of counsel), for respondent.

PETER B. SKELOS, J.P., and SHERI S. ROMAN, SYLVIA O. HINDS–RADIX, and HECTOR D. LaSALLE, JJ.

Opinion

[1] ***660** Appeal by the defendant from an order of the Supreme Court, Queens County (Buchter, J.), dated May 16, 2013, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the defendant is designated a level one sex offender.

The defendant was convicted, upon his plea of guilty, of criminal sexual act in the second degree (*see* Penal Law § 130.45[1]), based upon his act of engaging in oral sexual conduct with ***661** his 14–year–old niece. The District Attorney prepared a risk assessment instrument assessing the defendant points to determine his presumptive risk level as a sex offender (*see People v. Game,* 110 A.D.3d 861, 973 N.Y.S.2d 701). The risk assessment instrument assessed the defendant 85 points, which included 20 points that were assessed based on a finding that there were two victims, the defendant's 14–year–old niece and his two-year-old child who was present at the time the defendant engaged in the sexual conduct with his niece.

[2] **[3]** The People must submit clear and convincing evidence in support of the assessment of points (*see People v. Madison,* 98 A.D.3d 573, 949 N.Y.S.2d 701). Further, any ground for an upward departure from the presumptive risk level must be established by clear and convincing evidence (*see People v. Wyatt,* 89 A.D.3d 112, 123, 931 N.Y.S.2d 85).

[4] **[5]** The number of victims focuses upon the number of victims underlying the instant conviction (*see* Sex Offender Registration Act: Risk Assessment Guidelines **168** and Commentary at 10 [2006]; *People v. Grimm,* 107 A.D.3d 1040, 1044, 967 N.Y.S.2d 189; *People v. Duart,* 84 A.D.3d 908, 923 N.Y.S.2d 149). The victims must be associated with the current offense (*see People v. Hoffman,* 62 A.D.3d 976, 976, 880 N.Y.S.2d 122). However, the court is not limited to consideration of the charges to which the defendant pleaded guilty (*see People v. Robertson,* 101 A.D.3d 1671, 956 N.Y.S.2d 378; *People v. Madera,* 100 A.D.3d 1111, 1112, 953 N.Y.S.2d 385; *People v. Gardiner,* 92 A.D.3d 1228, 1229, 938 N.Y.S.2d 389; *People v. D'Adamo,* 67 A.D.3d 1132, 1133, 888 N.Y.S.2d 310; *People v. Thomas,* 59 A.D.3d 783, 784, 873 N.Y.S.2d 757).

In the instant case, there was no evidence that the two-year old child was the victim of any sexual misconduct, or that she witnessed or was aware of the sexual conduct between the defendant and his niece. Therefore, the People failed to submit clear and convincing evidence in support of the finding that there were two victims, and the Supreme Court should not have assessed the additional 20 points based on that finding (*see People v. Madison,* 98 A.D.3d 573, 949 N.Y.S.2d 701).

Without those 20 points, the defendant was assessed 65 points, rendering him presumptively a level one sex offender. The People did not submit evidence in support of an upward departure, although they requested one, and the Supreme Court ruled that it would not grant an upward departure. In view of the foregoing, the defendant's sex offender designation must be reduced from level two to level one.

All Citations

121 A.D.3d 660, 993 N.Y.S.2d 166, 2014 N.Y. Slip Op. 06569

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195 A.D.3d 866
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Felix MORA, appellant.

2017–11094
|
(Ind. No. 1952/16)
|
Submitted—March 30, 2021
|
June 16, 2021

Attorneys and Law Firms

Joseph A. Hanshe, Sayville, NY, for appellant.

Timothy D. Sini, District Attorney, Riverhead, N.Y. (Kathleen Becker Langlan of counsel), for respondent.

HECTOR D. LASALLE, P.J., LEONARD B. AUSTIN, BETSY BARROS, PAUL WOOTEN, JJ.

DECISION & ORDER

Appeal by the defendant from a judgment of the County Court, Suffolk County (Mark Cohen, J.), rendered August 31, 2017, convicting him of rape in the second degree, criminal sexual act in the second degree, rape in the third degree, criminal sexual act in the third degree, sexual abuse in the second degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was convicted of rape in the second and third degrees, sexual abuse ***840** in the second degree, and related offenses for acts he committed against his adopted daughter, arising from incidents of abuse which began in 2014 and ended with the complainant's report of the abuse in September 2016.

Contrary to the defendant's contentions, defense counsel's cross examination of witnesses, and his declining to present an affirmative defense case, did not constitute ineffective assistance of counsel. In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, the United States Supreme Court adopted a two-part test for evaluating claims of ineffective assistance of counsel. A "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense" (*id.* at 687, 104 S.Ct. 2052). "The first prong of the *Strickland* test is essentially a restatement of attorney competence, which requires a showing that counsel's representation fell below an objective standard of reasonableness. The second prong, also known as the prejudice prong, focuses on whether" (*People v. McDonald,* 1 N.Y.3d 109, 113–114, 769 N.Y.S.2d 781, 802 N.E.2d 131 [citation and internal quotation marks omitted]) " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' " (*People v. Pagan,* 155 A.D.3d 779, 781, 64 N.Y.S.3d 299, quoting *Strickland v. Washington,* 466 U.S. at 694, 104 S.Ct. 2052).

To establish a claim of ineffective assistance of counsel under the New York Constitution, a defendant must show that he or she was not afforded "meaningful representation" based upon "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation" (*People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400). "Our cases, however, agree with *Strickland* on the first prong" (*People v. Turner,* 5 N.Y.3d 476, 480, 806 N.Y.S.2d 154, 840 N.E.2d 123) in that " 'counsel's efforts should not be second-guessed with the clarity of hindsight' " and the defendant is not entitled to perfect representation (*id.* at 480, 806 N.Y.S.2d 154, 840 N.E.2d 123, quoting *People v. Benevento,* 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584).

Generally, whether to call an expert is a tactical decision, and cross-examination of the People's experts will, in many instances, be sufficient to expose defects in the experts' presentations (*see People v. Caldavado,* 166 A.D.3d 792, 794, 88 N.Y.S.3d 236). "As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (*People v. Benevento,* 91 N.Y.2d at 712–713, 674 N.Y.S.2d 629, 697 N.E.2d 584).

Under the circumstances presented here, the record shows that trial counsel effectively cross-examined the People's witnesses, including the experts, and elicited testimony that was damaging to the People's case. The fact that the

defense did not call its own witnesses reflects a reasonable legal strategy that the best way to defend this case was through impeachment of the People's witnesses (*see People v. Caldavado,* 166 A.D.3d at 794, 88 N.Y.S.3d 236). As the defendant failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings (*see People v. Robinson,* 160 A.D.3d 991, 992, 72 N.Y.S.3d 462), we find no basis to disturb the judgment of conviction on this ground.

LASALLE, P.J., AUSTIN, BARROS and WOOTEN, JJ., concur.

All Citations

195 A.D.3d 866, 145 N.Y.S.3d 839 (Mem), 2021 N.Y. Slip Op. 03855

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186 A.D.3d 861
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Devon NETTLES, Appellant.

2016–10548
|
(Ind. No. 7641/14)
|
Argued—January 29, 2019
|
August 26, 2020

Synopsis

Background: Following decision of the Supreme Court, Kings County, Betty J. Williams, J., denying defendant's motion to controvert a search warrant, defendant was convicted in the Supreme Court, William M. Harrington, J., of criminal possession of a firearm. Defendant appealed. The Supreme Court, Appellate Division, 172 **A.D.3d** 1102, 100 **N.Y.S.3d** 325, remitted with instructions for in camera hearing to confirm the existence and reliability of the confidential informant, and held the appeal in abeyance pending receipt of trial court's report.

[Holding:] After receiving Supreme Court's report, the Supreme Court, Appellate Division held that evidence did not support that individual referred to as confidential informant (CI) at hearing was the same individual referred to as the CI in detective's affidavit in support of search warrant, and thus, did not support that the CI both existed and gave police information sufficient to establish probable cause for no-knock search warrant.

Reversed and remitted.

Dillon, J.P., dissented; Lasalle, J., concurred with dissent.

West Headnotes (5)

[1] Criminal Law Hearing; in camera examination

Evidence did not support that individual referred to as confidential informant (CI) at in camera hearing to confirm existence and reliability of CI was the same individual referred to as the CI in detective's affidavit in support of search warrant, and thus, did not support that the CI both existed and gave police information sufficient to establish probable cause for no-knock search warrant; in search warrant affidavit detective averred that CI provided reliable information on one prior occasion, person identified as CI testified that he/she worked with and swore out search warrants for detective approximately 100 times, and detective's description of two controlled buys in search warrant affidavit was significantly different from single controlled buy described by CI at hearing. U.S. Const. Amend. 4.

1 Case that cites this headnote

[2] Criminal Law Hearing; in camera examination

An in camera inquiry is necessary when the issue of identity of a confidential informant is raised at a suppression hearing to insure that the informant both exists and gave the police information sufficient to establish probable cause, while protecting the informant's identity. U.S. Const. Amend. 4.

1 Case that cites this headnote

[3] Criminal Law Hearing; in camera examination

Requirement for the court to conduct an in camera hearing to confirm the existence and reliability of a confidential informant when the issue of informant's identity is raised at a suppression hearing, which gives clear guidance to lower courts and guarantees that the protections of the Fourth Amendment have not

been circumvented, is necessary to properly test the officer's credibility, and is designed to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him or her entirely fabricated. U.S. Const. Amend. 4.

[4] **Criminal Law** Evidence wrongfully obtained

The credibility determinations of a hearing court following an in camera hearing to confirm the existence and reliability of a confidential informant are accorded deference on appeal, and will not be disturbed unless they are not supported by the record.

1 Case that cites this headnote

[5] **Searches and Seizures** Anonymous or confidential informants

Where a search warrant application is based upon hearsay information from a confidential informant, it is critical that the officer give accurate information from which the court may assess, inter alia, the informant's reliability. U.S. Const. Amend. 4.

Attorneys and Law Firms

****611** Paul Skip Laisure, New York, N.Y. (Samuel Barr of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Sholom J. Twersky of counsel), for respondent.

MARK C. DILLON, J.P., HECTOR D. LASALLE, BETSY BARROS, LINDA CHRISTOPHER, PAUL WOOTEN, JJ.

****612** DECISION & ORDER

***862** Appeal by the defendant from a judgment of the Supreme Court, Kings County (William M. Harrington, J.), rendered September 8, 2016, convicting him of criminal possession of a firearm, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial (Betty J. Williams, J.) of the defendant's motion to controvert a search warrant and for a *Darden* hearing (*see People v. Darden*, 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49). By decision and order dated May 15, 2019, this Court remitted the matter to the Supreme Court, Kings County, for an in camera hearing and inquiry in accordance with the guidelines set forth in *People v. Darden*, and thereafter for the submission of a report by the Supreme Court on its determination. The appeal was held in abeyance pending receipt of a report from the Supreme Court. The Supreme Court has filed its report.

ORDERED that the judgment is reversed, on the facts, the defendant's motion to controvert the search warrant is granted, the indictment is dismissed, and the matter is remitted to the Supreme Court, Kings County, for the purpose of entering an order in its discretion pursuant to CPL 160.50.

On September 4, 2014, a detective with the New York City Police Department obtained a "no knock" search warrant, which authorized a search of an apartment in a 21–story building in Brooklyn. In his affidavit in support of the search warrant, the detective averred that, based upon information from a confidential informant (hereinafter CI) who made two controlled drug buys at the location, there was reasonable cause to believe that there would be evidence of the sale and possession of cocaine, and conspiracy to commit those crimes, including, inter alia, cocaine, vials, caps, glassine envelopes, small ziplock bags, currency, and financial records.

At 6:20 a.m. on September 11, 2014, a team of police officers executed the search warrant. No contraband was found except for a single ziplock bag containing narcotics and some pipes with residue. A semi-automatic handgun was found hidden in the defendant's bedroom closet. The defendant was charged with and ultimately convicted of criminal possession of a firearm, a class E felony. The defendant's appeal from the judgment brings up for review the defendant's motion to controvert the search warrant and for a *Darden* hearing (*see People v. Darden*, 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49).

***863** In our decision and order dated May 15, 2019, we determined that "the detective's on-the-scene observations during the two controlled drug buys fell short of probable cause without the information provided to him by the CI" (*People v. Nettles,* 172 **A.D.3d** 1102, 1103–1104, 100

N.Y.S.3d 325). We explained that, "[a]lthough the detective observed the CI enter and exit the building, the detective was unable to confirm that the CI had actually purchased the narcotics from the subject apartment" (*id.* at 1104, 100 N.Y.S.3d 325; *see generally People v. Burks*, 134 A.D.2d 604, 606, 521 N.Y.S.2d 718). Given our determination, we held the appeal in abeyance, and remitted the matter to the Supreme Court, Kings County, inter alia, to conduct an in camera inquiry pursuant to *People v. Darden,* 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49.

Upon remittitur, the *Darden* hearing was held, wherein testimony was taken from a person identified as the CI, as well ****613** as the police detective who had obtained the search warrant. In accordance with the *Darden* procedure, the defendant was not allowed to be present for the hearing, and the hearing transcript was sealed. The defendant was permitted to submit written questions.

[1] In its report, the Supreme Court determined that the testimony of the alleged CI and the detective "clearly established that the individual who was present at the *Darden* hearing was, in fact, the CI that provided the information that provided probable cause for the search warrant." We reverse.

[2] **[3]** The *Darden* rule is necessary to insure "that the confidential informant both exists and gave the police information sufficient to establish probable cause, while protecting the informant's identity" (*People v. Edwards*, 95 N.Y.2d 486, 494, 719 N.Y.S.2d 202, 741 N.E.2d 876; *see People v. Adrion*, 82 N.Y.2d 628, 635, 606 N.Y.S.2d 893, 627 N.E.2d 973). The rule, which "gives clear guidance to lower courts and guarantees that the protections of the Fourth Amendment have not been circumvented" (*People v. Edwards*, 95 N.Y.2d at 494, 719 N.Y.S.2d 202, 741 N.E.2d 876 [internal quotation marks omitted]), "is necessary to properly test the officer's credibility" (*id.* at 495, 719 N.Y.S.2d 202, 741 N.E.2d 876), and is "designed to protect against the contingency, of legitimate concern to a defendant, that the informer might have been wholly imaginary and the communication from him [or her] entirely fabricated" (*People v. Darden*, 34 N.Y.2d at 182, 356 N.Y.S.2d 582, 313 N.E.2d 49).

[4] The credibility determinations of a hearing court following a *Darden* hearing are accorded deference on appeal, and will not be disturbed unless they are not supported by the record (*see People v. Binion*, 100 A.D.3d 1514, 1515, 954 N.Y.S.2d 369; *see also People v. Plass*, 160 A.D.3d 771, 772–773, 74 N.Y.S.3d 587; *People v. Kelly*, 131 A.D.3d 484, 485, 15 N.Y.S.3d 391).

***864** Here, the Supreme Court's credibility determinations are not supported by the record. As will be shown, there were substantial material discrepancies between the detective's affidavit in support of the search warrant, and the testimonies of the alleged CI and the detective at the *Darden* hearing pertaining to (1) the CI's track record of reliability, (2) the prior relationship between the detective and the CI, and (3) the facts and circumstances of the alleged controlled buy or buys at the subject apartment. Consequently, we find that the People failed to meet their burden at the *Darden* hearing.

In his search warrant affidavit, the detective averred that he spoke "to a confidential informant who is registered with the NYPD ... [who] has a proven history of reliability based on his/her having provided reliable information on *one* occasion" (emphasis added). The detective averred that, on this one prior occasion, the information supplied by the CI led to the seizure of heroin and the arrest of three individuals. The detective did not aver that he personally ever worked with the CI.

In contrast to the detective's affidavit, the person identified as the CI testified at the *Darden* hearing that he/she worked with the detective "[m]aybe 100" times prior to the subject warrant; and that "[p]rior to this search warrant," he/she had sworn out approximately 100 search warrants for the detective. When questioned by the Supreme Court, the detective confirmed that it was correct to say that he and the CI worked together on approximately 100 search warrants. The detective testified that the CI had provided good information on "probably all of" those prior 100 occasions. When asked by the court if there were any discrepancies, the ****614** detective stated that there were none. Consequently, the detective never explained why in his search warrant affidavit he averred that the CI provided reliable information on only one prior occasion.

Additionally, the detective's description of the two controlled buys in his search warrant affidavit was significantly different from the single controlled buy described by the alleged CI at the *Darden* hearing. In his search warrant affidavit, the detective averred that in a first controlled buy, the CI purchased drugs from a female, and then in the second controlled buy he/she purchased drugs from a male. However, at the *Darden* hearing, the alleged CI described only one controlled buy in which he/she purchased drugs from a male. The alleged CI testified that he/she had never been to

the subject apartment prior to that controlled buy. Overall, the alleged CI's *Darden* hearing testimony describing the circumstances of a single controlled buy cannot, on this record, be reconciled with the ***865** detective's affidavit describing the circumstances of two controlled buys.

[5] Contrary to our dissenting colleagues' opinion, the detective's *Darden* testimony that he worked with the CI approximately 100 times does not bolster the search warrant application wherein he averred that the CI had only provided reliable information to the police on 1 occasion. Where a search warrant application is based upon hearsay information from a CI, it is critical that the officer give accurate information from which the court may assess, inter alia, the CI's reliability (*see Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637; *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; *People v. Bigelow*, 66 N.Y.2d 417, 423, 497 N.Y.S.2d 630, 488 N.E.2d 451; *People v. Rayner*, 171 A.D.2d 820, 567 N.Y.S.2d 764; *People v. Burks*, 134 A.D.2d at 605, 521 N.Y.S.2d 718). The detective's inconsistency on the critical issue of the CI's track record of reliability and whether the CI had ever worked with the detective, in itself, calls into doubt whether the person identified as the CI at the *Darden* hearing was the same person referred to as the CI in the detective's affidavit.

Furthermore, we disagree with our dissenting colleagues' attempt to reconcile the contradictory information by resorting to speculation. The People, who bear the burden at the *Darden* hearing, failed to proffer any evidence or testimony reconciling the aforementioned material contradictions.

Given these inconsistencies regarding the CI's track record and relationship with the detective, and the facts which supported the search warrant application, we disagree with the Supreme Court's conclusion, inter alia, that the People established that the individual referred to as the CI at the *Darden* hearing was, in fact, the same individual referred to as the CI in the detective's affidavit in support of the search warrant. Given that the court's credibility determinations were not supported by the record, we conclude that the People failed to meet their burden at the *Darden* hearing to establish, among other things, that the CI both existed and gave the police information sufficient to establish probable cause (*see People v. Edwards*, 95 N.Y.2d at 494, 719 N.Y.S.2d 202, 741 N.E.2d 876; *People v. Adrion*, 82 N.Y.2d at 635, 606 N.Y.S.2d 893, 627 N.E.2d 973).

Accordingly, the judgment must be reversed, the defendant's motion to controvert the search warrant must be granted, the indictment dismissed, and the case remitted to the Supreme Court, Kings County, for the purpose of entering an order in its discretion pursuant to CPL 160.50.

****615** In light of our determination, we need not reach the defendant's remaining contentions.

BARROS, CHRISTOPHER and WOOTEN, JJ., concur.

DILLON, J.P., dissents, and votes to affirm the judgment, with ***866** the following memorandum, in which LASALLE, J., concurs:

I respectfully dissent, and vote to affirm the judgment of conviction appealed from.

On September 11, 2014, the police conducted a search of an apartment at a premises located on Sutter Avenue in Brooklyn pursuant to a "no-knock" warrant issued for evidence of drugs and drug distribution. The warrant application of the detective was based in significant part upon information developed from a registered confidential informant (hereinafter CI) who had purportedly engaged in two controlled buys at the premises, and who was represented as having been reliable in the past. The detective averred in his affidavit in support of the warrant that he had worked with the CI on one prior occasion, earlier in 2014, which resulted in that instance in the issuance of a search warrant, and in the seizure of narcotics and the arrest of three individuals.

At the time the defendant's apartment was searched, which was seven days after the subject search warrant was obtained, no contraband was found except for a single ziplock bag containing narcotics and some crack pipes with residue. The rooms of the apartment were "messy" except for the defendant's bedroom, where a loaded semi-automatic handgun was found wrapped and hidden in the closet. The defendant was charged with, inter alia, criminal possession of a firearm, a class E felony (Penal Law § 265.01–b). Ultimately, after a jury trial, the defendant was found guilty of criminal possession of a firearm by judgment of conviction rendered September 8, 2016.

Upon remittitur ordered by this Court, a *Darden* hearing was held wherein testimony was taken from both the CI and the police detective who had obtained the search warrant

(*see People v. Darden*, 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49). At the hearing, the CI described his history of drug use, his familiarity with crack cocaine and its paraphernalia, his controlled buy of crack cocaine at the subject premises, and his observation of the "dirty" condition of the apartment's interior. Significantly, the CI also testified that he had worked with the detective on approximately 100 prior occasions resulting in approximately 100 search warrants. The detective then testified and confirmed that he had worked with the CI on approximately 100 occasions, and that search warrants were obtained in those instances resulting in arrests or the confiscation of narcotic contraband in "[p]robably all of them." The Supreme Court resolved any issues of credibility in favor of the CI and filed its report which we have reviewed and considered.

***867** To establish probable cause, a search warrant application must provide sufficient information to support a reasonable belief that evidence of a crime may be found at a certain location (*see People v. Coleman,* 176 **A.D.3d** 851, 107 **N.Y.S.3d** 877). When probable cause is sought to be established through hearsay information provided by a confidential informant, the warrant application must establish the reliability and veracity of the information and the basis of the informant's knowledge. The *Darden* rule performs a twofold function, to assure that the confidential informant described in a search warrant application actually exists, and that information given to police by the confidential informant is sufficient to establish probable cause for the search ****616** (*see People v. Edwards*, 95 N.Y.2d 486, 494, 719 N.Y.S.2d 202, 741 N.E.2d 876; *People v. Adrion*, 82 N.Y.2d 628, 635, 606 N.Y.S.2d 893, 627 N.E.2d 973; *People v. Darden*, 34 N.Y.2d at 182, 356 N.Y.S.2d 582, 313 N.E.2d 49). Credibility determinations made during *Darden* hearings, including the determination rendered in this instance, are to be accorded great deference on appeal (*see People v. Crupi*, 172 **A.D.3d** 898, 100 **N.Y.S.3d** 56; *People v. Binion*, 100 **A.D.3d** 1514, 1515, 954 N.Y.S.2d 369).

Here, while the detective's affidavit in support of the warrant mentioned that the CI had proven reliable on 1 prior occasion, and the hearing testimony of the CI and the detective described 100 prior investigations, the hearing testimony actually *bolsters,* rather than detracts from, the search warrant application. The affidavit, rather than fabricating or exaggerating the reliability of the CI, understated the CI's reliability, perhaps by oversight or typographical error. The hearing testimonies established that not only did the CI exist, but that he had an extensive track record of reliability with the police in their investigations of drug offenses 100 times greater than that initially represented in detective's affidavit. The description of events in the warrant application and of the actual search, and the consistency of the witnesses' testimonies with each other at the *Darden* hearing, establish that the CI described in the detective's affidavit and the witness at the hearing are one in the same person.

Our colleagues who are troubled by the discrepancy between the number of times the CI productively interacted with the detective—either 1 or 100—draw their credibility conclusions backwards. The reliability of the warrant application could have been controverted if the detective had advertised on the application 100 prior interactions with the CI and the subsequent hearing testimony revealed only 1 interaction, since under those circumstances, the detective might be accused of exaggerating and misleading the Criminal Court about the ***868** reliability of the CI. Here, however, the record establishes the exact opposite. Notably, the CI's interactions with the police were even more extensive and reliable than had been represented to the court in the warrant application. Therefore, the *Darden* hearing brought forth no information impeaching the "four corners of the warrant" in terms of its underlying reliability and probable cause (*see People v. Darden*, 34 N.Y.2d at 182, 356 N.Y.S.2d 582, 313 N.E.2d 49), which is the purpose of the *Darden* hearing. Given the credibility finding of the Supreme Court in favor of the People, which is entitled to great deference, there is no discernable basis for this Court to apply backwards reasoning, rule otherwise, and then dismiss the indictment.

As to the remaining issues on appeal, the defendant's argument that Penal Law § 265.01–b is unconstitutional is unpreserved for appellate review and, in any event, without merit (*see United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755; *People v. Eboli*, 34 N.Y.2d 281, 290, 357 N.Y.S.2d 435, 313 N.E.2d 746).

The defendant's argument that the jury should have been charged with the lesser included offense of criminal possession of a weapon in the fourth degree is waived, as no request for the lesser charge was ever made at trial (*see* CPL 300.50[1]; *People v. Davis*, 232 A.D.2d 227, 648 N.Y.S.2d 89; *People v. Smith*, 217 A.D.2d 671, 673, 630 N.Y.S.2d 84).

The Supreme Court did not improvidently exercise its discretion in refusing to dismiss the defendant's indictment in the interest of justice (*see* CPL 210.40; ****617** *People v. Clayton*, 41 A.D.2d 204, 342 N.Y.S.2d 106).

The defendant's remaining contention about the admission of a criminal justice agency report is without merit.

Accordingly, the judgment of conviction should affirmed.

All Citations

186 A.D.3d 861, 128 N.Y.S.3d 610, 2020 N.Y. Slip Op. 04776

KeyCite Red Flag - Severe Negative Treatment
Order Reversed by People v. On Sight Mobile Opticians, N.Y., December 16, 2014

40 Misc.3d 95
Supreme Court, Appellate Term, New York.
9th and 10th Judicial Districts.

The PEOPLE of the State
of New York, Respondent,
v.
ON SIGHT MOBILE OPTICIANS, Appellant.

July 8, 2013.

Synopsis
Background: Defendant, an opticians' business, pleaded guilty in the District Court of Suffolk County, Sixth District, James P. Flanagan, J., of placing a prohibited sign on public property in violation of town code. Defendant appealed.

Holdings: The Supreme Court, Appellate Term, held that:

[1] code provisions prohibiting commercial advertising on public property and roads were narrowly tailored to substantial governmental interest;

[2] code's limitations on offsite commercial signs and billboards were not impermissibly underinclusive;

[3] code provisions were not void for vagueness; but

[4] code provisions unconstitutionally favored commercial speech over noncommercial speech; and

[5] unconstitutional provisions could not be severed from the constitutional provisions.

Reversed.

West Headnotes (23)

[1] **Municipal Corporations** Parks and Public Squares and Places

Local governments retain broad powers to regulate the use of public areas. McKinney's Municipal Home Rule Law § 2(8).

[2] **Zoning and Planning** Validity of regulations in general

Because zoning ordinances are legislative acts they enjoy a strong presumption of constitutionality.

[3] **Zoning and Planning** Reasonableness in general

If there is a reasonable relation between the end sought to be achieved and the means adopted to achieve it, a zoning regulation will be upheld.

[4] **Constitutional Law** Presumptions and Construction as to Constitutionality

Constitutional Law Proof beyond a reasonable doubt

Constitutional Law Inquiry into Legislative Judgment

Questions as to wisdom, need or appropriateness are for the legislative body, and courts will strike down statutes only as a last resort and only when unconstitutionality is shown beyond a reasonable doubt.

[5] **Constitutional Law** Burden of Proof

A challenger bears a heavy burden to overcome the presumption of constitutionality of a statute.

[6] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

Constitutional Law Existence of other channels of expression

As a general rule, time, place, and manner restrictions are permissible if they are justified without reference to the content of the regulated speech, serve a significant governmental interest, and leave open ample alternative channels for

communication of the information. U.S.C.A. Const.Amend. 1.

[7] **Constitutional Law** Difference in protection given to other speech

The New York State Constitution does not afford heightened free speech protections to commercial speech. McKinney's Const. Art. 1, § 8.

[8] **Constitutional Law** Advertising

Constitutional Law Signs

Rational basis standard of review applied to business's First Amendment challenge to town code provisions prohibiting commercial advertising on public property and roads, since the ordinance's restrictions were based on the type of entity that violated the regulations, as opposed to the content of the advertisements, and business's signs were not inherently misleading or related to unlawful activity. U.S.C.A. Const.Amend. 1.

[9] **Constitutional Law** Commercial Speech in General

The four-part test employed by the Supreme Court in *Central Hudson* determines whether restrictions on commercial speech are constitutional: (1) whether the communication is outside the scope of constitutional protection, that is, is it misleading or related to unlawful activity; (2) whether the government interests sought to be protected are substantial; (3) how directly the regulation advances those interests; and (4) whether there is a less restrictive alternative. U.S.C.A. Const.Amend. 1.

[10] **Constitutional Law** Advertising

Constitutional Law Signs

Zoning and Planning Signs and billboards

Town code provisions prohibiting commercial advertising on public property and roads were narrowly tailored to substantial governmental interest in avoiding an unsightly proliferation of unnecessary signs and furthering traffic safety and esthetics; read as a whole, the code provided ample opportunity to advertise commercial activities on privately owned land and businesses. U.S.C.A. Const.Amend. 1.

[11] **Constitutional Law** Signs

Governments may under the First Amendment regulate the physical characteristics of commercial signs in addition to their location and content. U.S.C.A. Const.Amend. 1.

[12] **Constitutional Law** Reasonableness; relationship to governmental interest

A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. U.S.C.A. Const.Amend. 1.

[13] **Constitutional Law** Reasonableness; relationship to governmental interest

Constitutional validity of statute restricting commercial speech is judged by the relation it bears to the overall problem the government seeks to correct not on the extent to which it furthers the government's interest in an individual case. U.S.C.A. Const.Amend. 1.

[14] **Constitutional Law** Reasonableness; relationship to governmental interest

A statute restricting commercial speech must be narrowly tailored to achieve the desired objective. U.S.C.A. Const.Amend. 1.

[15] **Constitutional Law** Reasonableness; relationship to governmental interest

A statute restricting commercial speech is narrowly tailored, as required by the First Amendment, if it targets and eliminates no more

than the exact source of the evil it seeks to remedy. U.S.C.A. Const.Amend. 1.

[16] **Constitutional Law** Reasonableness; relationship to governmental interest

A complete ban on commercial speech can be narrowly tailored, as required by the First Amendment, but only if each activity within the proscription's scope is an appropriately targeted evil. U.S.C.A. Const.Amend. 1.

[17] **Constitutional Law** Off-premises signs

Constitutional Law Off-premises billboards

Zoning and Planning Signs and billboards

Limitations on offsite commercial signs and billboards, in town code provisions barring virtually all commercial advertising aside from the premises on which the goods or services were provided, were not impermissibly underinclusive under the First Amendment; town could reasonably conclude that its interest in regulating offsite advertising was stronger with respect to traffic safety and aesthetics than for onsite advertising. U.S.C.A. Const.Amend. 5.

[18] **Constitutional Law** Signs and billboards

Zoning and Planning Signs and billboards

Town code provisions prohibiting commercial advertising on public property and roads and barring virtually all commercial advertising aside from the premises on which the goods or services were provided were not void for vagueness; the meaning of the terms employed in the code, for example "signs," "advertising devices," and "aesthetic character," as well as terms or expressions such as "public roadways," "public property," "onsite businesses," "commercial premises," and "political signs," were either specifically defined or were amenable to common-sense understanding. U.S.C.A. Const.Amend. 14; McKinney's Statutes § 94.

[19] **Constitutional Law** Certainty and definiteness; vagueness

The vagueness doctrine, which is essentially a dimension of due process, requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of the enactment's terms. U.S.C.A. Const.Amend. 14.

[20] **Constitutional Law** Difference in protection for commercial signs

Zoning and Planning Signs and billboards

Town code provisions regulating the location and configuration of commercial and noncommercial signs unconstitutionally favored commercial speech over noncommercial speech; although the provisions had few explicit limitations on noncommercial advertising, the code's language of limitation, in which "only the following signs" were "permitted" or "allowed," imposed broad restrictions on noncommercial speech that was not political, and the provisions permitted commercial advertising in every zoning district aside from public lands and roads, yet barred noncommercial speech in most contexts in which commercial speech was allowed. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[21] **Constitutional Law** Difference in protection given to other speech

Noncommercial speech is to be afforded a greater degree of protection than commercial speech. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[22] **Zoning and Planning** Particular regulations

The unconstitutional portions of town code provisions regulating the location and configuration of commercial and noncommercial signs, which unconstitutionally favored commercial speech over noncommercial speech, could not be severed from the constitutional

portions; the code had no severability clause, and the provisions were so closely interwoven that removing them wholesale would render the regulatory scheme incoherent and would amount to a judicial rewriting of a legislative scheme. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[23] **Statutes** Effect of Partial Invalidity; Severability

Absent a severability clause, the burden is on the legislative body to show that the unconstitutional provisions of an enactment are severable, with the critical issue being whether the legislation would have been enacted if it had not included the unconstitutional provisions.

Attorneys and Law Firms

****659** Michael P. Walsh, Patchogue, for respondent.

Raymond Negron, Mount Sinai, for appellant.

PRESENT: LaSALLE, J.P., NICOLAI and IANNACCI, JJ.

Opinion

Appeal from five judgments of the District Court of Suffolk County, Sixth District (James P. Flanagan, J.), rendered February 9, 2012. Each judgment convicted defendant, upon its plea of guilty, of placing a prohibited sign on public property.

***96** ORDERED that the judgments of conviction are reversed, on the law, the accusatory instruments are dismissed, and the fines, if paid, are remitted.

Defendant was charged, in each of five separate informations, respectively, with placing a sign advertising its opticians' business on public property at five locations in the Town of Brookhaven (the Town) in violation of Town of Brookhaven Code (Code) section 57A–11 (B), which prohibits commercial advertising on public property and roads. Defendant's counsel entered not guilty pleas on defendant's behalf and moved to dismiss the informations. Counsel argued, in the District Court as he does on appeal, that the provision under which defendant was charged did not further the Town's stated purposes in enacting chapter 57A of the Code; that certain of the regulation's terms and expressions are unconstitutionally vague; and that the entirety of chapter 57A, which contains the provisions regulating the location and configuration of commercial and noncommercial signs, is unconstitutional because chapter 57A impermissibly favors commercial speech over noncommercial speech. Defendant's counsel urges that, in the absence of a severability clause (which ****660** the Town has since enacted), chapter 57A, in its entirety, must be invalidated. The District Court denied the motion and, on February 9, 2012, defendant's counsel entered guilty pleas to the five informations on defendant's behalf. For the reasons that follow, we find chapter 57A to be unconstitutional.

[1] **[2]** **[3]** **[4]** **[5]** In furtherance of chapter 57A's stated purposes of "avoiding an unsightly proliferation of unnecessary signs," of "[p]rotecting the public from improperly located or distracting ***97** signs which create a hazard to said public by virtue of their construction, location and/or illumination" (Code § 57A–1[C]), of providing "adequate signs for the business community to communicate its availability to the public" (Code § 57A–1[B]), and of allowing "effective means for political expression" (Code § 57A–10[A]), the Code bars all commercial advertising on public roads and property (Code § 57A–11), bars virtually all commercial advertising aside from the premises on which the goods or services are provided (i.e., permitting "onsite" and barring " offsite" advertising) (*e.g.* Code § 57A–4[A]), limits the size and configuration of all signs (*e.g.* Code § 57A–4[A][2]), and permits limited forms of noncommercial signage in most areas of the Town, albeit, with respect to political advertising, for only 30 days in relation to a particular campaign (Code §§ 57A–3, 57A–10[B], [C]). The Code also exempts from regulation several categories of signs, including utility signs, signs associated with government interests and traffic control, and other signs required by law (Code § 57A–3). Code violations are punishable by fines and up to 15 days' incarceration (Code § 57A–24[A]). Local governments retain "broad powers" to regulate the use of public areas (*Matter of Sulzer v. Environmental Control Bd. of City of N.Y.,* 165 A.D.2d 270, 275, 566 N.Y.S.2d 595 [1991]; *see also* Municipal Home Rule Law §§ 2[8]; 10), and "[b]ecause zoning ordinances are legislative acts they enjoy a strong presumption of constitutionality[.] ... [Therefore, i]f there is a reasonable relation between the end sought to be achieved and the means adopted to achieve it [,] the regulation will be upheld" (*Matter of Town of Islip v. Caviglia,* 73 N.Y.2d 544, 550–551, 542 N.Y.S.2d 139, 540 N.E.2d 215 [1989]; *see also*

Stringfellow's of N.Y. v. City of New York, 91 N.Y.2d 382, 395–396, 671 N.Y.S.2d 406, 694 N.E.2d 407 [1998]). "Questions as to wisdom, need or appropriateness are for the [legislative body] ... [and courts will] strike down statutes only as a last resort ... and only when unconstitutionality is shown beyond a reasonable doubt" (*Paterson v. University of State of N.Y.,* 14 N.Y.2d 432, 438, 252 N.Y.S.2d 452, 201 N.E.2d 27 [1964] [citations omitted]; *see McMinn v. Town of Oyster Bay,* 66 N.Y.2d 544, 548, 498 N.Y.S.2d 128, 488 N.E.2d 1240 [1985]). Accordingly, a challenger bears a "heavy burden" to overcome the presumption of constitutionality (*Matter of Sulzer,* 165 A.D.2d at 275, 566 N.Y.S.2d 595).

[6] **[7]** **[8]** As a general rule, "time, place, and manner restrictions are permissible if 'they are justified without reference to the content of the regulated speech, ... serve a significant governmental interest, and leave ... open ample alternative channels for communication of the information' " (***98** *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 516, 101 S.Ct. 2882, 69 L.Ed.2d 800 [1981], quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 [1976]). "[T]he New York State Constitution does not afford heightened free speech protections to commercial speech" (*OTR Media Group, Inc. v. City of New York,* 83 A.D.3d 451, 452, 920 N.Y.S.2d 337 [2011]). Where, as ****661** here, the restrictions are based on "the type of entity that violates the regulations" as opposed to "the content of the advertisements," and because defendant's signs were not inherently misleading or related to unlawful activity, a "rational basis" standard of review is applicable (*id.* at 453, 920 N.Y.S.2d 337; *see e.g. Willow Media, LLC v. City of New York,* 78 A.D.3d 596, 910 N.Y.S.2d 903 [2010]).

[9] With respect to commercial speech, the Court of Appeals has adopted the four-part test employed in *Central Hudson Gas & Elec. v. Public Serv. Comm. of N.Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 [1980] to determine whether restrictions are constitutional: "(1) whether the communication is outside the scope of constitutional protection—i.e., is it misleading or related to unlawful activity? (2) whether the government interests sought to be protected are substantial? (3) how directly the regulation advances those interests? and (4) whether there is a less restrictive alternative?" (*Matter of von Wiegen,* 63 N.Y.2d 163, 173, 481 N.Y.S.2d 40, 470 N.E.2d 838 [1984]). Elaborating on this test, in *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 623–624, 115 S.Ct. 2371, 132 L.Ed.2d 541 [1995] [internal quotation marks and citations omitted], the Supreme Court stated:

> "(C)ommercial speech (enjoys) a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression ... [Accordingly], we engage in intermediate scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson* ... [whereby] the government may freely regulate commercial speech that concerns unlawful activity or is misleading ... [Where the c]ommercial speech ... falls into neither of those categories ... the advertising ... may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the ***99** regulations must be narrowly drawn" (*see also Matter of Lucas v. Scully,* 71 N.Y.2d 399, 404, 526 N.Y.S.2d 927, 521 N.E.2d 1070 [1988] ["commercial speech—although not vested with full First Amendment stature—is entitled to a certain degree of protection"]).

[10] **[11]** Nevertheless, "[i]t is common ground that governments may regulate the physical characteristics of signs" in addition to their location and content (*City of Ladue v. Gilleo,* 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 [1994]). The stated purpose of the Code, essentially, to avoid "an unsightly proliferation of unnecessary signs" (Code § 57A–1[C]) in the interests of traffic safety and esthetics, represents a "substantial" governmental interest which is constitutionally furthered by the regulation under which defendant was charged (*see Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805, 807, 104 S.Ct. 2118, 80 L.Ed.2d 772 [1984] ["It is well settled that the state may legitimately exercise its police powers to advance esthetic values ... (Thus, t)he problem advanced by (an ordinance which banned political advertising in public places)—the visual assault ... presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within ... (a local government's) power to prohibit"]; *see also Metromedia, Inc.,* 453 U.S. at 507–508, 101 S.Ct. 2882; *OTR Media Group, Inc.* 83 A.D.3d at 453, 920 N.Y.S.2d 337; ****662** *People v. Weinkselbaum,* 194 Misc.2d 19, 22, 753 N.Y.S.2d 284 [App. Term, 9th & 10th Jud. Dists. 2002]; 2 Rathkopf's Law of Zoning and Planning § 17:5).

In *Florida Bar*, the Supreme Court stated:

> "[T]he differences between commercial speech and noncommercial speech are manifest ... '[T]he least restrictive means' test has no role in the commercial speech context ... 'What our decisions require,' instead, 'is a "fit" between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' ... [and which is] narrowly tailored to achieve the desired objective' " (515 U.S. at 632, 115 S.Ct. 2371 [citations omitted]).

[12] **[13]** "A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" (*Edenfield v. Fane,* 507 U.S. 761, 762, 113 S.Ct. 1792, 123 L.Ed.2d 543 [1993]; *see also Rubin v. Coors Brewing Co.,* 514 U.S. 476, 486–487, 115 S.Ct. 1585, 131 L.Ed.2d 532 [1995]). However, it is irrelevant that barring defendant's several ***100** small and scattered signs would not materially advance the interests stated, because a statute's constitutional validity is judged by "the relation it bears to the overall problem the government seeks to correct ... not on the extent to which it furthers the government's interest in an individual case" (*United States v. Edge Broadcasting Co.,* 509 U.S. 418, 419, 113 S.Ct. 2696, 125 L.Ed.2d 345 [1993] [citation omitted]).

[14] **[15]** **[16]** Nevertheless, in this context, a statute must be "narrowly tailored to achieve the desired objective" (*Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 528, 121 S.Ct. 2404, 150 L.Ed.2d 532 [2001]). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil' it seeks to remedy ... A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil" (*Frisby v. Schultz,* 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 [1988]). Although chapter 57A bars commercial advertising on public lands and roads, read as a whole, chapter 57A provides ample opportunity to advertise commercial activities on privately owned land and businesses (*see Metromedia, Inc.,* 453 U.S. at 508, 101 S.Ct. 2882 [upholding so much of a municipality's regulations as imposed a general ban on offsite commercial billboards, in part, because the municipality had "stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs"]). Here, because the regulations are content neutral and permit a substantial scope for commercial expression, the tailoring requirement is satisfied "even though it is not the least restrictive or least intrusive means of serving the statutory goal" (*Hill v. Colorado,* 530 U.S. 703, 726, 120 S.Ct. 2480, 147 L.Ed.2d 597 [2000]).

[17] Further, chapter 57A's limitations on offsite commercial signs and billboards are not impermissibly underinclusive, a principle based on the recognition that "an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people" (*City of Ladue,* 512 U.S. at 51, 114 S.Ct. 2038 [internal quotation marks and citation omitted]). However, a governmental body may "reasonably conclude" that its interest in regulating offsite advertising is "stronger" ****663** with respect to traffic safety and aesthetics than for onsite advertising without being constitutionally underinclusive (*Metromedia, Inc.,* 453 U.S. at 511–512, 101 S.Ct. 2882).

[18] **[19]** Notwithstanding that "esthetic judgments are necessarily subjective, defying objective evaluation" (*Metromedia, Inc.,* 453 U.S. at 510, 101 S.Ct. 2882), Code § 57A–11 is not vague. The vagueness doctrine, ***101** which is essentially a dimension of due process, " 'requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of [the enactment's] terms' " (*Dua v. New York City Dept. of Parks & Recreation,* 84 A.D.3d 596, 598, 924 N.Y.S.2d 47 [2011], quoting *Foss v. City of Rochester,* 65 N.Y.2d 247, 253, 491 N.Y.S.2d 128, 480 N.E.2d 717 [1985]). In *Hill v. Colorado,* the Supreme Court stated:

> "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement .... [However] we can never expect mathematical certainty from our language ... [and where] it is clear what the ordinance as a whole prohibits ... speculation about possible vagueness in hypothetical situations ... will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications" (530 U.S. at 732–733, 120 S.Ct. 2480 [internal quotation marks and citations omitted]).

The meaning of the terms employed in Code § 57A–11, for example "signs," "advertising devices," and "aesthetic character," as well as terms or expressions found elsewhere in chapter 57A to which defendant objects as impermissibly vague, such as "public roadways," "public property," "onsite businesses," "commercial premises," and "political signs," are either specifically defined in the chapter or are amenable to common-sense understanding (*see* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94 ["statutory language is generally construed according to its natural and most obvious sense"]; *Edge Broadcasting Co.,* 509 U.S. at 426, 113 S.Ct. 2696 [recognizing a "common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to governmental regulation, and other varieties of speech"] [internal quotation marks and citation omitted]).

[20] **[21]** While the section of chapter 57A defendant violated, considered in isolation, represents a constitutional exercise of the Town's zoning authority, considered as a whole, chapter 57A unconstitutionally favors commercial speech over noncommercial speech. Noncommercial speech is to be afforded "a greater degree of protection" than commercial speech (*Metromedia, Inc.,* 453 U.S. at 513, 101 S.Ct. 2882). A governmental body favors commercial speech over noncommercial speech, for example, by allowing ***102** greater scope to onsite commercial speech than to onsite noncommercial speech (*id.*). While there are few explicit limitations on noncommercial advertising, aside from public lands and roads, and on "political" advertising, chapter 57A's language of limitation ("only the following signs" are "permitted" or "allowed") can only be construed as imposing broad restrictions on noncommercial speech that is not "political." Chapter 57A permits commercial advertising in every zoning district aside from public lands and roads, and bars noncommercial speech in most contexts in which commercial speech is allowed.

****664** **[22]** **[23]** The question then is whether the unconstitutional portions may be severed from the constitutional portions. Absent a severability clause, "[t]he burden is on the [legislative body] to show that the unconstitutional provisions are severable ... [t]he critical issue [being] whether the legislation would have been enacted if it had not included the unconstitutional provisions" (*National Advertising Co. v. Town of Babylon,* 900 F.2d 551, 557 [2d Cir.1990]). Where "the constitutional and unconstitutional provisions [are] inextricably interwoven" an inference may be drawn that they are nonseverable (*id.; see* McKinney's Consolidated Laws of N.Y., Book 1, Statutes § 150[d]). Although the severability clause did not exist at the time of the instant offenses, we may nevertheless consider whether the unconstitutional portions may be severed from the constitutional parts (*e.g. Lamar Advertising of Penn, LLC v. Town of Orchard Park, New York,* 356 F.3d 365, 375 [2d Cir.2004]), and we conclude that they cannot be severed. In light of the ubiquitous use of the language of limitation quoted above and the relative absence of media of expression for noncommercial speech, it is impossible to sever so much of chapter 57A as permits "commercial favoritism" while retaining the remainder. The chapter's provisions are so closely interwoven that removing them wholesale would render the regulatory scheme incoherent and would amount to a judicial rewriting of a legislative scheme, which the courts do not favor (*National Advertising Co.,* 900 F.2d at 557).

Accordingly, because we find chapter 57A to be unconstitutional, the judgments convicting defendant of violating section 57A–11 (B) of the Code are reversed, the accusatory instruments are dismissed, and the fines, if paid, are remitted.

All Citations

40 Misc.3d 95, 971 N.Y.S.2d 656, 2013 N.Y. Slip Op. 23235

128 A.D.3d 856
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Guy D. PENDLETON, Jr., appellant.

May 13, 2015.

Synopsis

Background: Following jury trial, defendant was convicted in the County Court, Dutchess County, Greller, J., of assault in the second degree as a hate crime and criminal possession of a weapon in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] trial court was not statutorily required to conduct competency hearing;

[2] error in denying defendant's requested jury charge was harmless; and

[3] jury charge on intoxication was not warranted.

Affirmed.

West Headnotes (3)

[1] Criminal Law Evidence, Information, or Conduct Invoking Inquiry

Trial court was not statutorily required to conduct hearing to determine whether defendant was competent to stand trial, in prosecution for assault in the second degree as a hate crime and criminal possession of a weapon in the second degree, where defense counsel initially sought hearing, but subsequently withdrew motion. McKinney's CPL § 730.30(2), 730.60(2).

[2] Criminal Law Instruction as to evidence

Trial court's error in denying defendant's request for a jury charge as to principle of "falsus in uno, falsus in omnibus" was harmless, in prosecution for assault in the second degree as a hate crime and criminal possession of a weapon in the second degree, inasmuch as there was no significant probability that jury would have acquitted defendant if charge had been given.

[3] Criminal Law Intoxication

Jury charge on intoxication was not warranted, in prosecution for assault in the second degree as a hate crime and criminal possession of a weapon in the second degree; while there might have been some evidence in record to suggest that defendant had consumed alcohol, there was no evidence as to, inter alia, amount of alcohol consumed, time of such consumption, or effect of alcohol on defendant's mental state.

Attorneys and Law Firms

****127** KasniaLaw, PLLC, Poughkeepsie, N.Y. (Cynthia G. Kasnia of counsel), for appellant.

William V. Grady, District Attorney, Poughkeepsie, N.Y. (Joan H. McCarthy of counsel), for respondent.

MARK C. DILLON, J.P., JOHN M. LEVENTHAL, LEONARD B. AUSTIN, and HECTOR D. LaSALLE, JJ.

Opinion

***856** Appeals by the defendant from (1) a judgment of the County Court, Dutchess County (Greller, J.), rendered October 24, 2012, and (2) an amended judgment of the same court rendered April 3, 2013, finding him guilty of the crimes of assault in the second degree as a hate crime and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the appeal from the judgment is dismissed, as the judgment was superseded by the amended judgment; and it is further,

ORDERED that the amended judgment is affirmed.

The defendant was convicted, upon a jury verdict, of assault in the second degree as a hate crime, and criminal possession of a weapon in the second degree. The charges arose from an incident in which the defendant pursued two victims on a street while repeatedly uttering racial epithets. During the incident, the defendant brandished a hammer and other objects at the complainants. The defendant used the hammer to strike one of the complainants in the knee.

****128** **[1]** Contrary to the defendant's contention, the County Court was not required to conduct a hearing pursuant to CPL 730.30(2) and 730.60(2). Where a superintendent of an institution in which a defendant is confined for mental-health treatment determines that the defendant is no longer an incapacitated person, the superintendent must so notify the court (*see* CPL 730.60[2]). At that point, the trial court must conduct a hearing on the issue of whether the defendant is an incapacitated person, if such hearing is requested by the defense counsel or by the prosecutor (*see* CPL 730.30[2]). The court may also conduct such a hearing on its own motion (*see* CPL 730.30[2]). Here, defense counsel initially sought a CPL 730.30(2) hearing, but subsequently withdrew the motion. Under these circumstances, the County Court was not statutorily required to conduct a competency hearing (*see* CPL 730.30[2]; *People v. Kenney,* 225 A.D.2d 707, 707–708, 639 N.Y.S.2d 940; *cf. People v. Christopher,* 65 N.Y.2d 417, 492 N.Y.S.2d 566, 482 N.E.2d 45). The County Court did not improvidently exercise its discretion in declining to, sua sponte, order a CPL 730.30(2) hearing under the circumstances of this case (*see People v. Kenney,* 225 A.D.2d at 707–708, 639 N.Y.S.2d 940).

***857** **[2]** Although the County Court erred in denying the defendant's request for a jury charge as to the principle of "falsus in uno, falsus in omnibus," the error was harmless, as there is no significant probability that the jury would have acquitted the defendant if the charge had been given (*see People v. Whaley,* 277 A.D.2d 151, 151, 717 N.Y.S.2d 107).

[3] The County Court did not err in denying the defendant's request for a jury charge on intoxication. While there might have been some evidence in the record to suggest that the defendant had consumed alcohol, there was no evidence as to, inter alia, the amount of alcohol consumed, the time of such consumption, or the effect of alcohol on the defendant's mental state. Consequently, under the circumstances of this case, a jury charge on intoxication was not warranted (*see People v. Gaines,* 83 N.Y.2d 925, 926, 615 N.Y.S.2d 309, 638 N.E.2d 954; *People v. Rodriguez,* 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658).

The sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

The defendant's remaining contentions are unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Green,* 92 A.D.3d 953, 939 N.Y.S.2d 520), and we decline to reach them in the exercise of our interest of justice jurisdiction.

All Citations

128 A.D.3d 856, 9 N.Y.S.3d 126, 2015 N.Y. Slip Op. 04153

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195 A.D.3d 644
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Pedro RIVERA, also known as Pedro Castaneda, appellant.

2019-12014
|
(Ind. No. 1654/18)
|
Argued—April 8, 2021
|
June 2, 2021

Attorneys and Law Firms

Stephen R. Mahler, Kew Gardens, NY, for appellant.

Madeline Singas, District Attorney, Mineola, N.Y. (Jason R. Richards and Sarah S. Rabinowitz of counsel), for respondent.

HECTOR D. LASALLE, P.J., MARK C. DILLON, ROBERT J. MILLER, FRANCESCA E. CONNOLLY, JJ.

DECISION & ORDER

***644** Appeal by the defendant from a judgment of the Supreme Court, Nassau County ****632** (Terence P. Murphy, J.), rendered October 1, 2019, convicting him of murder in the second degree, conspiracy in the first degree, and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson,* 9 N.Y.3d 342, 348, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo,* 2 N.Y.3d 383, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

The Supreme Court providently exercised its discretion in denying the defendant's motion for a mistrial based on the People's alleged violations of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. "To establish a *Brady* violation, a defendant must show that the evidence is favorable to the defendant because it is either ***645** exculpatory or impeaching in nature, the evidence was suppressed by the prosecution, and prejudice arose because the suppressed evidence was material" (*People v. Breland,* 178 A.D.3d 716, 717, 115 N.Y.S.3d 427; *see People v. Rong He,* 34 N.Y.3d 956, 958, 112 N.Y.S.3d 1, 135 N.E.3d 1081; *People v. Alisuarez,* 186 A.D.3d 1391, 1391, 128 N.Y.S.3d 880). "*Brady* does not require that disclosure be made at any particular point in the proceedings, but only that it be made in time for the defense to use it effectively" (*People v. McClinton,* 180 A.D.3d 712, 713, 119 N.Y.S.3d 132; *see People v. Alisuarez,* 186 A.D.3d at 1391, 128 N.Y.S.3d 880; *People v. Perkins,* 227 A.D.2d 572, 574, 643 N.Y.S.2d 173; *People v. White,* 178 A.D.2d 674, 675, 578 N.Y.S.2d 227). Here, a statement allegedly made by Ramon Martines, which the defendant contends was exculpatory, was turned over to defense counsel during the People's case-in-chief and admitted into evidence during the defense case (*see People v. Tripp,* 162 A.D.3d 691, 693, 77 N.Y.S.3d 670). Moreover, defense counsel did not seek to recall any prosecution witnesses who had already testified for the purpose of conducting further cross-examination based on Martines's statement (*see People v. Alisuarez,* 186 A.D.3d at 1391–1392, 128 N.Y.S.3d 880; *People v. Tripp,* 162 A.D.3d at 693, 77 N.Y.S.3d 670). Accordingly, the defendant was afforded a meaningful opportunity to make use of Martines's statement, and there is no indication that earlier disclosure might have had any effect on the outcome of the trial (*see People v. Fuentes,* 12 N.Y.3d 259, 265, 879 N.Y.S.2d 373, 907 N.E.2d 286; *People v. McClinton,* 180 A.D.3d at 713, 119 N.Y.S.3d 132). A statement allegedly made by Raul Ponce was turned over to defense counsel prior to the commencement of the trial, and there is no indication that the People suppressed Ponce's statement (*see People v. Alisuarez,* 186 A.D.3d at 1392, 128 N.Y.S.3d 880; *People v. Rispers,* 146 A.D.3d 988, 989, 45 N.Y.S.3d 217).

Contrary to the People's contention, the defendant preserved for appellate review ****633** his contention that he was deprived of the right to present a defense by the Supreme Court's failure to admit Ponce's statement into evidence at trial (*see* CPL 470.05[2]). Nevertheless, the court properly precluded Ponce's statement because the statement was hearsay and was not a declaration against penal interest (*see People v. Morgan,* 76 N.Y.2d 493, 495, 561 N.Y.S.2d 408, 562 N.E.2d 485; *Moody v. United States,* 82 A.3d 769, 778 n. 10 [D.C. 2013]).

The defendant's contention that certain statements made by the prosecutor during summation deprived him of a fair trial is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Romero,* 7 N.Y.3d 911, 912, 828 N.Y.S.2d 274, 861 N.E.2d 89; *People v. Harnett,* 189 A.D.3d 1261, 1263, 134 N.Y.S.3d 273), and we decline to review it in the exercise of our interest of justice jurisdiction.

LASALLE, P.J., DILLON, MILLER and CONNOLLY, JJ., concur.

All Citations

195 A.D.3d 644, 144 N.Y.S.3d 631 (Mem), 2021 N.Y. Slip Op. 03473

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132 A.D.3d 781
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Daniel RODRIGUEZ, appellant.

Oct. 14, 2015.

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, Firetog, J., of murder in the second degree, assault in the first degree, and assault in the second degree, and he appealed, challenging denial of his motion to suppress.

Holdings: The Supreme Court, Appellate Division, held that:

[1] statement that defendant made to police without receiving *Miranda* warnings and videotaped statement he made two hours later, after receiving *Miranda* warnings, were part of a single continuous chain of events, requiring suppression of the second statement, but

[2] error in admitting the videotaped statement into evidence did not require reversal, in view of overwhelming evidence of defendant's guilt.

Affirmed.

West Headnotes (6)

[1] Criminal Law Two-step interrogation technique; warnings

Where an improper, unwarned statement gives rise to a subsequent *Mirandized* statement as part of a single continuous chain of events, there is inadequate assurance that the *Miranda* warnings were effective in protecting a defendant's rights, and the warned statement must also be suppressed.

3 Cases that cite this headnote

[2] Criminal Law Two-step interrogation technique; warnings

In determining whether a subsequent statement made after *Miranda* warnings were given was part of a single continuous chain of events with a prior unwarned statement, so as to require suppression, the court considers various factors including whether the same police personnel were present and involved in eliciting each statement; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the *Miranda* violation, such as the extent of the improper questioning; and whether, prior to the *Miranda* violation, defendant had indicated a willingness to speak to police.

4 Cases that cite this headnote

[3] Criminal Law Two-step interrogation technique; warnings

The purpose of the inquiry into whether a subsequent statement made after *Miranda* warnings were given was part of a single continuous chain of events with a prior unwarned statement, so as to require suppression, is to determine whether there was a definite, pronounced break in questioning sufficient to return the defendant to the status of one who is not under the influence of questioning.

4 Cases that cite this headnote

[4] Criminal Law Two-step interrogation technique; warnings

Statement that murder defendant made to police without receiving *Miranda* warnings and videotaped statement he made two hours later, after receiving *Miranda* warnings, were part of a single continuous chain of events, requiring suppression of the second statement; police officer asked defendant to make a further videotaped statement when he first interrogated defendant and was present during the subsequent

videotaped interrogation, which was conducted in the same interview room.

1 Case that cites this headnote

[5] **Criminal Law** Acts, admissions, declarations, and confessions of accused

Error in admitting into evidence murder defendant's videotaped statement to police, which was tainted by his earlier, *unMirandized* statement, did not require reversal, where evidence of defendant's guilt, including his prior untainted statements, his codefendant's trial testimony, and two surveillance videos corroborating codefendant's account of events, was overwhelming.

[6] **Criminal Law** Failure to call witness or produce evidence

Murder defendant was not entitled to a missing witness charge, since testimony of the uncalled witness would have been merely cumulative.

Attorneys and Law Firms

****754** Lynn W.L. Fahey, New York, N.Y. (Barry Stendig of counsel), for appellant.

Kenneth P. Thompson, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Jill Oziemblewski of counsel), for respondent.

REINALDO E. RIVERA, J.P., SHERI S. ROMAN, HECTOR D. LaSALLE, and BETSY BARROS, JJ.

Opinion

***781** Appeal by the defendant from a judgment of the Supreme ***782** Court, Kings County (Firetog, J.), rendered May 7, 2012, convicting him of murder in the second degree, assault in the first degree, and assault in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress a videotaped statement he made to law enforcement officials.

ORDERED that the judgment is affirmed.

The defendant was convicted, after a jury trial, of murder in the second degree, assault in the first degree, and assault in the second degree after he acted in concert with codefendant Devone Sanders to set fire to a residential building, causing the death of one victim and injuring two others.

On February 22, 2010, at approximately 10:50 p.m., the defendant, who was in custody, waived his *Miranda* rights (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) and gave an oral statement to Detectives Rodriguez and Belissimo. After giving the oral statement, the defendant agreed to make a videotaped statement. The next morning, at 5:47 a.m., the defendant answered questions from Assistant District Attorney DiIngines, in the presence of Detective Rodriguez, while being videotaped. After five ****755** minutes, the defendant invoked his right to remain silent. At 8:30 a.m., Detectives Rodriguez and Belissimo returned to the interview room, and, without giving the defendant further *Miranda* warnings, showed the defendant a videotaped statement given earlier by another suspect which inculpated the defendant. After showing the defendant the videotaped statement, Detective Rodriguez questioned the defendant for 10 to 15 minutes (hereinafter the pre–9 a.m. questioning), and then asked the defendant to reconsider making a videotaped statement, and the defendant agreed to do so. That interrogation ended at 9:00 a.m. At 11:00 a.m., the Assistant District Attorney, in the presence of Detective Rodriguez, re-administered the *Miranda* warnings, and the defendant gave a full videotaped statement (hereinafter the second videotaped statement).

On appeal, the defendant contends that the hearing court erred in refusing to suppress the second videotaped statement because that statement was tainted by the pre–9 a.m. questioning.

[1] [2] [3] "[W]here an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a 'single continuous chain of events', there is inadequate assurance that the *Miranda* warnings were effective in protecting a defendant's rights, and the warned statement must also be suppressed" ***783** (*People v. Paulman,* 5 N.Y.3d 122, 130, 800 N.Y.S.2d 96, 833 N.E.2d 239, quoting *People v. Chapple,* 38 N.Y.2d 112, 114, 378 N.Y.S.2d 682, 341 N.E.2d 243). In determining whether a subsequent statement made after *Miranda* warnings were given was part of a "single continuous chain of events," the court considers various factors including "whether the same police personnel

were present and involved in eliciting each statement; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the *Miranda* violation, such as the extent of the improper questioning; and whether, prior to the *Miranda* violation, defendant had indicated a willingness to speak to police" (*People v. Paulman,* 5 N.Y.3d at 130–131, 800 N.Y.S.2d 96, 833 N.E.2d 239). The purpose of the inquiry is to determine whether there was a "definite, pronounced break in questioning sufficient to return the defendant to the status of one who is not under the influence of questioning" (*People v. Sedunova,* 83 A.D.3d 965, 967, 922 N.Y.S.2d 134; *see People v. Celleri,* 29 A.D.3d 707, 708, 814 N.Y.S.2d 270; *People v. Johnson,* 79 A.D.2d 617, 618, 433 N.Y.S.2d 477; *see also People v. Paulman,* 5 N.Y.3d at 131, 800 N.Y.S.2d 96, 833 N.E.2d 239; *People v. Chapple,* 38 N.Y.2d at 115, 378 N.Y.S.2d 682, 341 N.E.2d 243).

[4] Here, the statement made by the defendant during the pre–9 a.m. questioning, which the Supreme Court suppressed, and the second videotaped statement were part of a single continuous chain of events inasmuch as during the pre–9 a.m. questioning, Detective Rodriguez asked the defendant to make a further videotaped statement when he interrogated the defendant in violation of his constitutional rights. Therefore, during the two-hour break, the defendant was never returned to the status of one who was not under the influence of questioning (*see People v. Celleri,* 29 A.D.3d at 708, 814 N.Y.S.2d 270), but was anticipating the arrival of the Assistant District Attorney to continue the interrogation. Moreover, Detective Rodriguez, who elicited the 10–to–15 minute statement the defendant made during the pre–9 a.m. questioning without having been again given his *Miranda* warnings, was present during the subsequent videotaped interrogation, and both interrogations were conducted in the same interview ****756** room (*see People v. Paulman,* 5 N.Y.3d at 130–131, 800 N.Y.S.2d 96, 833 N.E.2d 239; *People v. Celleri,* 29 A.D.3d at 708, 814 N.Y.S.2d 270). Considering these factors and the nature and extent of the *Miranda* violation, we cannot conclude that there was a definite, pronounced break between the defendant's first and second videotaped statements sufficient to return the defendant to the status of one who was not under the influence of questioning (*see People v. Chapple,* 38 N.Y.2d at 115, 378 N.Y.S.2d 682, 341 N.E.2d 243; *People v. Sedunova,* 83 A.D.3d at 967, 922 N.Y.S.2d 134; *People v. Celleri,* 29 A.D.3d at 708, 814 N.Y.S.2d 270).

Accordingly, the Supreme Court should have suppressed the defendant's second videotaped statement.

[5] ***784** However, reversal is not required since the People presented overwhelming proof of the defendant's guilt, including the defendant's prior untainted statements, his codefendant's trial testimony, and two surveillance videos corroborating the codefendant's account of the crimes. There is no reasonable possibility that the admission of the second videotaped statement affected the verdict (*see People v. Paulman,* 5 N.Y.3d at 134, 800 N.Y.S.2d 96, 833 N.E.2d 239; *People v. Celleri,* 29 A.D.3d at 708, 814 N.Y.S.2d 270; *People v. Pearson,* 20 A.D.3d 575, 577, 799 N.Y.S.2d 155).

The defendant's contention regarding the Supreme Court's *Sandoval* ruling (*see People v. Sandoval,* 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413), is unpreserved for appellate review (*see People v. Mantock,* 117 A.D.3d 753, 984 N.Y.S.2d 613) and, in any event, is without merit (*see People v. Monk,* 50 A.D.3d 925, 926, 854 N.Y.S.2d 784).

[6] The defendant's request for a missing witness charge was properly denied since the testimony of the uncalled witness would have been merely cumulative (*see People v. Smith,* 49 A.D.3d 904, 905–906, 855 N.Y.S.2d 572; *People v. Miller,* 282 A.D.2d 691, 723 N.Y.S.2d 684).

Contrary to the defendant's contention, he has not demonstrated that his trial counsel was ineffective under either federal or state constitutional standards (*see Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Caban,* 5 N.Y.3d 143, 800 N.Y.S.2d 70, 833 N.E.2d 213; *People v. Baldi,* 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400; *People v. Salcedo,* 150 A.D.2d 624, 541 N.Y.S.2d 494). The record establishes that defense counsel provided meaningful representation as a whole (*see People v. Benevento,* 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584; *People v. Cruz,* 127 A.D.3d 987; *People v. Anderson,* 24 A.D.3d 460, 805 N.Y.S.2d 655).

All Citations

132 A.D.3d 781, 17 N.Y.S.3d 753, 2015 N.Y. Slip Op. 07520

164 A.D.3d 625
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,
v.
Noah ROSARIO, appellant.

2015–06830
|
Submitted - March 9, 2018
|
August 8, 2018

Synopsis

Background: The Supreme Court, Kings County, Michael J. Brennan, J., designated defendant a level three sex offender. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] assessment of 15 points for history of drug or alcohol abuse was warranted, and

[2] state established, by clear and convincing evidence, that assessment of 15 points was appropriate based on defendant's refusal to participate in treatment.

Affirmed.

West Headnotes (4)

[1] Mental Health Proceedings

In assessing points when determining a defendant's appropriate risk level under the Sex Offender Registration Act (SORA), evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders, or any other reliable source, including reliable hearsay. N.Y. Correction Law § 168-n(3).

3 Cases that cite this headnote

[2] Mental Health Scores and risk levels

Assessment of 15 points for history of drug or alcohol abuse was warranted when determining sex offender's appropriate risk level under Sex Offender Registration Act (SORA), where sex offender's history of drug or alcohol abuse was established by clear and convincing evidence in the form of his presentence report and case summary completed by Board of Examiners of Sex Offenders, and sex offender was abusing drugs and alcohol at time of offense. N.Y. Correction Law § 168-n(3).

4 Cases that cite this headnote

[3] Mental Health Scores and risk levels

For purposes of determining sex offender's appropriate risk level under Sex Offender Registration Act (SORA), state established, by clear and convincing evidence, that assessment of 15 points was appropriate based on sex offender's refusal to participate in treatment, although sex offender stated that he may have refused treatment because he was afraid of another inmate; refusal-notification form signed by sex offender stated, "I feel I don't need the program," and risk assessment guidelines did not contain exceptions with respect to offender's reasons for refusing to participate in treatment. N.Y. Correction Law § 168-n(3).

4 Cases that cite this headnote

[4] Mental Health Scores and risk levels

For purposes of assessing points when determining a sex offender's appropriate risk level under the Sex Offender Registration Act (SORA), a refusal to participate in a sex offender treatment program automatically demonstrates an unwillingness to accept responsibility for the crime. N.Y. Correction Law § 168-n(3).

5 Cases that cite this headnote

Attorneys and Law Firms

****567** The Legal Aid Society, New York, N.Y. (Michael C. Taglieri of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Joyce Adolfsen, and Julian Joiris of counsel), for respondent.

WILLIAM F. MASTRO, J.P., MARK C. DILLON, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***625** Appeal by the defendant from an order of the Supreme Court, Kings County (Michael J. Brennan, J.), dated July 21, 2015, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

****568** ORDERED that the order is affirmed, without costs or disbursements.

[1] In establishing an offender's appropriate risk level under the Sex Offender Registration Act (*see* Correction Law art 6–C; hereinafter SORA), "[t]he People 'bear the burden of proving the facts supporting the determinations' by clear and convincing evidence" (*People v. Pettigrew,* 14 N.Y.3d 406, 408, 901 N.Y.S.2d 569, 927 N.E.2d 1053, quoting Correction Law § 168–n[3]; *see People v. Mingo,* 12 N.Y.3d 563, 571, 883 N.Y.S.2d 154, 910 N.E.2d 983; *People v. Pearce,* 135 A.D.3d 722, 722, 22 N.Y.S.3d 575; SORA: Risk Assessment Guidelines and Commentary at 5 [2006; hereinafter Guidelines]). "In assessing points, evidence may be derived from the defendant's admissions, the victim's statements, evaluative reports completed by the supervising probation officer, parole officer, or corrections counselor, case summaries prepared by the Board of Examiners of Sex Offenders (hereinafter the Board), or any other reliable source, including reliable hearsay" (*People v. Crandall,* 90 A.D.3d 628, 629, 934 N.Y.S.2d 446; *see* Correction Law § 168–n[3]; *People v. Mingo,* 12 N.Y.3d at 571–572, 883 N.Y.S.2d 154, 910 N.E.2d 983; Guidelines at 5).

***626** **[2]** We agree with the Supreme Court's assessment of 15 points under risk factor 11 of the risk assessment instrument for a history of drug or alcohol abuse. The defendant's history of drug or alcohol abuse was established by clear and convincing evidence in the form of his presentence report and the case summary completed by the Board (*see People v. Hernandez,* 153 A.D.3d 862, 57 N.Y.S.3d 906; *People v. Morrell,* 139 A.D.3d 835, 835–836, 31 N.Y.S.3d 561; *People v. Crandall,* 90 A.D.3d at 629, 934 N.Y.S.2d 446). Moreover, it was established by clear and convincing evidence that the defendant was abusing drugs and alcohol at the time of the offense (*see People v. Carpenter,* 60 A.D.3d 833, 874 N.Y.S.2d 382; *People v. Robinson,* 55 A.D.3d 708, 866 N.Y.S.2d 683), which, under the Guidelines, will generally justify the assessment of points in this category (*see People v. Crandall,* 90 A.D.3d at 629–630, 934 N.Y.S.2d 446).

[3] **[4]** Contrary to the defendant's contention, the People established, by clear and convincing evidence, that the assessment of 15 points under risk factor 12 was appropriate based on the defendant's refusal to participate in treatment. "[A] refusal to participate in a sex offender treatment program automatically demonstrates an unwillingness to accept responsibility for the crime" (*People v. DeCastro,* 101 A.D.3d 693, 693, 954 N.Y.S.2d 496; *see People v. Quinones,* 157 A.D.3d 834, 66 N.Y.S.3d 643; *People v. Grigg,* 112 A.D.3d 802, 977 N.Y.S.2d 84). Here, the People submitted a refusal notification form signed by the defendant, in which he stated, "I feel I don't need the program." Moreover, although the defendant contends that he may have refused treatment because he was afraid of another inmate, the " 'risk assessment guidelines do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment' " (*People v. Grigg,* 112 A.D.3d at 803, 977 N.Y.S.2d 84, quoting *People v. Thousand,* 109 A.D.3d 1149, 1150, 971 N.Y.S.2d 604; *see People v. Quinones,* 157 A.D.3d 834, 66 N.Y.S.3d 643).

The defendant's contention that he was improperly assessed 15 points for the infliction of physical injury, rather than 10 points for the use of forcible compulsion, under risk factor 1 need not be addressed, since the defendant was presumptively a level three sex offender based upon the points assessed for his drug and alcohol ****569** abuse, refusal to participate in treatment, and other factors that he does not contest.

MASTRO, J.P., DILLON, MALTESE and LASALLE, JJ., concur.

All Citations

164 A.D.3d 625, 81 N.Y.S.3d 566, 2018 N.Y. Slip Op. 05712

132 A.D.3d 748
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Alexander RUKASOV, appellant.

Oct. 14, 2015.

Synopsis

Background: Appeal was taken from order of the Supreme Court, Richmond County, Rienzi, J., designating defendant as level-two sex offender under the Sex Offender Registration Act (SORA).

[Holding:] The Supreme Court, Appellate Division, held that trial court providently exercised its discretion in determining that sex offender's presumptive risk level under the Sex Offender Registration Act (SORA) did not overassess the danger presented by offender and the risk of reoffense.

Affirmed.

West Headnotes (4)

[1] Mental Health Scores and risk levels

In determining sex offender's risk level pursuant to the Sex Offender Registration Act (SORA), court, as general rule, may depart downward from sex offender's presumptive risk level only when there exists a mitigating factor of a kind, or to a degree, that is not otherwise adequately taken into account by the SORA Guidelines. McKinney's Correction Law § 168–n(3).

5 Cases that cite this headnote

[2] Mental Health Scores and risk levels

Sex offender who seeks a downward departure from his presumptive risk level under the Sex Offender Registration Act (SORA) bears initial burden of (1) identifying, as matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, which is otherwise not adequately taken into account by the Sex Offender Registration Guidelines, and (2) establishing facts in support of existence of this mitigating factor by a preponderance of the evidence. McKinney's Correction Law § 168–n(3).

2 Cases that cite this headnote

[3] Mental Health Scores and risk levels

Sex offender's successful showing, by preponderance of evidence, of facts in support of an appropriate mitigating factor does not automatically result in downward departure from sex offender's presumptive risk level, but merely opens the door to court's exercise of its sound discretion to grant such relief under the Sex Offender Registration Act (SORA) upon further examination of all of the relevant circumstances. McKinney's Correction Law § 168–n(3).

4 Cases that cite this headnote

[4] Mental Health Scores and risk levels

Trial court providently exercised its discretion in determining that sex offender's presumptive risk level under the Sex Offender Registration Act (SORA) did not overassess the danger presented by offender and the risk of reoffense. McKinney's Correction Law § 168–n(3).

3 Cases that cite this headnote

Attorneys and Law Firms

****773** Seymour W. James, Jr., New York, N.Y. (Nancy E. Little of counsel), for appellant.

Daniel L. Master, Jr., Acting District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart and Paul M. Tarr of counsel), for respondent.

REINALDO E. RIVERA, J.P., SHERI S. ROMAN, HECTOR D. LaSALLE, and BETSY BARROS, JJ.

Opinion

***748** Appeal by the defendant from an order of the Supreme Court, Richmond County (Rienzi, J.), dated December 6, 2013, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

Correction Law § 168–n(3) requires a court making a risk level determination pursuant to the Sex Offender Registration Act (*see* Correction Law art 6–C [hereinafter SORA]) to "render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168–n[3]). Here, the Supreme Court did not adequately set forth its findings of fact and conclusions of law in its order. However, since the record is sufficient for this Court to make its own findings of fact and conclusions of law, remittal is not required (*see People v. Welch,* 126 A.D.3d 773, 773, 5 N.Y.S.3d 257; *People v. Amaya,* 121 A.D.3d 874, 874–875, 994 N.Y.S.2d 193).

[1] **[2]** **[3]** In determining a defendant's risk level pursuant to SORA, "[a] downward ****774** departure from a sex offender's presumptive risk level generally is only warranted where there exists a mitigating factor of a kind, or to a degree, that is not otherwise adequately taken into account by the SORA Guidelines" (*People v. Watson,* 95 A.D.3d 978, 979, 944 N.Y.S.2d 584; *see People v. Gillotti,* 23 N.Y.3d 841, 861, 994 N.Y.S.2d 1, 18 N.E.3d 701; *People v. Romero,* 113 A.D.3d 605, 605, 977 N.Y.S.2d 900; *People v. Fernandez,* 91 A.D.3d 737, 737, 936 N.Y.S.2d 556). "A defendant seeking a downward departure has the initial burden of '(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' " (*People v. Watson,* 95 A.D.3d at 979, 944 N.Y.S.2d 584, quoting *People v. Wyatt,* 89 A.D.3d 112, 128, 931 N.Y.S.2d 85; *see People v. Wortham,* 119 A.D.3d 666, 666, 989 N.Y.S.2d 618). "A sex offender's successful showing by a preponderance ***749** of the evidence of facts in support of an appropriate mitigating factor does not automatically result in the relief requested, but merely opens the door to the SORA court's exercise of its sound discretion upon further examination of all relevant circumstances" (*People v. Wyatt,* 89 A.D.3d at 127, 931 N.Y.S.2d 85).

[4] Under the circumstances of this case, the Supreme Court providently exercised its discretion in determining that the presumptive risk level did not overassess the danger presented by the defendant and the risk of reoffense (*see People v. Morel–Baca,* 127 A.D.3d 833, 834, 4 N.Y.S.3d 893; *People v. Nethercott,* 119 A.D.3d 918, 918, 989 N.Y.S.2d 900; *see generally People v. Shelton,* 126 A.D.3d 959, 960, 6 N.Y.S.3d 121). Accordingly, the court properly denied the defendant's application for a downward departure from his designation as a level two sex offender.

All Citations

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148 A.D.3d 831
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Aladdin SANCHEZ, also
known as "Shags," appellant.

March 8, 2017.

Synopsis

Background: Defendant was convicted in the County Court, Dutchess County, Forman, J., of manslaughter in the first degree, assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] charging manslaughter in the second degree as lesser-included offense of murder in the second degree was not warranted;

[2] justification defense remained available to defendant even though it may have been more prudent for his own safety for him to leave area when he first went to car to retrieve gun;

[3] error in not giving justification charge even though there was reasonable view of evidence to support it was not harmless; and

[4] defendant was entitled to assert justification defense notwithstanding that his co-defendant who shot victims pleaded guilty to murder in the second degree and assault in the first degree on an acting-in-concert theory.

Vacated in part.

LaSalle, J., filed opinion concurring in part and dissenting in part.

West Headnotes (14)

[1] **Criminal Law** Construction in favor of government, state, or prosecution

On appeal of a conviction, the evidence is viewed in the light most favorable to the prosecution.

[2] **Criminal Law** Province of jury or trial court

On appeal of a conviction, an appellate court accords great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor.

[3] **Criminal Law** Weight of Evidence in General

On appeal of a conviction, an appellate court has the responsibility to conduct an independent review of the weight of the evidence. McKinney's CPL § 470.15(5).

[4] **Homicide** Degree or classification of manslaughter

Jury charge of manslaughter in the second degree as lesser-included offense of murder in the second degree was not warranted, where there was no reasonable view of evidence that would support finding that defendant acted recklessly.

[5] **Assault and Battery** Self-defense

Homicide Danger and imminence thereof

Justification defense charge should have been submitted to jury with respect to crimes of manslaughter in the first degree, assault in the first degree, and assault in the second degree, even though it may have been more prudent for defendant's own safety for him to leave area when he first went to car to retrieve gun, where evidence, when viewed in light most favorable to defendant and drawing all reasonable inferences in his favor, might have

led jury to decide that it was not until point in time that defendant returned to his companions with gun that threat of deadly physical force was imminent. McKinney's Penal Law § 35.15(2)(b).

1 Case that cites this headnote

[6] **Assault and Battery** Provocation

Homicide Necessity of instruction in general

A charge on justification is warranted whenever there is evidence to support it; if on any reasonable view of the evidence, the fact finder might have decided that the defendant's actions were justified, the trial court should instruct the jury as to the defense and must when so requested.

[7] **Assault and Battery** Defenses and Mitigating Circumstances in General

Homicide Necessity of instruction in general

In determining whether a justification charge is warranted, a court must view the record in the light most favorable to the defendant.

[8] **Assault and Battery** Self-Defense

Homicide Weapons

Whether defendant charged with murder and assault intended for co-defendant to use gun he provided or knew that he would use gun did not preclude defense of justification. McKinney's Penal Law § 35.15(2)(b).

[9] **Assault and Battery** Withdrawal or retreat

Homicide Duty to Retreat or Avoid Danger

The other person's deadly force must be actually occurring or imminent before the duty to retreat arises. McKinney's Penal Law § 35.15(2)(a).

[10] **Criminal Law** Defenses

Error in not giving justification charge even though there was reasonable view of evidence to support it was not harmless, in defendant's trial on charges of manslaughter in the first degree, assault in the first degree, and assault in the second degree, since it could not be said that there was no significant probability that verdict would have been different if charge had been given. McKinney's Penal Law § 35.15(2)(a).

1 Case that cites this headnote

[11] **Constitutional Law** Rights to notice, hearing, and defense, in general

Criminal Law Necessity and scope of proof

The right to present a defense is a fundamental element of due process of law, and one of the minimum essentials of a fair trial. U.S.C.A. Const.Amend. 14.

[12] **Constitutional Law** Particular issues and applications

In defendant's trial on charges of murder in the second degree and assault in the first degree on acting-in-concert theory, finding that co-defendant's plea of guilty precluded defendant from establishing his entitlement to justification charge, regardless of whether examination of record as whole would support such charge, would impermissibly infringe upon defendant's right to due process. U.S.C.A. Const.Amend. 14; McKinney's Penal Law §§ 35.15(2)(a, b).

1 Case that cites this headnote

[13] **Assault and Battery** Danger and apprehension of danger

Homicide Excuse or justification in general

Defendant was entitled to defense of justification, in his trial on charges of murder in the second degree and assault in the first degree on acting-in-concert theory, notwithstanding co-defendant's plea of guilty, where there was reasonable view of evidence that co-defendant's use of deadly and ordinary physical force was

justified to protect himself and his friends; jury could have concluded that co-defendant fired gun because he was faced with threatening crowd and feared that deadly physical force was going to be used against himself and his friends. McKinney's Penal Law §§ 35.15(2)(a, b).

[14] Criminal Law Defenses

Failure to instruct jury on the justification defense did not affect defendant's conviction on charge of criminal possession of a weapon. McKinney's Penal Law § 35.15(2)(b).

Attorneys and Law Firms

****85** Gary Greenwald & Partners, P.C., Chester, NY (David A. Brodsky of counsel), for appellant.

William V. Grady, District Attorney, Poughkeepsie, NY (Kirsten A. Rappleyea of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., JEFFREY A. COHEN, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

Opinion

***831** Appeal by the defendant from a judgment of the County Court, Dutchess County (Forman, J.), rendered August 5, 2014, convicting him of manslaughter in the first degree, assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, on the law, by vacating the convictions of manslaughter in the first degree, assault in the first degree, and assault in the second degree, and the sentences imposed thereon, and dismissing the count in the indictment charging murder in the second degree, without prejudice to the People to re-present any appropriate charges to another grand jury (*see People v. Beslanovics,* 57 N.Y.2d 726, 454 N.Y.S.2d 976, 440 N.E.2d 1322); as so modified, the judgment is affirmed, and a new trial is ordered on the counts of the indictment charging the defendant with assault in the first degree and assault in the second degree.

The defendant was convicted of manslaughter in the first degree for the June 15, 2013, shooting death of Ines Amigon. He was also convicted of assault in the first degree and assault ***832** in the second degree for the shootings of Rolando Baldemar and Sandy Vivaldo, respectively, as well as criminal possession of a weapon in the second degree.

[1] [2] [3] Viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson,* 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo,* 2 N.Y.3d 383, 779 N.Y.S.2d 399, 811 N.E.2d 1053). Upon reviewing the record here, we are satisfied that the verdict was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[4] The County Court properly denied the defendant's request to charge manslaughter in the second degree as a lesser-included offense of murder in the second degree since, viewing the evidence in the light most favorable to the defendant, ****86** there was no reasonable view of the evidence that would support a finding that the defendant acted recklessly (*see People v. Dickerson,* 67 A.D.3d 700, 889 N.Y.S.2d 199).

The defendant's contention that the County Court's charge on accomplice corroboration was improper is without merit (*see People v. Arena,* 69 A.D.3d 867, 894 N.Y.S.2d 467).

[5] However, we agree with the defendant's contention that the County Court should have submitted a justification defense charge to the jury with respect to the crimes of manslaughter in the first degree, assault in the first degree, and assault in the second degree.

[6] [7] "[A] charge on justification is warranted whenever there is evidence to support it" (*People v. McManus,* 67 N.Y.2d 541, 549, 505 N.Y.S.2d 43, 496 N.E.2d 202). Indeed, "if on any reasonable view of the evidence, the fact finder might have decided that the defendant's actions were justified" (*People v. Padgett,* 60 N.Y.2d 142, 145, 468 N.Y.S.2d 854, 456 N.E.2d 795), "the trial court should instruct the jury as to the defense and must when so requested" (*id.* at 144–145, 468 N.Y.S.2d 854, 456 N.E.2d 795). In determining whether a justification charge is warranted, a court must

view the record in the light most favorable to the defendant (*see People v. Petty,* 7 N.Y.3d 277, 284, 819 N.Y.S.2d 684, 852 N.E.2d 1155; *People v. Singh,* 139 A.D.3d 761, 762, 31 N.Y.S.3d 168). Contrary to the conclusion reached by our dissenting colleague and the County Court, we find that there was a reasonable view of the evidence to support the defendant's request for a justification charge pursuant to Penal Law § 35.15(2)(b).

***833** In February of 2014, prior to trial, codefendant Armando Martinez–Mendoza, also known as "Balu," who fired the shots that killed Amigon and wounded the other victims, pleaded guilty to murder in the second degree and two counts of assault in the first degree, and waived his right to appeal. He signed an agreement requiring him to testify against the defendant at the defendant's trial. The agreement provided that he must testify truthfully.

When viewed in the light most favorable to the defendant, the testimony presented at trial reveals the following. On March 31, 2013, the defendant was at a bar in Newburgh, along with Martinez–Mendoza, when they became involved in a fight with others in the bar. The defendant was stabbed in the abdomen. The defendant was then airlifted to Westchester Medical Center, where he was hospitalized for approximately 10 days. It was the defendant's understanding that the "word on the street" after that attack upon him was that the attackers never "finished the job."

Approximately six weeks later, on the evening of June 15, 2013, the defendant, together with a group of companions comprising two men and two women, went to the El Molino restaurant and bar in Poughkeepsie. At trial, the defendant testified that while at El Molino, he went to the bathroom, where he saw an individual called Casper snorting cocaine. Another person, Melvin Hernandez, was also there. When Casper asked the defendant if he wanted to buy drugs, the defendant declined. Casper and Melvin Hernandez started to question the defendant about tattoos on the defendant's arm. Without warning, Casper punched the defendant in the face, and he fell to the ground. A third person, Roman Berra, then entered the bathroom, and the three men started kicking the defendant while commenting on his tattoos, calling him "pussy" and "mother fucker," and saying "East Side" repeatedly. The defendant was afraid that ****87** he would be stabbed again and thought that his stomach wound from the prior attack had been opened. The defendant testified that the bar "bouncer," Jermaine Knox, who was also in the bathroom, did nothing to stop the attack, merely blocked the door, and "just stood there." Knox testified that when he went to the bathroom, he saw the altercation between the defendant and his attackers. The defendant claimed that Casper and his companions left the bathroom laughing, and told the defendant that they would kill him if he ever came back.

According to the defendant, after he was assaulted, he spoke to his male companions, Jonathan Ramirez and Martinez– ***834** Mendoza, who was drunk. The defendant had a purple eye and had a sharp pain in the location of his prior stab wound. When one of his female companions asked him if he was okay, the defendant answered that he had to leave because he was getting dizzy. All of them then decided to leave El Molino, and the defendant told one of his female companions to go open the car because he wanted to leave "real quick" so that he could get medical attention. As they were leaving El Molino, Martinez–Mendoza asked the defendant who had attacked him, and the defendant pointed to Casper. The defendant testified that he and his companions "just wanted to get out of there," and they left on their own. The defendant testified that many people who were in the bar, approximately 10 to 15 of them, followed them outside while threatening them. They told the defendant and his friends not to come back and also threatened to kill the defendant, Ramirez, and Martinez–Mendoza. Outside El Molino, the defendant saw the people who had attacked him earlier in the bathroom, together with 10 to 15 other people. The defendant claimed that they seemed to be "bragging" about what they had done to him. According to Martinez–Mendoza, someone in the crowd said "you're gonna pay for it" in Spanish. Knox testified that Casper may have continued to be aggressive toward the defendant and his companions after the defendant's group exited the club. The defendant, along with his two female companions, then started walking toward the car while Ramirez and Martinez–Mendoza stayed behind, trying to keep the people outside the bar away from them. The people were calling the defendant "pussy" and kept repeating "East Side, East Side." They were also making threats. Martinez–Mendoza told the defendant to go to the car to get a gun from Ramirez's backpack, because there was going to be trouble. Indeed, the defendant's female companions, Tania Raya and Milagros Huerta, each testified that while leaving the club, they were both fearful of being injured. On his way to the car, the defendant turned around and saw Ramirez break a beer bottle in an attempt to keep some people away. The defendant quickly walked to the car, where he grabbed the gun from the backpack in the car. He intended for Martinez–Mendoza to use it to scare the people away, and did not believe Martinez–

Mendoza would fire the gun. The defendant believed he could not leave without his friends. The defendant testified that the men outside the bar were making threats and that if he did not have "a weapon they would probably hurt us." He thought that his life and the lives of his friends were in danger. Although there was also a knife in the backpack, he did not take it because he did not think that it would be sufficient to ***835** keep the people away. When the defendant returned with the gun to his friends, he observed one of the men who had attacked him in the bathroom reaching into the waist of his pants to obtain what the defendant ****88** believed to be a weapon, something he described as being shiny. Amigon, the victim, said something to Casper and grabbed Ramirez's arm, at which time Martinez–Mendoza grabbed the gun from the defendant's hand. Martinez–Mendoza shot in Casper's direction, but Amigon was in front of Casper, in the line of fire, and was shot.

Testifying on behalf of the People as required by his plea agreement, Martinez–Mendoza maintained that when they were outside El Molino, the defendant handed him the gun and then pointed out the man who had hurt him. He testified that he fired the gun because he was angry about "what they did" to the defendant and because he was drunk, but admitted, on direct examination, that at the time of his arrest, he told the investigating police officers that he shot the victim and the others because he felt threatened and was afraid. At trial, he testified that what he told the police had been a lie. Martinez–Mendoza also testified that at the time of his arrest, he had told the police that there was a crowd of people coming after them out of the bar, as many as 20; at trial, he testified that this also was a lie. On cross-examination, Martinez–Mendoza testified that when he spoke to his mother from the police department following his arrest, he told her the same story about the threatening crowd that he told the police. Upon cross-examination, he testified that he lied over and over again to the police about the night of the shooting, but contended that he was being truthful at trial. Martinez–Mendoza did, however, admit during cross-examination that the reason he had the gun and was aiming it at the people outside of El Molino was to protect his friends and to keep the people away from them, that he was fearful for the safety of himself and his friends while they were leaving the club, and that he wanted to protect them.

[8] At the outset, we note that whether the defendant intended for Martinez–Mendoza to use the gun he provided or knew that he would use the gun does not preclude a defense of justification (*see People v. Magliato,* 68 N.Y.2d 24, 28–29, 505 N.Y.S.2d 836, 496 N.E.2d 856; *People v. Giamanco,* 188 A.D.2d 547, 547, 591 N.Y.S.2d 449).

Our dissenting colleague's conclusion that there was no reasonable view of the evidence that would have permitted the jury to find that the defendant acted with justification seems to diminish the import of the well-settled principle that, in determining whether the evidence warrants a justification ***836** charge, the court must assess the record in the light most favorable to the defendant (*see People v. Petty,* 7 N.Y.3d at 284, 819 N.Y.S.2d 684, 852 N.E.2d 1155; *People v. Magliato,* 68 N.Y.2d at 29, 505 N.Y.S.2d 836, 496 N.E.2d 856; *People v. McManus,* 67 N.Y.2d at 549, 505 N.Y.S.2d 43, 496 N.E.2d 202; *People v. Padgett,* 60 N.Y.2d at 144, 468 N.Y.S.2d 854, 456 N.E.2d 795; *People v. Watts,* 57 N.Y.2d 299, 301, 456 N.Y.S.2d 677, 442 N.E.2d 1188; *People v. Irving,* 130 A.D.3d 844, 845, 15 N.Y.S.3d 62). We agree that here, some evidence contradicted the defendant's testimony. However, the record also included evidence, including testimony from Martinez–Mendoza, that, when viewed in the light most favorable to the defendant and drawing all reasonable permissible inferences in his favor, indicated the propriety of charging the justification defense requested by the defendant. Indeed, a justification defense was found to be appropriate in cases where part of a defendant's testimony was inconsistent with a justification defense (*see People v. Padgett,* 60 N.Y.2d at 144–145, 468 N.Y.S.2d 854, 456 N.E.2d 795), where a defendant's testimony was in conflict ****89** with that of other witnesses (*see People v. Huntley,* 87 A.D.2d 488, 452 N.Y.S.2d 952, *affd.* 59 N.Y.2d 868, 465 N.Y.S.2d 929, 452 N.E.2d 1257; *People v. Locicero,* 87 A.D.3d 1163, 1164, 930 N.Y.S.2d 58), and even where there was "strong" evidence to negate a defendant's testimony relating to justification (*People v. Curry,* 85 A.D.3d 1209, 1212, 924 N.Y.S.2d 217).

[9] Furthermore, we disagree with the conclusion drawn by our dissenting colleague that the defendant could not have reasonably believed that there was no ability to safely retreat, as demonstrated by the fact that the defendant, along with his female companions, were able to get to the car without incident a few minutes earlier. The use of lethal defensive force is limited to circumstances when the defender cannot "with complete personal safety, to oneself and others," "avoid the necessity of so doing by retreating" (Penal Law § 35.15[2][a]; *see People v. Aiken,* 4 N.Y.3d 324, 795 N.Y.S.2d 158, 828 N.E.2d 74). However, the duty to retreat does not arise until the defendant forms a reasonable belief that another person "is using or about to use deadly physical force" (Penal Law

§ 35.15[2][a]). More specifically, the other person's deadly force must be actually occurring or imminent before the duty to retreat arises (*see Matter of Y.K.,* 87 N.Y.2d 430, 434, 639 N.Y.S.2d 1001, 663 N.E.2d 313). Here, the evidence, when viewed in the light most favorable to the defendant and drawing all reasonable inferences in his favor, might lead a jury to decide that it was not until the point in time that the defendant returned to his companions with the gun that the threat of deadly physical force was imminent. Thus, the justification defense remained available to this defendant, even though it may have been more prudent for his own safety for him to leave the area of El Molino when he first went to the car to retrieve the gun (*see People v. Magliato,* 68 N.Y.2d at 30, 505 N.Y.S.2d 836, 496 N.E.2d 856; *People v. McManus,* 67 N.Y.2d at 549, 505 N.Y.S.2d 43, 496 N.E.2d 202).

[10] ***837** Because there was a reasonable view of the evidence to support a justification charge, the charge should have been given (*see People v. Petty,* 7 N.Y.3d at 284, 819 N.Y.S.2d 684, 852 N.E.2d 1155; *People v. McManus,* 67 N.Y.2d at 549, 505 N.Y.S.2d 43, 496 N.E.2d 202; *People v. Fermin,* 36 A.D.3d 934, 935, 828 N.Y.S.2d 546). Further, the error was not harmless since it cannot be said that there was no significant probability that the verdict would have been different if the charge had been given (*see People v. Irving,* 130 A.D.3d at 845, 15 N.Y.S.3d 62).

[11] **[12]** **[13]** Here, the evidence shows that the defendant, indicted on charges of murder in the second degree and assault in the first degree on an acting-in-concert theory, was entitled to assert a justification defense notwithstanding that his codefendant who shot the victims pleaded guilty to those offenses. The right to present a defense is "a fundamental element of due process of law" (*Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019), and one of the "minimum essentials of a fair trial" (*Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297). As an initial matter, to find that Martinez–Mendoza's plea of guilty precludes the defendant from establishing his entitlement to a justification charge, regardless of whether an examination of the record as a whole would support such a charge, would impermissibly infringe upon the defendant's right to due process. Second, under the evidence viewed in the light most favorable to the defendant, there is a reasonable view of the evidence that, notwithstanding the plea of guilty, ****90** Martinez–Mendoza's use of deadly and ordinary physical force was justified to protect himself and his friends. In this case, we find it would not be unreasonable for the jury to reject Martinez–Mendoza's trial testimony as unworthy of belief, as the jury was aware that testifying against the defendant was a condition of Martinez–Mendoza's plea agreement. Viewing the record as a whole, upon such a determination, it also would not be unreasonable for the jury to conclude that Martinez–Mendoza fired the gun because he was faced with a threatening crowd and feared that deadly physical force was going to be used against himself and his friends. Since the defendant was charged with the shared intent of Martinez–Mendoza, he too was entitled to the defense of justification (*see People v. Fermin,* 36 A.D.3d at 934, 828 N.Y.S.2d 546; *People v. Gant,* 282 A.D.2d 298, 299–300, 725 N.Y.S.2d 299).

[14] We note, however, that the failure to instruct the jury on the justification defense does not affect the conviction of criminal possession of a weapon (*see People v. Pons,* 68 N.Y.2d 264, 508 N.Y.S.2d 403, 501 N.E.2d 11; *People v. Tasheem,* 298 A.D.2d 411, 412, 751 N.Y.S.2d 250).

Accordingly, we modify the judgment by vacating the convictions of manslaughter in the first degree, assault in the first ***838** degree, and assault in the second degree, and the sentences imposed thereon, and by dismissing the count in the indictment charging murder in the second degree. As the defendant was convicted of manslaughter in the first degree, charged as a lesser-included offense of murder in the second degree, we dismiss the count of the indictment charging murder in the second degree with leave to the People to re-present any appropriate charges to another grand jury (*see People v. Gonzalez,* 61 N.Y.2d 633, 471 N.Y.S.2d 847, 459 N.E.2d 1285; *People v. Beslanovics,* 57 N.Y.2d 726, 454 N.Y.S.2d 976, 440 N.E.2d 1322; *People v. Andujar,* 105 A.D.3d 756, 963 N.Y.S.2d 667; *People v. Kim,* 83 A.D.3d 866, 921 N.Y.S.2d 291; *People v. Lauderdale,* 295 A.D.2d 539, 746 N.Y.S.2d 163).

In light of our determination, we need not reach the defendant's remaining contentions.

LEVENTHAL, J.P., COHEN and DUFFY, JJ., concur.

LASALLE, J., concurs in part and dissents in part, and votes to affirm the judgment, with the following memorandum.

I agree with my colleagues in the majority that the evidence was legally sufficient to prove the defendant's guilt of the charges of manslaughter in the first degree, assault in the first degree, assault in the second degree, and criminal possession

of a weapon in the second degree. I also agree with my colleagues in the majority that the County Court properly denied the defendant's request to charge manslaughter in the second degree as a lesser-included offense of murder in the second degree. However, I respectfully dissent, and vote to affirm the judgment, because I conclude that the court properly denied the defendant's request for a justification charge. In my opinion, viewing the evidence in the light most favorable to the defendant, there was no reasonable view of the evidence which would have permitted the jury to find that the defendant's conduct was justified. Accordingly, I vote to affirm the judgment of conviction.

I. *The People's Case*

In the evening of June 15, 2013, the defendant and four of his friends went to El Molino, a restaurant and bar in Poughkeepsie. The four friends were the codefendant Armando Martinez–Mendoza, Jonathon ****91** Ramirez, Milagros Huerta, and Tania Raya. Raya drove all of them in her car, and the men brought two backpacks with them.

While the defendant and his friends were in the bar, Jermaine Knox, who was working security, went into the bathroom and saw the defendant in an altercation with an individual called Casper. Upon exiting the bathroom, the defendant, who appeared to be upset and in pain, spoke to Martinez–Mendoza and Ramirez, both of whom appeared angry.

***839** When the defendant and his friends were leaving El Molino, another bouncer heard Martinez–Mendoza say "Fuck El Molino" and "we're going to get you all." Raya heard the defendant say to either Martinez–Mendoza or Ramirez, " I'll show you who it is." The defendant told Raya to go open the car, and Huerta went with her. Raya, Huerta, the bouncer, and Roman Berra, the owner of El Molino, all testified that while the defendant and his friends were exiting the bar, no one was threatening them.

While outside El Molino, Ramirez was observed waving a beer bottle at individuals. Meanwhile, Raya, Huerta, and the defendant arrived at the car. The defendant opened the back door, reached into the back seat for something, and then returned to the front of El Molino where Martinez–Mendoza and Ramirez had remained. There were approximately five or six other individuals outside. Huerta overheard Martinez–Mendoza and Ramirez ask the defendant "who did it." The defendant then whispered something in Martinez–Mendoza's ear and handed him a gun. Martinez–Mendoza began to fire the gun in the direction of the people who had gathered outside, and struck an individual who then ran inside the bar. Martinez–Mendoza then went inside the bar and continued firing the gun, striking two more individuals.

Raya drove her vehicle to the front of El Molino, and the defendant, Martinez–Mendoza, and Ramirez got inside. She testified that she did not hear anyone making threats while she was driving to the front of El Molino. Shortly after leaving El Molino, Raya's vehicle was pulled over by a police officer. The police officer observed a silver-colored handgun between the center console and the front passenger seat, and also observed one of the backpacks, which contained a kitchen knife.

Martinez–Mendoza, who signed an agreement requiring him to testify truthfully at the defendant's trial, was called as a People's witness. He testified that while at the bar, he went into the bathroom to find the defendant getting up from the floor with a swollen face. Martinez–Mendoza later learned that the defendant had been in a dispute with someone over the price of drugs. Martinez–Mendoza was angry and asked the defendant who had hit him. As they returned to the bar, the defendant told Martinez–Mendoza that he would show him who had attacked him. The two of them, together with Ramirez, Raya, and Huerta, then proceeded to leave, and as they were leaving, Ramirez told the defendant to go get the gun. The defendant had previously bought the gun, but Martinez–Mendoza denied that the defendant ever gave it to him before the shooting. ***840** No one was yelling at or threatening them, throwing things at them, or rushing toward them as they were leaving.

Martinez–Mendoza testified that he started yelling and screaming to get people to come outside. When four or five people came outside, he asked them who hit the defendant, because he wanted to "go after the guy." At the time, Ramirez was waving a broken beer bottle. The defendant came and stood behind him, ****92** handed him a gun, and then pointed to a man and said "that's him." Martinez–Mendoza testified that before the defendant handed him the gun, no one was threatening them or trying to come after them. Martinez–Mendoza fired in the direction the defendant had indicated, and hit a man who was not armed and was standing approximately four or five feet away from him. He then walked toward the bar and continued shooting, hitting two other people. Martinez–Mendoza testified that he fired the gun because he was drunk and angry that the defendant had been assaulted. When they got in the car, he gave the

gun to the defendant. Shortly after that, the police pulled them over. Martinez–Mendoza admitted that he initially lied to police when he said that he shot the victims because he felt threatened and afraid.

II. *The Defendant's Case*

The defendant testified that on March 31, 2013, less than three months prior to the incident that occurred at El Molino, he was the victim of a stabbing that occurred outside a club in Newburgh. As a result of that stabbing, the defendant purchased a gun from a man in Newburgh. Although the defendant later gave the gun to Martinez–Mendoza, the gun was kept in the defendant's house because Martinez–Mendoza did not want his parents to find it.

On June 15, 2013, when the defendant and his friends were going to El Molino, Martinez–Mendoza and Ramirez both brought backpacks, but he did not know which backpack the gun was in. While at the bar, the defendant went into the bathroom and saw Casper snorting cocaine. Casper asked the defendant if he wanted to buy drugs, and the defendant declined. Casper then punched him in the face, and other individuals began kicking him.

After the defendant was assaulted, he spoke to Ramirez and Martinez–Mendoza, who was drunk. The defendant was in pain and wanted to leave the bar to get medical attention. The defendant asked Raya to go open the car because he wanted to leave quickly. While they were leaving the bar, Martinez–Mendoza asked the defendant who had attacked him, and the defendant pointed to Casper. The defendant testified that he ***841** and his friends just wanted to leave, and they left on their own.

As they were leaving, approximately 15 people followed and threatened them. They told the defendant and his friends not to come back, and threatened to kill Ramirez and Martinez–Mendoza. Martinez–Mendoza told the defendant to get the gun from Ramirez's backpack. The defendant saw Ramirez break a beer bottle in what he believed was an attempt to keep people away. The defendant testified that he, Huerta, and Raya walked toward the car, and Ramirez and Martinez–Mendoza stayed behind, trying to keep the people outside the bar, who were continuing to make threats, away from them. The defendant testified that he walked quickly to the car and retrieved the gun. He believed that his life and his friends' lives were in danger. Although there was also a knife in the backpack, the defendant did not take it, because he believed it would not be sufficient to keep the people away. The defendant testified that he did not know whether the gun was loaded, and he did not believe that Martinez–Mendoza would shoot anyone; rather, he thought that he would only use the gun to scare people away.

The defendant testified that the people outside El Molino had lots of bottles and probably had knives. He further testified that he saw a "shiny thing," but was unsure whether it was a knife. He also ****93** testified that he saw a man reach for something at his waist, although he admitted that he never told anyone that before the trial. The defendant testified that he believed that if he had not retrieved the gun, he and his friends would have been shot and killed.

When the defendant returned to his friends with the gun, Martinez–Mendoza began shooting in Casper's direction, but struck another individual. Shortly thereafter, the defendant and Martinez–Mendoza ran to the car, but then Martinez–Mendoza went back and continued shooting.

III. *Cross–Examination of the Defendant*

On cross-examination, the defendant conceded various points. The defendant admitted that while he was in the bar, he pointed out to Martinez–Mendoza and Ramirez the individual who had assaulted him, and that he did not call the police after he was assaulted. He also admitted that when he and his friends were leaving El Molino, no one prevented them from leaving.

He conceded, upon being shown a videotape recording of the parking area outside El Molino, that when he went to the car to get the gun, and after he retrieved it, he was not running. Rather, the defendant described it as "speed walking." He also ***842** admitted that there were no individuals blocking the way to the vehicle. Notwithstanding this, he never told Martinez–Mendoza or Ramirez to get in the car so they could leave. While at the car, he didn't call the police from his cell phone. He also did not tell the girls to call the police. He admitted that at this point he was safe and he could have left in the car.

The defendant reiterated during cross-examination that even though there was also a knife in the car, he took the gun because he did not believe the knife would be as effective at scaring the people away. However, he admitted that once he retrieved the gun, he never held the gun up or displayed it in any way, and he never yelled at the crowd to back

off. Rather, he gave the gun to Martinez–Mendoza even though he knew he was drunk and angry; he also claimed, inconsistently, that Martinez–Mendoza grabbed the gun from him. He admitted that the gun would have been safer in his hands. He admitted that, even though there were other individuals standing outside threatening them, Martinez–Mendoza fired the gun in Casper's direction, and hit another individual who was standing in front of Casper. The defendant also admitted that he did not tell the police, when they pulled over Raya's car, that there was a gun in the car or that he saw an individual reach into his waistband while outside the bar.

IV. *Justification*

At trial, the defendant requested a justification charge. The County Court denied the defendant's request, finding that there was no reasonable view of the evidence that supported a justification defense. On appeal, the defendant argues that the court erred in denying his request for a justification charge. I disagree with my colleagues in the majority, and would hold that there was no reasonable view of the evidence which would have permitted the jury to find that the defendant's conduct was justified.

Penal Law § 35.15 provides, in pertinent part: "A person may not use deadly physical force upon another person ... unless: (a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and ****94** others he or she may avoid the necessity of so doing by retreating" (Penal Law § 35.15[2][a]). A person is justified in using deadly physical force against another if he or she reasonably believes such to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force by such other ***843** person (*see People v. Heron,* 130 A.D.3d 754, 755, 13 N.Y.S.3d 243; *People v. Ojar,* 38 A.D.3d 684, 832 N.Y.S.2d 250).

"[J]ustification is comprised of both subjective and objective elements. The subjective element is concerned with whether the defendant believed that the use of deadly force was necessary; while under the objective prong, the jury must consider whether a reasonable person in the defendant's circumstances would have believed that deadly force was required" (*People v. Umali,* 10 N.Y.3d 417, 425, 859 N.Y.S.2d 104, 888 N.E.2d 1046). When a defense of justification is raised, "the People must demonstrate beyond a reasonable doubt that the defendant did not believe deadly force was necessary or that a reasonable person in the same situation would not have perceived that deadly force was necessary" (*id.* at 425, 859 N.Y.S.2d 104, 888 N.E.2d 1046).

A charge on the defense of justification is required when requested if, viewing the evidence in the light most favorable to the defendant, there is a reasonable view of the evidence permitting the jury to find that the defendant's conduct was justified (*see People v. Irving,* 130 A.D.3d 844, 15 N.Y.S.3d 62; *People v. Heron,* 130 A.D.3d at 755, 13 N.Y.S.3d 243; *People v. Nunez,* 120 A.D.3d 714, 991 N.Y.S.2d 121; *People v. Ramirez,* 118 A.D.3d 1108, 1112, 987 N.Y.S.2d 496; *People v. Zayas,* 88 A.D.3d 918, 920, 931 N.Y.S.2d 109; *People v. Fermin,* 36 A.D.3d 934, 935, 828 N.Y.S.2d 546). To be entitled to a justification charge relating to the use of deadly physical force, the record must include evidence that the defendant reasonably believed the victim was using or was about to use deadly physical force and that he or she could not safely retreat (*see People v. Ramirez,* 118 A.D.3d at 1112, 987 N.Y.S.2d 496; *People v. Fermin,* 36 A.D.3d at 935, 828 N.Y.S.2d 546).

The NY Criminal Jury Instructions provide that the determination of whether a person reasonably believes deadly physical force to be necessary to defend himself/herself or someone else from what he or she reasonably believes to be the use or imminent use of deadly physical force by another individual, requires the application of a two-part test (*see* CJI2d[NY] Penal Law § 35.15). "First, the defendant must have actually believed that [the individual] was using or was about to use deadly physical force against him/her [or someone else], and that the defendant's own use of deadly physical force was necessary to defend himself/herself [or someone else] from it; and Second, a 'reasonable person' in the defendant's position knowing what the defendant knew and being in the same circumstances, would have had those same beliefs" (*id.*).

"Thus, under our law of justification, it is not sufficient that the defendant honestly believed in his [or her] own mind that he [or she] was faced with defending himself/herself [or ***844** someone else] against the use or imminent use of deadly physical force. An honest belief, no matter how genuine or sincere, may yet be unreasonable" (*id.*).

A "defendant would not be justified if he/she knew that he/she could with complete safety to himself/herself and

others avoid the necessity of using deadly physical force by retreating" (CJI2d[NY] Penal Law § 35.15).

****95** V. *Analysis*

Notably, much of the defendant's testimony that he believed that the people outside El Molino were armed and that he feared for his and his friends' lives was contradicted by the testimony of all of the People's witnesses. Viewing the evidence in the light most favorable to the defendant, in my view, there was no reasonable view of the evidence that would have permitted the jury to find that the defendant's conduct was justified.

The defendant testified that after he was attacked, he was in pain and just wanted to leave quickly and seek medical attention. He further testified that he and his friends were able to leave the bar and go outside without incident. However, he testified that as he and his friends were leaving, approximately 15 people followed them, told the defendant and his friends not to come back, and threatened to kill Ramirez and Martinez–Mendoza. However, it is undisputed that none of these individuals stopped or interfered with the defendant or any of his friends from leaving the bar.

The defendant testified that these people had bottles with them; however, there was no evidence that they broke the bottles or were attempting to use them as weapons. Indeed, the only individual who broke a bottle in an attempt to utilize it as a weapon was the defendant's friend Ramirez. Although the defendant stated that the people "probably had knives," and that he saw a "shiny thing," he did not testify that he saw any of the individuals actually possess or display a knife or any other weapon. The testimony that he saw one of the individuals reach for something at his waist was revealed by the defendant for the first time at trial, and nonetheless was not evidence that the individual was reaching for a weapon.

The defendant conceded that none of these individuals attempted to stop him and his friends from leaving, and none of them was impeding their ability to get to the car. Indeed, Raya, Huerta, and the defendant were able, with complete safety, to get back to the car without anyone impeding or harming them in any way, and there was no evidence that Martinez–Mendoza and Ramirez were prevented from getting to the car.

Once the car was unlocked, rather than leaving or attempting ***845** to get Martinez–Mendoza and Ramirez into the car, the defendant retrieved the gun, and returned to the area where Martinez–Mendoza and Ramirez had remained, essentially leaving the safety of the vehicle and returning to the area where he believed deadly physical force was imminent.

In my view, the defendant's testimony did not establish that, at the time he retrieved the gun, the defendant reasonably believed that any of the people outside El Molino was using or about to use deadly physical force on himself or his friends, and that he and his friends could not safely retreat.

The defendant conceded that once he and his friends were outside, he never told his friends that they should leave. None of the individuals was physically blocking their path to the car. Yet, when Martinez–Mendoza told him to get the gun, he did not tell his friends that they should leave or that he wanted to leave. The defendant could not have reasonably believed that any of the individuals was about to use deadly physical force, because he did not see any of them possessing any weapons, other than bottles. However, even assuming that the defendant could have reasonably believed that the use of deadly physical force was imminent, he could not have reasonably believed that there was no ability to safely retreat. This ****96** was demonstrated by the fact that the defendant, Huerta, and Raya were indeed able to get to the car without incident, and the defendant conceded that he was safe at that point and could have left.

The defendant conceded that the individuals outside El Molino did not stop them from going to the car, and there was no testimony by the defendant that these individuals did anything to prevent Martinez–Mendoza or Ramirez from going to the car. There was no testimony that the individuals, aside from making threats, did anything to prevent the defendant or any of his friends from leaving. Viewing the evidence in the light most favorable to the defendant, there was no reason to believe that the defendant and his friends could not have retreated in complete safety. Rather than attempt to get Martinez–Mendoza or Ramirez to leave, the defendant went to the car, retrieved the gun, and walked back to the very location where he claimed he and his friend were being threatened.

I agree with the general proposition stated by the majority that where a principal is entitled to a justification charge, a codefendant charged with acting-in-concert with the principal is also entitled to a justification charge (*see People v. Fermin,* 36 A.D.3d 933, 827 N.Y.S.2d 874; *People v. Gant,* 282 A.D.2d 298, 725 N.Y.S.2d 299). Here, however, Martinez–

Mendoza admitted at trial that he ***846** lied initially when he told the police and his mother that he shot the gun because he felt threatened and afraid, and actually shot the victim and others because he was drunk and angry. Additionally, Martinez–Mendoza's guilt of intentional murder was established by his plea of guilty.

In my view, a reasonable person in the defendant's position, knowing what the defendant knew and in the same circumstances, would not have believed that the use of deadly physical force was imminent or that he and his friends could not have retreated with complete safety. In my view, there is no reasonable view of the evidence which would have permitted the jury to find that this conduct by the defendant was justified (*see People v. Watts,* 57 N.Y.2d 299, 456 N.Y.S.2d 677, 442 N.E.2d 1188; *People v. Heron,* 130 A.D.3d 754, 13 N.Y.S.3d 243; *People v. Casseus,* 120 A.D.3d 828, 991 N.Y.S.2d 147; *People v. Small,* 80 A.D.3d 786, 915 N.Y.S.2d 501; *People v. Dickerson,* 67 A.D.3d 700, 889 N.Y.S.2d 199; *People v. Simon,* 56 A.D.3d 804, 868 N.Y.S.2d 151; *People v. Ojar,* 38 A.D.3d 684, 832 N.Y.S.2d 250; *People v. Snell,* 256 A.D.2d 480, 682 N.Y.S.2d 80).

Accordingly, because I conclude that the County Court properly denied the defendant's request for a justification charge, I vote to affirm the judgment of conviction.

All Citations

148 A.D.3d 831, 50 N.Y.S.3d 83, 2017 N.Y. Slip Op. 01718

187 A.D.3d 1219
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Clifford SHANE, appellant.

2016–05702
|
(Ind. No. 2004/14)
|
Argued—September 17, 2020
|
October 28, 2020

Attorneys and Law Firms

Paul Skip Laisure, New York, N.Y. (Rebecca J. Gannon of counsel), for appellant.

Melinda Katz, District Attorney, Kew Gardens, N.Y. (Johnnette Traill, William H. Branigan, and Katherine A. Triffon of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., HECTOR D. LASALLE, VALERIE BRATHWAITE NELSON, ANGELA G. IANNACCI, JJ.

***228** DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Richard L. Buchter, J.), rendered May 17, 2016, convicting him of rape in the first degree, criminal sexual act in the first degree (four counts), sexual abuse in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Daniel Lewis, J.), of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

ORDERED that the judgment is affirmed.

The defendant was convicted, after a jury trial, of rape in the first degree, criminal sexual act in the first degree (four counts), sexual abuse in the first degree, and endangering the welfare of a child in relation to conduct perpetrated by the defendant against his stepdaughter.

Contrary to the defendant's contention, the People met their burden of establishing that the defendant knowingly and voluntarily waived his *Miranda* rights (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) before making statements to law enforcement officials (*see Berghuis v. Thompkins,* 560 U.S. 370, 382–383, 130 S.Ct. 2250, 176 L.Ed.2d 1098; *People v. Thomas,* 22 N.Y.3d 629, 641, 985 N.Y.S.2d 193, 8 N.E.3d 308). At the suppression hearing, the testimony of a detective established that the detective gave the defendant written *Miranda* warnings and that the defendant read the written warnings, wrote "yes" and signed his name next to each of the warnings, and indicated that he understood his rights and was willing to speak with the detective. This evidence was sufficient to establish a knowing, intelligent, and voluntary waiver (*see People v. Sirno,* 76 N.Y.2d 967, 968, 563 N.Y.S.2d 730, 565 N.E.2d 479; *People v. Fuentes,* 185 A.D.3d 960, 961, 128 N.Y.S.3d 221; *People v. Peraza,* 288 A.D.2d 689, 690, 733 N.Y.S.2d 510). Accordingly, we agree with the Supreme Court's determination denying that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

The Supreme Court providently exercised its discretion in permitting the testimony of the People's expert witness on the subject of child sexual abuse accommodation syndrome. The expert's testimony was properly admitted to explain the issue of delayed disclosure, to counter the defense claim that the complainant fabricated the sexual abuse allegations, and to explain why the complainant might not recall with specificity when certain of the alleged incidents occurred (*see People v. Nicholson*, 26 N.Y.3d 813, 828–829, 28 N.Y.S.3d 663, 48 N.E.3d 944; *People v. Tebout*, 179 A.D.3d 1099, 1101, 114 N.Y.S.3d 679; *People v. Gopaul*, 112 A.D.3d 966, 966, 977 N.Y.S.2d 95). Contrary to the defendant's contention, the majority of the expert's testimony neither bolstered nor vouched for the complainant's credibility, as the expert spoke in general terms and did not suggest that the charged crimes occurred (*see People v. Diaz*, 20 N.Y.3d 569, 575–576, 965 N.Y.S.2d 738, 988 N.E.2d 473; *People v. Tebout*, 179 A.D.3d at 1101, 114 N.Y.S.3d 679). We agree with the defendant, however, that the expert's testimony did exceed permissible bounds when the prosecutor tailored two hypothetical questions to include facts concerning the abuse that occurred in this particular case (*see People v. Williams*, 20 N.Y.3d 579, 584, 964 N.Y.S.2d 483, 987 N.E.2d 260). However, ***229** this error was harmless because

the evidence of the defendant's guilt, which included the complainant's testimony and the defendant's own admissions, was overwhelming, and there was no significant probability that, but for the introduction of the erroneous portion of the expert's testimony, the defendant would have been acquitted (*see id.* at 585, 964 N.Y.S.2d 483, 987 N.E.2d 260).

The sentence imposed was not unduly harsh or severe (*see* CPL 470.15[6][b]).

In light of our determination, we do not reach the parties' remaining contentions.

SCHEINKMAN, P.J., LASALLE, BRATHWAITE NELSON and IANNACCI, JJ., concur.

All Citations

187 A.D.3d 1219, 131 N.Y.S.3d 227 (Mem), 2020 N.Y. Slip Op. 06152

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144 A.D.3d 652
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,

v.

Kareem SMITH, appellant.

Nov. 2, 2016.

Synopsis

Background: Defendant appealed order of the County Court, Westchester County, R. Bellantoni, J., which, after a hearing, designated him a level three sex offender pursuant to the Sex Offender Registration Act (SORA).

Holdings: The Supreme Court, Appellate Division, held that:

[1] clear and convincing evidence established that victim was physically helpless, and

[2] assessment of 20 points on basis that victim was physically helpless, while also assessing points under risk factor for crimes involving victims between 11 and 16 years old, did not constitute impermissible double counting.

Affirmed.

West Headnotes (7)

[1] Mental Health Appeal

Remittal was not required in proceeding under the Sex Offender Registration Act (SORA), despite County Court's failure to adequately set forth its findings of fact and conclusions of law in its order; record was sufficient for Appellate Division to make its own findings of fact and conclusions of law. McKinney's Correction Law § 168–n(3).

1 Case that cites this headnote

[2] Mental Health Scores and risk levels

Clear and convincing evidence established that victim was drugged and asleep at beginning of incident, and thus was "physically helpless" within meaning of Penal Law, supporting assessment of 20 points in proceeding to determine defendant's risk level under the Sex Offender Registration Act (SORA). McKinney's Correction Law § 168 et seq.; McKinney's Penal Law § 130.00(7).

3 Cases that cite this headnote

[3] Mental Health Scores and risk levels

Assessment of 20 points, in proceeding to determine defendant's risk level under the Sex Offender Registration Act (SORA), on basis that victim was physically helpless at beginning of incident, while also assessing points under risk factor for crimes involving victims between 11 and 16 years old, did not constitute impermissible double counting; victim's physical helplessness was not the result of, or in any way connected with, her age. McKinney's Correction Law § 168 et seq.; McKinney's Penal Law § 130.00(7).

4 Cases that cite this headnote

[4] Mental Health Scores and risk levels

Clear and convincing evidence established that defendant and victim were strangers within meaning of the Sex Offender Registration Act (SORA), supporting assessment, in proceeding to determine defendant's sex offender risk level, of 20 points under risk factor for crimes directed at strangers; evidence showed that defendant and victim met for first time on night of the crime. McKinney's Correction Law § 168 et seq.

6 Cases that cite this headnote

[5] Mental Health Scores and risk levels

Clear and convincing evidence established that defendant did not genuinely accept responsibility for his conduct and minimized his behavior, warranting assessment, in proceeding to determine his risk level under the Sex Offender Registration Act (SORA), of 10 points under

risk factor 12 for not accepting responsibility. McKinney's Correction Law § 168 et seq.

4 Cases that cite this headnote

[6] **Mental Health** Scores and risk levels

Request for downward departure on basis of mitigating factors was properly denied in proceeding to determine defendant's risk level under the Sex Offender Registration Act (SORA), where defendant failed to identify any appropriate mitigating factor which would warrant downward departure from his presumptive designation as a level three sex offender. McKinney's Correction Law § 168 et seq.

1 Case that cites this headnote

[7] **Mental Health** Scores and risk levels

Mental Health Proceedings

Defendant seeking a downward departure from the presumptive risk level in proceeding to determine his risk level under the Sex Offender Registration Act (SORA) has initial burden of (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the SORA Guidelines, and (2) establishing the facts in support of its existence by a preponderance of the evidence. McKinney's Correction Law § 168 et seq.

1 Case that cites this headnote

Attorneys and Law Firms

****475** Clare J. Degnan, White Plains, NY (Jacqueline F. Oliva of counsel; Michael Chiaramonte on the brief), for appellant.

James A. McCarty, Acting District Attorney, White Plains, NY (Laurie Sapakoff and Steven Bender of counsel), for respondent.

RUTH C. BALKIN, J.P., L. PRISCILLA HALL, JEFFREY A. COHEN and HECTOR D. LaSALLE, JJ.

Opinion

***652** Appeal by the defendant from an order of the County Court, Westchester County (R. Bellantoni, J.), entered July 18, 2007, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

[1] Correction Law § 168–n(3) requires a court making a risk level determination pursuant to the Sex Offender Registration Act (*see* Correction Law art 6–C; hereinafter SORA) to "render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168–n[3]). Here, the County Court failed to adequately set forth its findings of fact and conclusions of law in its order. However, since the record is sufficient for this Court to make its own findings of fact and conclusions of law, remittal is not required (*see People v. Uphael,* 140 A.D.3d 1143, 35 N.Y.S.3d 194; *People v. Eaton,* 105 A.D.3d 722, 723, 963 N.Y.S.2d 271; *People v. Finizio,* 100 A.D.3d 977, 954 N.Y.S.2d 636).

[2] **[3]** ***653** The County Court properly assessed 20 points against the defendant under risk factor 6, as the People established, by clear and convincing evidence, that the victim was drugged and asleep at the beginning of the incident and, therefore, was physically helpless (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 11 [2006]; Penal Law § 130.00[7]; *People v. Duff,* 96 A.D.3d 1031, 946 N.Y.S.2d 891; *People v. Rhodehouse,* 88 A.D.3d 1030, 1031–1032, 930 N.Y.S.2d 105; *People v. Caban,* 61 A.D.3d 834, 877 N.Y.S.2d 403; *People v. Davis,* 51 A.D.3d 442, 857 N.Y.S.2d 542). Contrary to the defendant's contention, since the victim's physical helplessness was not the result of, or in any way connected with, her age, assessing points under both risk factors 5 and 6 did not constitute double counting (*see People v. Caban,* 61 A.D.3d at 835, 877 N.Y.S.2d 403; *People v. Ramirez,* 53 A.D.3d 990, 990–991, 863 N.Y.S.2d 114).

[4] The People established, by clear and convincing evidence, that the defendant and the victim met for the first time on the night of the crime, and therefore were strangers within the meaning of SORA (*see People v. Palacios,* 137 A.D.3d 761, 762, 26 N.Y.S.3d 351; *People v. Mabee,* 69

A.D.3d 820, 893 N.Y.S.2d 585). Thus, the County Court properly assessed 20 points against the defendant under risk factor 7.

[5] Further, the People presented clear and convincing evidence that the defendant did not genuinely accept responsibility for his conduct and minimized his behavior, thus warranting the assessment of 10 points under risk factor 12 for not accepting responsibility (*see People v. Stapleton,* ****476** 125 A.D.3d 951, 5 N.Y.S.3d 160; *People v. Johnson,* 118 A.D.3d 684, 986 N.Y.S.2d 860).

[6] **[7]** A defendant seeking a downward departure from the presumptive risk level has the initial burden of "(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" (*People v. Wyatt,* 89 A.D.3d 112, 128, 931 N.Y.S.2d 85; *see People v. Gillotti,* 23 N.Y.3d 841, 994 N.Y.S.2d 1, 18 N.E.3d 701). Here, since the defendant failed to identify any appropriate mitigating factor which would warrant a downward departure from his presumptive designation as a level three sex offender, his request for a downward departure was properly denied (*see People v. Wise,* 127 A.D.3d 834, 6 N.Y.S.3d 292).

Accordingly, the County Court properly designated the defendant a level three sex offender.

All Citations

144 A.D.3d 652, 40 N.Y.S.3d 473, 2016 N.Y. Slip Op. 07171

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134 A.D.3d 739
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Winfred L. TAYLOR, appellant.

Dec. 2, 2015.

Synopsis

Background: Defendant was convicted in the County Court, Suffolk County, Weber, J., of robbery in the second degree and assault in the third degree. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that identification of defendant by complainant would not be suppressed as the result of impermissibly suggestive procedure.

Affirmed.

West Headnotes (4)

[1] Criminal Law Credibility of Witnesses

In fulfilling its responsibility to conduct an independent review of the weight of the evidence, the appellate court will nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor. McKinney's CPL § 470.15(5).

[2] Criminal Law Confrontations at the scene or shortly after offense or arrest

Identification of defendant by complainant would not be suppressed as the result of impermissibly suggestive procedure, in prosecution for robbery in the second degree and assault in the third degree, even though the complainant was being driven home from the hospital by the police at the time she made the identification, where the identification occurred near the scene of the crime, was spontaneous, and was not the result of a police-arranged confrontation.

1 Case that cites this headnote

[3] Criminal Law Cross-examination and impeachment

While the Confrontation Clause guarantees an opportunity for effective cross-examination, it does not guarantee a cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. U.S.C.A. Const.Amend. 6.

[4] Witnesses Irrelevant, Collateral, or Immaterial Matters

It is within the discretion of the trial court to limit the scope of cross-examination when questions are irrelevant, concern collateral issues, or risk misleading the jury.

Attorneys and Law Firms

****301** Mark Diamond, New York, N.Y., for appellant, and appellant pro se.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Edward A. Bannan of counsel), for respondent.

MARK C. DILLON, J.P., SANDRA L. SGROI, JEFFREY A. COHEN, and HECTOR D. LaSALLE, JJ.

Opinion

***739** Appeal by the defendant from a judgment of the County Court, Suffolk County (Weber, J.), rendered February 23, 2012, convicting him of robbery in the second degree and assault in the third degree, upon a jury verdict, and imposing sentence. The appeal ***740** brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress identification testimony.

ORDERED that the judgment is affirmed.

[1] The defendant's contention that the evidence was legally insufficient to support his convictions of robbery in the second degree and assault in the third degree is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Gray,* 86 N.Y.2d 10, 20, 629 N.Y.S.2d 173, 652 N.E.2d 919; *People v. Williams,* 187 A.D.2d 547, 589 N.Y.S.2d 604). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of those crimes beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v. Danielson,* 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo,* 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[2] The defendant contends that the branch of his omnibus motion which was to suppress identification testimony should have been granted because the identification was the result of an impermissibly suggestive showup procedure. However, the complainant's identification of the defendant ****302** near the scene of the crime was spontaneous, and not the result of a police-arranged confrontation, even though the complainant was being driven home from the hospital by the police at the time (*see People v. Tlatelpa,* 107 A.D.3d 1022, 966 N.Y.S.2d 903).

The defendant's arguments regarding alleged prosecutorial misconduct during summation are largely unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Garner,* 27 A.D.3d 764, 815 N.Y.S.2d 614). In any event, the challenged remarks were either fair comment on the evidence, permissive rhetorical comment, or responsive to defense counsel's summation (*see People v. Galloway,* 54 N.Y.2d 396, 446 N.Y.S.2d 9, 430 N.E.2d 885; *People v. Garner,* 27 A.D.3d at 764, 815 N.Y.S.2d 614; *People v. Rhodes,* 11 A.D.3d 487, 782 N.Y.S.2d 788).

There is no merit to the defendant's contention that he was deprived of the effective assistance of counsel based solely on defense counsel's failure to object to the alleged prosecutorial misconduct (*see People v. Parker–Davidson,* 89 A.D.3d 1114, 933 N.Y.S.2d 603; *People v. Dunn,* 54 A.D.3d 871, 864 N.Y.S.2d 107).

The County Court properly declined to charge the jury on ***741** the defense of justification, because there was no reasonable view of the evidence supporting a justification charge (*see People v. Baranov,* 121 A.D.3d 706, 707, 993 N.Y.S.2d 337; *People v. Pine,* 82 A.D.3d 1498, 919 N.Y.S.2d 564; *People v. Victor,* 176 A.D.2d 769, 574 N.Y.S.2d 826; *People v. White,* 168 A.D.2d 962, 565 N.Y.S.2d 344).

[3] **[4]** The defendant's contention that the County Court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution is not preserved for appellate review (*see People v. Walker,* 70 A.D.3d 870, 894 N.Y.S.2d 156). In any event, the contention is without merit. While the Confrontation Clause guarantees an opportunity for effective cross-examination, it does not guarantee a cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish" (*Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15; *see People v. Burns,* 6 N.Y.3d 793, 811 N.Y.S.2d 297, 844 N.E.2d 751; *People v. Goodson,* 35 A.D.3d 760, 761, 825 N.Y.S.2d 778). It is within the discretion of the trial court to limit the scope of cross-examination when questions are irrelevant, concern collateral issues, or risk misleading the jury (*see Delaware v. Van Arsdall,* 475 U.S. 673, 678–679, 106 S.Ct. 1431, 89 L.Ed.2d 674; *People v. Francisco,* 44 A.D.3d 870, 843 N.Y.S.2d 439; *People v. Legere,* 81 A.D.3d 746, 750, 916 N.Y.S.2d 187; *People v. Gaviria,* 67 A.D.3d 701, 886 N.Y.S.2d 900). Here, the court's limitation of the defense cross-examination was a provident exercise of its discretion.

The defendant's remaining contentions, including those raised in his pro se supplemental brief which were not stricken on motion, are without merit.

Motion by the respondent to strike the appellant's pro se supplemental brief on an appeal from a judgment of the County Court, Suffolk County, rendered February 23, 2012, on the ground that it refers to matter dehors the record. By decision and order on motion of this Court dated June 25, 2015, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is granted to the extent that the "Statement of Facts" ****303** on pages 7–10, and paragraphs 10–14 on pages 13–15 and paragraphs 39–40 on page 27, are stricken from the appellant's pro se supplemental brief and have not been considered on the appeal; and it is further,

ORDERED that the motion is otherwise denied.

All Citations

134 A.D.3d 739, 21 N.Y.S.3d 300, 2015 N.Y. Slip Op. 08862

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177 A.D.3d 579
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Santos TORRES, Appellant.

2017-12609

(Ind. No. 1797/16)

Argued—June 17, 2019

November 6, 2019

Synopsis

Background: Following denial of motion to suppress, defendant was convicted in the County Court, Suffolk County, John J. Toomey, J., of murder in second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant knowingly, voluntarily, and intelligently waived his rights under *Miranda* prior to making statements to detectives;

[2] court did not err in failing to charge jury on manslaughter in first degree as lesser included offense of murder in second degree, based on affirmative defense of extreme emotional disturbance;

[3] defendant did not receive ineffective assistance of counsel; and

[4] verdict was supported by legally sufficient evidence and was not against weight of evidence.

Affirmed.

West Headnotes (5)

[1] **Criminal Law** Particular Cases

Spanish-speaking murder defendant knowingly, voluntarily, and intelligently waived his rights under *Miranda* prior to making statements to detectives; although defendant's written statement was transcribed into English by interviewing detective, the statement was not thereby rendered inadmissible, where detective read it back to defendant in Spanish before defendant signed and adopted statement as his own.

3 Cases that cite this headnote

[2] **Criminal Law** Particular cases

Trial court did not err in declining to suppress murder defendant's statements to police, on defendant's claim that he should have been examined by doctor prior to administration of *Miranda* warnings, where record demonstrated that defendant was lucid and coherent during police interview, and gave no indication that he would have been unable to comprehend immediate import of the warnings.

[3] **Criminal Law** Grade or degree of offense

Trial court did not err in failing to charge jury on manslaughter in first degree as lesser included offense of murder in second degree, based on affirmative defense of extreme emotional disturbance, where defendant failed to request that charge, and court was under no obligation to give such charge sua sponte, since such instruction would interfere with defendant's trial strategy. N.Y. Penal Law § 125.25(1)(a).

[4] **Criminal Law** Particular Cases and Issues

Murder defendant did not receive ineffective assistance of counsel, where defendant failed to demonstrate absence of strategic or other legitimate explanations for counsel's alleged shortcoming. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[5] **Homicide** Second degree murder

Verdict convicting defendant of murder in second degree was supported by legally sufficient evidence that defendant acted with intent to kill victim and was not against weight of evidence, where evidence showed that defendant struck victim more than 50 times with machete.

1 Case that cites this headnote

Attorneys and Law Firms

****708** Laurette D. Mulry, Riverhead, N.Y. (Felice B. Milani of counsel), for appellant.

Timothy D. Sini, District Attorney, Riverhead, N.Y. (Grazia DiVincenzo and Marion Tang of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., ROBERT J. MILLER, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***579** Appeal by the defendant from a judgment of the County Court, Suffolk County (John J. Toomey, J.), rendered November 13, 2017, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of the defendant's motion to suppress his statements to law enforcement officials.

ORDERED that the judgment is affirmed.

[1] We agree with the County Court's determination, which denied, after a *Huntley* hearing (*see People v. Huntley,* 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179), the suppression of the defendant's oral and written statements to detectives. The record establishes that the defendant knowingly, voluntarily, and intelligently waived his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 prior to making his statements (*see People v. Capela,* 97 A.D.3d 760, 761, 948 N.Y.S.2d 423). While the Spanish-speaking defendant's written statement was transcribed into English by the interviewing detective, the statement was not thereby rendered inadmissible since the detective read it back to the defendant in Spanish before the defendant signed and adopted the statement as his own (*see People v. Mora,* 57 A.D.3d 571, 868 N.Y.S.2d 722; *People v. Fabricio,* 307 A.D.2d 882, 883, 763 N.Y.S.2d 619, *affd* 3 N.Y.3d 402, 787 N.Y.S.2d 219, 820 N.E.2d 863).

[2] The defendant's further contentions regarding the County Court's determination declining to suppress his statements are unpreserved for appellate review (*see* CPL 470.05[2]) and, in any event, without merit. The defendant's contention that he should have been examined by a doctor prior to the administration of *Miranda* warnings (*see* ***580** *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) is unavailing. The record demonstrates that the defendant was lucid and coherent during the interview and gave no indication that he would have been unable to comprehend "the immediate import of [the *Miranda*] warnings" (****709** *People v. Williams,* 62 N.Y.2d 285, 289, 476 N.Y.S.2d 788, 465 N.E.2d 327; *see People v. Capela,* 97 A.D.3d at 761, 948 N.Y.S.2d 423). Furthermore, there is no merit to the defendant's contention that his statements should have been suppressed because law enforcement officials failed to electronically record his waiver (*see People v. Esquerdo,* 71 A.D.3d 1424, 1426, 897 N.Y.S.2d 565).

[3] Contrary to the defendant's contention, the County Court did not err in failing to charge the jury on manslaughter in the first degree as a lesser included offense of murder in the second degree, based on the affirmative defense of extreme emotional disturbance (*see* Penal Law § 125.25[1][a]), since the defendant failed to request that charge (*see* CPL 300.50[2]; *People v. Emiliano,* 246 A.D.2d 553, 554, 666 N.Y.S.2d 933; *People v. Goros,* 224 A.D.2d 444, 638 N.Y.S.2d 107). Moreover, under the circumstances of this case, the court was under no obligation to give such a charge, sua sponte, where such instruction would interfere with the defendant's trial strategy (*see People v. Hardy,* 166 A.D.3d 645, 647, 88 N.Y.S.3d 54).

[4] The defendant's contention that he received ineffective assistance of counsel is without merit. On this record, the defendant failed to demonstrate "the absence of strategic or other legitimate explanations" for counsel's alleged shortcoming (*People v. Rivera,* 71 N.Y.2d 705, 709, 530 N.Y.S.2d 52, 525 N.E.2d 698; *see People v. Caban,* 5 N.Y.3d 143, 152, 800 N.Y.S.2d 70, 833 N.E.2d 213).

[5] The defendant's contention that the evidence was legally insufficient to support his conviction of murder in the second degree because the People failed to prove that he acted with intent to kill the victim is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Hawkins,* 11 N.Y.3d 484, 491–492, 872 N.Y.S.2d 395, 900 N.E.2d 946). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of murder in the second degree beyond a reasonable doubt when considered in light of the County Court's charge as given without exception (*see People v. Ford,* 11 N.Y.3d 875, 878, 874 N.Y.S.2d 859, 903 N.E.2d 256; *People v. Sala,* 95 N.Y.2d 254, 260, 716 N.Y.S.2d 361, 739 N.E.2d 727). Moreover, upon the exercise of our factual review power (*see* CPL 470.15[5]), we are constrained to weigh the evidence in light of the elements of the crime as charged without objection by the defendant (*see People v. Johnson,* 10 N.Y.3d 875, 860 N.Y.S.2d 762, 890 N.E.2d 877; *People v. Danielson,* 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1). Having ***581** done so, we are satisfied that the verdict was not against the weight of the evidence. The evidence that the defendant struck the victim more than 50 times with a machete was more than sufficient to sustain the verdict of guilt with respect to murder in the second degree (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

The sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

SCHEINKMAN, P.J., MILLER, MALTESE and LASALLE, JJ., concur.

All Citations

177 A.D.3d 579, 113 N.Y.S.3d 707, 2019 N.Y. Slip Op. 07873

153 A.D.3d 558
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

George TSINTZELIS, appellant.

Aug. 2, 2017.

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Griffin, J., of criminal mischief in the third degree and petit larceny. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] trial court violated Confrontation Clause by admitting lab reports from nontestifying DNA analyst, but

[2] the error was harmless.

Affirmed.

West Headnotes (5)

[1] Criminal Law Use of documentary evidence

Trial court violated defendant's Confrontation Clause rights in criminal mischief and larceny prosecution by admitting lab reports from nontestifying DNA analyst which directly linked defendant to the crime. U.S.C.A. Const.Amend. 6.

[2] Criminal Law Reception of evidence

Confrontation Clause violations are subject to a constitutional harmless error analysis. U.S.C.A. Const.Amend. 6.

[3] Criminal Law Prejudice to rights of party as ground of review

Constitutional error requires reversal unless the error's impact was harmless beyond a reasonable doubt; this determination is based on a review of the entire record.

[4] Criminal Law Prejudice to Defendant in General

In order for a constitutional error to be harmless beyond a reasonable doubt, the evidence of the defendant's guilt must be overwhelming, and there must be no reasonable possibility that the error might have contributed to the defendant's conviction.

[5] Criminal Law Reception of evidence

Trial court's error, in admitting lab reports from nontestifying DNA analyst in violation of defendant's Confrontation Clause rights, was harmless and, thus, did not warrant reversal of defendant's convictions for criminal mischief and petit larceny; evidence of defendant's guilt was overwhelming, as People presented evidence directly linking defendant to the crime, and the erroneously admitted evidence was cumulative of testimony given by criminalist who reached the same conclusion as the nontestifying analyst after comparing the same raw data relied upon by the analyst. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

Attorneys and Law Firms

****741** Seymour W. James, Jr., New York, NY (Shane Tela of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, NY (Robert J. Masters, John M. Castellano, Johnnette Traill, and Christopher J. Blira–Koessler of counsel), for respondent.

MARK C. DILLON, J.P., SHERI S. ROMAN, ROBERT J. MILLER, and HECTOR D. LaSALLE, JJ.

Opinion

***558** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Griffin, J.), rendered November 20, 2014, convicting him of criminal mischief in the third degree and petit larceny, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in denying his discovery request ****742** pursuant to CPL 240.40 for material that was not in the possession or control of the People (*see People v. Beckham,* 142 A.D.3d 556, 36 N.Y.S.3d 483; *People v. Robinson,* 53 A.D.3d 63, 860 N.Y.S.2d 159; *People v. Stern,* 270 A.D.2d 118, 704 N.Y.S.2d 569).

Viewing the evidence in the light most favorable to the People (*see People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to support the defendant's conviction of criminal mischief in the third degree beyond a reasonable doubt (*see People v. Tucker,* 113 A.D.3d 642, 978 N.Y.S.2d 312).

[1] The defendant's rights under the Confrontation Clause (*see* U.S. Const. Sixth Amend.) were violated when the Supreme Court admitted into evidence lab reports from a nontestifying DNA analyst which directly linked the defendant to the crime (*see People v. Cartagena,* 126 A.D.3d 913, 7 N.Y.S.3d 150; *People v. Gonzalez,* 120 A.D.3d 832, 991 N.Y.S.2d 340; *People v. Oliver,* 92 A.D.3d 900, 938 N.Y.S.2d 619).

[2] **[3]** **[4]** "Confrontation Clause violations are subject to a constitutional harmless error analysis" (*People v. Hardy,* 4 N.Y.3d 192, 198, 791 N.Y.S.2d 513, 824 N.E.2d 953; *see People v. Douglas,* 4 N.Y.3d 777, 779, 793 N.Y.S.2d 825, 826 N.E.2d 796; *People v. Eastman,* 85 N.Y.2d 265, 276, 624 N.Y.S.2d 83, 648 N.E.2d 459; ***559** *People v. Crimmins,* 36 N.Y.2d 230, 240–241, 367 N.Y.S.2d 213, 326 N.E.2d 787). "Constitutional error requires reversal unless the error's impact was 'harmless beyond a reasonable doubt' " (*People v. Hardy,* 4 N.Y.3d at 198, 791 N.Y.S.2d 513, 824 N.E.2d 953, quoting *People v. Eastman,* 85 N.Y.2d at 276, 624 N.Y.S.2d 83, 648 N.E.2d 459; *see Schneble v. Florida,* 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340). This determination is based on a review of the " 'entire record' " (*People v. Hardy,* 4 N.Y.3d at 198, 791 N.Y.S.2d 513, 824 N.E.2d 953, quoting *People v. Eastman,* 85 N.Y.2d at 276, 624 N.Y.S.2d 83, 648 N.E.2d 459). In order for the error to be harmless beyond a reasonable doubt, the evidence of the defendant's guilt must be overwhelming, and there must be "no reasonable possibility that the error might have contributed to the defendant's conviction" (*People v. Crimmins,* 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 326 N.E.2d 787).

[5] Here, apart from the erroneously admitted evidence, the evidence of the defendant's guilt was overwhelming. The People presented evidence directly linking the defendant to the crime. A criminalist employed by the Office of the Chief Medical Examiner of the City of New York testified that she reviewed, and verified the accuracy of, every stage of testing and all of the results of the DNA tests. Thus, the erroneously admitted evidence was cumulative, as the criminalist, who did testify, reached the same conclusion as the nontestifying analyst after comparing the same raw data relied upon by that analyst (*see People v. Cartagena,* 126 A.D.3d 913, 7 N.Y.S.3d 150; *People v. Gonzalez,* 120 A.D.3d 832, 991 N.Y.S.2d 340). Because the erroneously admitted evidence was cumulative, there was no reasonable possibility that the erroneously admitted evidence contributed to the defendant's conviction, and the error was harmless beyond a reasonable doubt (*cf. People v. Hardy,* 4 N.Y.3d at 198, 791 N.Y.S.2d 513, 824 N.E.2d 953).

All Citations

153 A.D.3d 558, 59 N.Y.S.3d 741, 2017 N.Y. Slip Op. 05980

131 A.D.3d 713
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Cordell TUCKER, appellant.

Aug. 26, 2015.

Synopsis

Background: Defendant was convicted in the County Court, Suffolk County, Camacho, J., of manslaughter in the second degree, unlawful fleeing a police officer in a motor vehicle in the first degree, assault in the second degree, aggravated unlicensed operation of a motor vehicle in the third degree, grand larceny in the third degree, and criminal possession of stolen property in the third degree. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that it was proper to amend Uniform Sentence and Commitment form without producing defendant for resentencing, in order to reflect sentence actually imposed by the court.

Affirmed.

West Headnotes (2)

[1] Criminal Law Jury selection

Court's determination, that the facially neutral explanation provided by the prosecutor for excluding prospective juror was not pretextual, is entitled to great deference on appeal from denial of a *Batson* challenge.

3 Cases that cite this headnote

[2] Sentencing and Punishment Technical, formal or arithmetical error

Sentencing and Punishment Presence of defendant

It was proper to amend Uniform Sentence and Commitment form, without producing defendant for resentencing, in order to reflect the sentence actually imposed by the court at sentencing, after the form initially transposed defendant's sentence of seven years imposed for assault in the second degree with the sentence imposed for fleeing a police officer in a motor vehicle in the first degree.

Attorneys and Law Firms

****224** Robert C. Mitchell, Riverhead, N.Y. (Louis E. Mazzola of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Rosalind C. Gray of counsel), for respondent.

RANDALL T. ENG, P.J., L. PRISCILLA HALL, SYLVIA O. HINDS–RADIX, and HECTOR D. LaSALLE, JJ.

Opinion

***713** Appeal by the defendant from a judgment of the County Court, Suffolk County (Camacho, J.), rendered June 27, 2013, convicting him of manslaughter in the second degree, unlawful fleeing a police officer in a motor vehicle in the first degree, assault in the second degree, aggravated unlicensed operation of a motor vehicle in the third degree, grand larceny in the third degree, and criminal possession of stolen property in the third degree, upon a jury verdict, and imposing sentence.

****225** ORDERED that the judgment is affirmed.

[1] The County Court properly denied the defendant's *Batson* ***714** challenge (*see Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69) to the prosecutor's exercise of a peremptory challenge to exclude a prospective African–American juror. The County Court's determination that the facially neutral explanation provided by the prosecutor for excluding this prospective juror was not pretextual, which is entitled to great deference on appeal, is supported by the record (*see People v. Hecker,* 15 N.Y.3d 625, 656, 663–665, 917 N.Y.S.2d 39, 942 N.E.2d 248; *People v. Adams,* 118 A.D.3d 717, 986 N.Y.S.2d 845; *People v. Smith,* 98 A.D.3d 533, 534, 949 N.Y.S.2d 190; *People v. Waters,* 81 A.D.3d 673, 673–674, 916 N.Y.S.2d 791).

Viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of manslaughter in the second degree beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson,* 9 N.Y.3d 342, 348, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo,* 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt of manslaughter in the second degree was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[2] For his conviction of assault in the second degree, the defendant was sentenced to a determinate term of imprisonment of seven years plus three years of postrelease supervision. However, the Uniform Sentence and Commitment form transposed the sentence imposed for assault in the second degree with the sentence imposed for fleeing a police officer in a motor vehicle in the first degree. The Uniform Sentence and Commitment form was later amended to reflect the sentence actually imposed by the court at sentencing, without producing the defendant for resentencing. Contrary to the defendant's contention, this procedure was proper (*see People v. Marks,* 128 A.D.3d 852, 9 N.Y.S.3d 120; *People v. Mercado,* 74 A.D.3d 990, 904 N.Y.S.2d 451; *cf. People v. Haywood,* 124 A.D.3d 798, 2 N.Y.S.3d 164).

The sentence imposed was not excessive (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

The defendant's remaining contentions are without merit.

All Citations

131 A.D.3d 713, 15 N.Y.S.3d 224, 2015 N.Y. Slip Op. 06686

39 Misc.3d 126(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Appellate Term, New York,
9th and 10th Judicial Districts.

The PEOPLE of the State
of New York, Appellant
v.
Carlos VALLE, Respondent.

No. 2010–1731 S CR.
|
March 15, 2013.

Present: NICOLAI, P.J., IANNACCI and LaSALLE, JJ.

Opinion

***1** Appeal from an amended order of the District Court of Suffolk County, First District (Joseph A. Santorelli, J.), dated July 6, 2012. The order, following a hearing, granted defendant's motion, pursuant to CPL 440.10, to vacate a judgment convicting defendant, upon his plea of guilty, of sexual misconduct.

ORDERED that, on the court's own motion, the notice of appeal from the order of the same court dated July 22, 2010 is deemed a premature notice of appeal from the amended order dated July 6, 2012 (*see* CPL 460.10[6]); and it is further,

ORDERED that the amended order is affirmed.

Defendant pleaded guilty to sexual misconduct (Penal Law § 130.20[1]) and was sentenced on February 5, 1999 to three years' probation. In December 2009, defendant moved, pursuant to CPL 440.10(1)(h), to vacate the judgment of conviction on the ground that he had been denied his right to the effective assistance of counsel because his attorney had provided him with the wrong advice regarding the consequences of his plea with respect to his immigration status. The District Court, after a hearing, granted the motion. By decision and order of this court dated December 27, 2011, the appeal was held in abeyance and the matter was remitted to the District Court to set forth its findings of fact, conclusions of law and the reasons for its determination (*People v. Valle,* 34 Misc.3d 138[A], 2011 N.Y. Slip Op 52415[U] [App Term, 9th & 10th Jud Dists 2011]). As a result, the District Court issued an amended order dated July 6, 2012, from which we deem the appeal to have been taken.

On appeal, the People contend that defendant was not denied his right to the effective assistance of counsel under the Federal and State Constitutions.

A defendant's right to the effective assistance of counsel is guaranteed by both the Federal and State Constitutions (U.S. Const, 6th Amend; NY Const, art I, § 6). To prevail on a federal claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defendant (*Strickland v. Washington,* 466 U.S. 668 [1984]). Prejudice exists when there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial (*see Hill v. Lockhart,* 474 U.S. 52, 59 [1985]). Here, defendant's sworn allegation that his attorney gave him incorrect advice that his guilty plea would not affect his immigration status established that his attorney's representation fell below the objective standard of reasonableness under *Strickland* (*see Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 1483–1484 [2010]; *People v. McDonald,* 1 N.Y.3d 109 [2003]; *People v. Augusto,* 22 Misc.3d 140[A], 2009 N.Y. Slip Op 50393[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). Additionally, defendant's sworn statement that he would not have pleaded guilty but, rather, would have gone to trial had he been correctly informed of the consequences of his guilty plea, established the second prong of the *Strickland* test. Thus, we need not consider whether defendant demonstrated that he was deprived of meaningful representation under the New York State standard (*see People v. Caban,* 5 N.Y.3d 143 [2005]).

***2** As we find that defendant has established that he was denied the effective assistance of counsel, the order granting defendant's motion to vacate the judgment of conviction is affirmed.

NICOLAI, P.J., IANNACCI and LaSALLE, JJ., concur.

All Citations

39 Misc.3d 126(A), 971 N.Y.S.2d 74 (Table), 2013 WL 1234856, 2013 N.Y. Slip Op. 50409(U)

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128 A.D.3d 788
Supreme Court, Appellate Division,
Second Department, New York.

PEOPLE of State of New York, respondent,
v.
Francis WILLIAMS, appellant.

May 13, 2015.

Synopsis

Background: The People petitioned for an upward modification of defendant's risk level designation under the Sex Offender Registration Act (SORA). The County Court, Westchester County, Cacace, J., granted the petition, and defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] upward modification of defendant's risk level designation was warranted based on new conviction and probation violation, and

[2] court was not required to obtain a new risk assessment instrument from the Board of Examiners of Sex Offenders before granting the petition.

Affirmed.

West Headnotes (2)

[1] Mental Health Proceedings

Upward modification of defendant's risk level designation under Sex Offender Registration Act (SORA) to a level three sex offender was warranted, where the People demonstrated, by clear and convincing evidence, that defendant was convicted of a new crime and violated a condition of his probation for attempted dissemination of indecent material to minors in the first degree, and that the conduct underlying the new crime and the violation was of a nature that indicated an increased risk of repeat sex offense. McKinney's Correction Law § 168–o(3); McKinney's CPL § 410.70.

1 Case that cites this headnote

[2] Mental Health Proceedings

Court was not required to obtain a new risk assessment instrument from the Board of Examiners of Sex Offenders in considering the People's petition for an upward modification of defendant's risk level designation under Sex Offender Registration Act (SORA), based on his conviction of a new crime and violation of a condition of his probation for attempted dissemination of indecent material to minors in the first degree; court followed the appropriate procedure and requested and received an updated recommendation from the Board, in the form of a letter. McKinney's Correction Law §§ 168–o(3, 4); McKinney's CPL § 410.70.

1 Case that cites this headnote

Attorneys and Law Firms

****156** Steven A. Feldman, Uniondale, N.Y., for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Laurie Sapakoff and Steven A. Bender of counsel), for respondent.

WILLIAM F. MASTRO, J.P., PETER B. SKELOS, THOMAS A. DICKERSON, and HECTOR D. LaSALLE, JJ.

Opinion

****157** ***788** Appeal by the defendant from an order of the County Court, Westchester County (Cacace, J.), entered February 24, 2012, which, after a hearing, granted the petition of the People of the State of New York pursuant to Correction Law § 168–o(3) for an upward modification of his risk level designation, and thereupon designated him a level three sex offender pursuant to Correction Law article 6–C.

***789** ORDERED that the order is affirmed, without costs or disbursements.

In 2000, the defendant was convicted, upon a plea of guilty, of attempted dissemination of indecent material to minors in the first degree, and sentenced to a five-year term of probation.

With respect to that conviction, in 2002, the defendant was designated a level one sex offender for the purposes of the Sex Offender Registration Act (*see* Correction Law art. 6–C; hereinafter SORA). In 2011, the People petitioned pursuant to Correction Law § 168–o(3) for an upward modification of the defendant's risk level designation. The County Court granted the petition, and designated the defendant a level three sex offender.

[1] Pursuant to Correction Law § 168–o(3), the People may file a petition for an upward modification of a sex offender's SORA risk level designation where the sex offender "(a) has been convicted of a new crime, or there has been a determination after a proceeding pursuant to [Criminal Procedure Law § 410.70] that the sex offender has violated one or more conditions imposed as part of a sentence of ... probation ... and (b) the conduct underlying the new crime or the violation is of a nature that indicates an increased risk of a repeat sex offense." Here, the People demonstrated, by clear and convincing evidence (*see* Correction Law § 168–o[3]), that the defendant was convicted of a new crime and violated a condition of his probation, and that the conduct underlying the new crime and the violation was "of a nature that indicates an increased risk of a repeat sex offense" (Correction Law § 168–o[3]). Upon that showing, the County Court providently exercised its discretion in designating the defendant a level three sex offender.

[2] Contrary to the defendant's contention, the County Court did not err in granting the People's petition for an upward modification without first obtaining a new Risk Assessment Instrument (hereinafter RAI) from the Board of Examiners of Sex Offenders (hereinafter the Board). Correction Law § 168–o specifies that, upon the receipt of such a petition, "the court shall forward a copy of the petition to the board and request an updated recommendation pertaining to the sex offender" (Correction Law § 168–o[4]). The County Court followed this procedure and received an "updated recommendation" from the Board, in the form of a letter. The RAI, an "objective assessment instrument" created by the Board to assess an offender's "presumptive risk level" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3 [2006]) was designed to assist the courts in reaching an initial SORA determination. ***790** Indeed, if a new RAI was completed upon the filing of the People's petition, it would be almost identical to the initial RAI, in which 10 out of the 15 risk factors addressed the subject sex offense and crimes committed prior to that offense (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [2006]). Thus, the County Court was not required to obtain a new RAI from the Board in considering the People's petition for an upward modification pursuant to Correction Law § 168–o(3).

Accordingly, we affirm the order granting the People's petition and thereupon ****158** designating the defendant a level three sex offender.

All Citations

128 A.D.3d 788, 9 N.Y.S.3d 156, 2015 N.Y. Slip Op. 04108

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123 A.D.3d 747
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,

v.

Ronald WILSON, appellant.

Dec. 3, 2014.

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Holder, J., of attempted murder in the second degree, attempted robbery in the first degree, burglary in the second degree, criminal possession of a weapon in the second degree, and assault in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] statements, made after the readministration of *Miranda* warnings, were properly admitted, and

[2] trial court properly refused to permit defendant to elicit from the People's police witness the purportedly exculpatory statements he made in his written statement.

Affirmed.

West Headnotes (2)

[1] Criminal Law Delay between initial statement and resumption of interrogation

Defendant's statements during police interrogation, which were made after the readministration of *Miranda* warnings, were properly admitted; statements were attenuated from his earlier pre-*Miranda* statements to police, as there was a definite and pronounced break in the questioning.

[2] Criminal Law Particular cases

Trial court properly refused to permit defendant to elicit from the People's police witness the purportedly exculpatory statements he made in his written statement; defendant could not avoid taking the witness stand and avoid being cross-examined by presenting his story through the hearsay testimony of another witness, and such self-serving hearsay was not admissible under any exception to hearsay rule.

Attorneys and Law Firms

****725** Lynn W.L. Fahey, New York, N.Y. (Melissa S. Horlick of counsel), for appellant, and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, Nicoletta J. Caferri, and Laura T. Ross of counsel), for respondent.

REINALDO E. RIVERA, J.P., SYLVIA O. HINDS–RADIX, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

Opinion

***747** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Holder, J.), rendered May 25, 2010, ***748** convicting him of attempted murder in the second degree, attempted robbery in the ****726** first degree, burglary in the second degree (two counts), criminal possession of a weapon in the second degree (two counts), and assault in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Braun, J.), of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

ORDERED that the judgment is affirmed.

[1] Contrary to the defendant's contention, the Supreme Court properly denied that branch of his omnibus motion which was to suppress his videotaped statement to an assistant district attorney. The statement was made after the readministration of *Miranda* warnings (*see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694), and was attenuated from his earlier statements to police, which had been taken in violation of his *Miranda* rights, as there was a definite and pronounced break in the questioning (*see People v. Paulman,* 5 N.Y.3d 122, 130, 800 N.Y.S.2d 96,

833 N.E.2d 239; *People v. Foddrell,* 65 A.D.3d 1375, 887 N.Y.S.2d 590; *People v. Sepulveda,* 52 A.D.3d 539, 540, 859 N.Y.S.2d 475; *People v. Vachet,* 5 A.D.3d 700, 702, 773 N.Y.S.2d 455).

[2] The Supreme Court did not err in refusing to permit the defendant to elicit from the People's police witness the purportedly exculpatory statements he made in his written statement. A defendant may not avoid taking the witness stand and avoid being cross-examined by presenting his story through the hearsay testimony of another witness (*see People v. Hughes,* 228 A.D.2d 618, 619, 645 N.Y.S.2d 493; *People v. Williams,* 203 A.D.2d 498, 610 N.Y.S.2d 596; *People v. Dvoroznak,* 127 A.D.2d 785, 512 N.Y.S.2d 180). Furthermore, the defendant failed to demonstrate that the self-serving hearsay statements were admissible under any exception to the hearsay rule (*see People v. Hughes,* 228 A.D.2d at 619, 645 N.Y.S.2d 493; *see also People v. Morgan,* 76 N.Y.2d 493, 561 N.Y.S.2d 408, 562 N.E.2d 485; *People v. Shortridge,* 65 N.Y.2d 309, 491 N.Y.S.2d 298, 480 N.E.2d 1080; *People v. Morrow,* 204 A.D.2d 356, 612 N.Y.S.2d 604; *People v. Cuevas,* 138 A.D.2d 620, 526 N.Y.S.2d 206; *People v. Rodriguez,* 121 A.D.2d 660, 504 N.Y.S.2d 53).

The defendant's remaining contentions, including those raised in his pro se supplemental brief, are without merit.

All Citations

123 A.D.3d 747, 997 N.Y.S.2d 725, 2014 N.Y. Slip Op. 08468

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170 A.D.3d 1206
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,

v.

Juan Pablo ZELAYA, Appellant.

2013–06915
|
(Ind.No. 770–13)
|
Submitted - December 7, 2018
|
March 27, 2019

Synopsis

Background: Spanish-speaking defendant was convicted in the County Court, Suffolk County, Barbara Kahn, J., of predatory sexual assault against a child, rape in the first degree, course of sexual conduct against a child in the first degree, sexual abuse in the first degree, and endangering the welfare of a child. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant's initial pre-*Miranda* statement to police officer was not product of custodial interrogation;

[2] defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights prior to giving statements to officers at police precinct; and

[3] prospective juror's comments and testimony of two witnesses indicating that defendant was incarcerated pending trial did not deprive defendant of fair trial.

Affirmed.

West Headnotes (3)

[1] Criminal Law Particular cases or issues

Criminal Law Particular cases or questions

Defendant's initial pre-*Miranda* statement to police officer was not product of custodial interrogation; when officer arrived at complainant's home in response to report of domestic incident, officer asked defendant if he knew why police had been called, and defendant gave inculpatory response.

[2] Criminal Law Particular Cases

Spanish-speaking defendant knowingly, voluntarily, and intelligently waived his *Miranda* rights prior to giving his statements to officers at police precinct; officer translated *Miranda* rights into Spanish and defendant's written statement was read back to him in Spanish before he signed and adopted the statement as his own.

3 Cases that cite this headnote

[3] Criminal Law Witnesses

Jury Trial and determination

Prospective juror's comments and testimony of two witnesses indicating that defendant was incarcerated pending trial did not impair defendant's presumption of innocence and deprive him of right to fair trial; neither prospective juror nor witnesses specifically indicated that defendant had been incarcerated pending or during trial, and given that jury was aware that defendant had been handcuffed, placed into custody, and taken to police precinct, comments did not suggest that the defendant remained incarcerated pending trial.

1 Case that cites this headnote

****684** Appeal by the defendant from a judgment of the County Court, Suffolk County (Barbara Kahn, J.), rendered June 18, 2013, convicting him of predatory sexual assault against a child, rape in the first degree, course of sexual conduct against a child in the first degree, sexual abuse in the first degree (two counts), and endangering the welfare of a child (two counts), upon a jury verdict, and imposing

sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

Attorneys and Law Firms

Carol E. Castillo, East Setauket, NY, for appellant.

Timothy D. Sini, District Attorney, Riverhead, N.Y. (Caren C. Manzello of counsel), for respondent.

WILLIAM F. MASTRO, J.P., JEFFREY A. COHEN, JOSEPH J. MALTESE, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***1206** ORDERED that the judgment is affirmed.

[1] **[2]** The evidence at the suppression hearing demonstrated that when a police officer arrived at the complainant's home in response to a report of a domestic incident, the officer asked the defendant if he knew why the police had been called, and the defendant gave an inculpatory response. Subsequently, after being taken to the police precinct and advised of his *Miranda* rights, (*see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694), the defendant gave oral and written statements to the police. We agree with the County Court's determination that the defendant's initial pre-*Miranda* statement to the officer was not the product ***1207** of a custodial interrogation (*see People v. Paulman*, 5 N.Y.3d 122, 129, 800 N.Y.S.2d 96, 833 N.E.2d 239; *People v. Huffman*, 41 N.Y.2d 29, 33–34, 390 N.Y.S.2d 843, 359 N.E.2d 353; *People v. Valentin*, 118 A.D.3d 823, 824, 987 N.Y.S.2d 227; *People v. Hardy*, 77 A.D.3d 133, 141, 907 N.Y.S.2d 244). We also agree with the court's determination that the defendant was advised of his *Miranda* rights and that he knowingly, voluntarily, and intelligently waived them at the precinct prior to giving his subsequent statements (*see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *People v. Hall*, 145 A.D.3d 915, 916, 44 N.Y.S.3d 102; ****685** *People v. Brown*, 113 A.D.3d 785, 785, 978 N.Y.S.2d 862). The evidence at the suppression hearing further demonstrated that an officer translated the *Miranda* rights into Spanish for the Spanish-speaking defendant and that the defendant's written statement was read back to him in Spanish before he signed and adopted the statement as his own (*see People v. Mora*, 57 A.D.3d 571, 572, 868 N.Y.S.2d 722; *People v. Fabricio*, 307 A.D.2d 882, 883, 763 N.Y.S.2d 619, *affd* 3 N.Y.3d 402, 787 N.Y.S.2d 219, 820 N.E.2d 863). Consequently, we agree with the court's determination to deny that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

[3] The defendant's contention that he was deprived of a fair trial based upon a prospective juror's comments and the testimony of two witnesses indicating that the defendant was incarcerated pending trial is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Brehon*, 267 A.D.2d 318, 318, 699 N.Y.S.2d 897; *People v. Jackson*, 239 A.D.2d 433, 433). In any event, this contention is without merit. Evidence indicating that a defendant was incarcerated pending trial may impair a defendant's presumption of innocence (*see People v. Jenkins*, 88 N.Y.2d 948, 951, 647 N.Y.S.2d 157, 670 N.E.2d 441; *People v. Fabregas*, 130 A.D.3d 939, 940, 15 N.Y.S.3d 794; *People v. Machicote*, 251 A.D.2d 684, 684, 676 N.Y.S.2d 472; *People v. Connor*, 137 A.D.2d 546, 550, 524 N.Y.S.2d 287). Here, however, neither the prospective juror nor the two witnesses specifically indicated that the defendant had been incarcerated pending or during trial. Given that the jury was aware that the defendant had been handcuffed, placed into custody, and taken to the police precinct, the comments of the prospective juror and the witnesses' testimony did not suggest that the defendant remained incarcerated pending trial (*see People v. Fabregas*, 130 A.D.3d at 940, 15 N.Y.S.3d 794). Under these circumstances, the County Court was not required, sua sponte, to issue a curative instruction (*see id.*; *see generally People v. Guy*, 93 A.D.3d 877, 879, 939 N.Y.S.2d 613).

The defendant's contention that the County Court erred in the manner in which it conducted the competency hearing for a then eight-year-old witness is unpreserved for appellate review (*see* CPL 470.05[2]). In any event, the court properly determined ***1208** that the witness was competent to give sworn testimony (*see* CPL 60.20[2]; *People v. Morales*, 80 N.Y.2d 450, 452–453, 591 N.Y.S.2d 825, 606 N.E.2d 953; *People v. Ramos*, 164 A.D.3d 1267, 83 N.Y.S.3d 580; *People v. Thompson*, 119 A.D.3d 966, 967, 989 N.Y.S.2d 881; *People v. Mendoza*, 49 A.D.3d 559, 560, 853 N.Y.S.2d 364).

The defendant's challenge to the legal sufficiency of the evidence is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Hawkins*, 11 N.Y.3d 484, 492, 872 N.Y.S.2d 395, 900 N.E.2d 946). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes*, 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454

N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt (*see People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson*, 9 N.Y.3d at 348–349, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo*, 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053; ****686** *People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v. Romero*, 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

The defendant was not deprived of the effective assistance of counsel (*see People v. Wragg*, 26 N.Y.3d 403, 412, 23 N.Y.S.3d 600, 44 N.E.3d 898; *People v. Benevento*, 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584).

The sentence imposed was not excessive (*see People v. Suitte*, 90 A.D.2d 80, 455 N.Y.S.2d 675).

The defendant's remaining contentions are unpreserved for appellate review and, in any event, without merit.

MASTRO, J.P., COHEN, MALTESE and LASALLE, JJ., concur.

All Citations

170 A.D.3d 1206, 96 N.Y.S.3d 683, 2019 N.Y. Slip Op. 02364

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158 A.D.3d 633
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of David PUTLAND, respondent,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, appellant.

2015–09183
|
(Index 1895/15)
|
Argued—October 23, 2017
|
February 7, 2018

Synopsis

Background: Prisoner, who had been convicted as a juvenile of second-degree murder and sodomy, brought article 78 action to review New York State Board of Parole's denial prisoner's application for parole release. The Supreme Court, Orange County, Robert A. Onofry, J., annulled the Board's determination and remitted the matter to the Board for a de novo parole interview before a different panel. Board appealed.

[Holding:] The Supreme Court, Appellate Division, held that Board of Parole was required to consider prisoner's youth at the time of the commission of the crimes and its attendant circumstances.

Affirmed.

West Headnotes (1)

[1] **Pardon and Parole** Factors governing decision, in general

In assessing the application for parole of a prisoner who had been convicted as a juvenile of second-degree murder and sodomy, the New York State Board of Parole was required to consider prisoner's youth at the time of the commission of the crimes and its attendant circumstances, as prisoner was 15 years of age at the time the crimes were committed.

3 Cases that cite this headnote

Attorneys and Law Firms

Eric T. Schneiderman, Attorney General, New York, N.Y. (Steven C. Wu and Philip V. Tisne of counsel), for appellant.

Cravath, Swaine & Moore LLP, New York, N.Y. (Antony L. Ryan and Xiaoxi Tu of counsel), for respondent.

MARK C. DILLON, J.P., JOHN M. LEVENTHAL, SYLVIA O. HINDS–RADIX, HECTOR D. LASALLE, JJ.

DECISION & ORDER

***633** Appeal from a judgment of the Supreme Court, Orange County (Robert A. Onofry, J.), dated July 1, 2015. The judgment granted the petition, filed pursuant to CPLR article 78, to review a determination of the New York State Board of Parole denying, after an interview, the petitioner's application for parole, annulled the determination, and remitted the matter to the New York State Board of Parole for a de novo parole interview before a different panel.

****94** ORDERED that the judgment is affirmed, without costs or disbursements.

The petitioner was convicted, as a juvenile offender, of murder in the second degree and sodomy in the first degree for crimes he committed in September 1979, when he was 15 years of age, against a victim who was 7 years of age (*see People v. Putland,* 105 A.D.2d 199, 199–200, 482 N.Y.S.2d 882). The petitioner was sentenced to indeterminate terms of imprisonment of 9 years ***634** to life on his conviction of murder in the second degree and 3⅓ to 10 years on his conviction of sodomy in the first degree, the sentences to run concurrently.

In June 2014, the petitioner appeared before the New York State Board of Parole (hereinafter the Parole Board) on his application for parole release. He was approximately 50 years

of age, and had been denied parole release on 13 prior occasions. Following an interview, the Parole Board denied the petitioner's application.

The petitioner commenced this proceeding pursuant to CPLR article 78 to review the Parole Board's determination. In a judgment dated July 1, 2015, the Supreme Court granted the petition, annulled the determination, and remitted the matter to the Parole Board for a de novo interview before a different panel. This appeal ensued.

During the pendency of this appeal, the Appellate Division, Third Judicial Department decided *Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision,* 140 A.D.3d 34, 30 N.Y.S.3d 397. In *Matter of Hawkins,* the Third Department held that "[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the [Parole] Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue" (*id.* at 39, 30 N.Y.S.3d 397).

In its reply brief on this appeal, the appellant represents that the Parole Board "has elected to comply with *Matter of Hawkins* on a statewide basis." The appellant informs us that regulations requiring the Parole Board to consider, inter alia, the diminished culpability of youth, were proposed and are now in effect. Evidently, these regulations constitute a recognition, at least implicitly, of the holding in *Matter of Hawkins,* and of the United States Supreme Court cases *Montgomery v. Louisiana,* —— U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599) and *Miller v. Alabama* (567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407), on which *Matter of Hawkins* is based. The appellant concedes that the petitioner should receive a de novo interview.

Under these circumstances, we deem it appropriate to affirm the judgment that annulled the Parole Board's determination and remitted the matter to the Parole Board for a de novo interview before a different panel. The petitioner is entitled to a meaningful opportunity for release in which the Parole Board considers, inter alia, his youth at the time of the commission of the crimes and its attendant circumstances (*see Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision,* 140 A.D.3d at 40, 30 N.Y.S.3d 397). In view of the foregoing, we need not ***635** address the parties' remaining contentions.

DILLON, J.P., LEVENTHAL, HINDS–RADIX and LASALLE, JJ., concur.

All Citations

158 A.D.3d 633, 72 N.Y.S.3d 93, 2018 N.Y. Slip Op. 00837

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156 A.D.3d 658
Supreme Court, Appellate Division,
Second Department, New York.

QUEENS BRANCH OF the BHUVANESHWAR MANDIR, INC., et al., respondents,

v.

Jagraine SHERMAN, et al., appellants.

2015–07175
|
(Index No. 1429/15)
|
Submitted—October 12, 2017
|
December 6, 2017

Synopsis

Background: In action for injunctive relief arising from dispute regarding control of religious corporation, proponents of slate of candidates moved to confirm the results of election in which candidates were elected as the members of corporation's board of trustees. Opponents cross moved for declaratory judgment that their own slate of candidates won the election. The Supreme Court, Queens County, Leonard Livote, J., granted proponents' motion and denied opponents' cross motion. Opponents appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] it could resolve dispute regarding control of religious corporation without offending First Amendment, and

[2] trial court properly granted proponents' motion to confirm the results of election.

Affirmed.

West Headnotes (5)

[1] **Constitutional Law** Religious Organizations in General

First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs. U.S. Const. Amend. 1.

[2] **Constitutional Law** Neutrality

Civil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution. U.S. Const. Amend. 1.

[3] **Constitutional Law** Neutrality

In applying neutral principles of law to resolve civil disputes involving religious parties or institutions without offending the First Amendment, courts may rely upon internal documents, such as a congregation's bylaws, but only if those documents do not require interpretation of ecclesiastical doctrine. U.S. Const. Amend. 1.

[4] **Constitutional Law** Neutrality

Religious Societies Judicial supervision in general

Appellate court could resolve dispute regarding control of religious corporation without offending First Amendment, where resolution of dispute, including determining whether any votes were cast by individuals who were not eligible to vote in election for religious corporation's board of trustees, did not require intrusion into constitutionally protected ecclesiastical matters, but rather could be resolved based upon neutral principles of law

and reference to the secular provisions of the religious corporation's internal documents. U.S. Const. Amend. 1.

[5] **Religious Societies** Officers and committees of church or society

In action for injunctive relief arising from dispute regarding control of religious corporation, trial court properly granted proponents' motion to confirm the results of election in which their candidates were elected as members of religious corporation's board of trustees, where opponents failed to establish that any of the individuals who voted in favor of the proponents' slate of candidates were ineligible to vote in election.

Attorneys and Law Firms

****285** John F. Langan, P.C., Long Island City, NY, for appellants.

Eugene F. Levy, Forest Hills, NY, for respondents.

REINALDO E. RIVERA, J.P., SHERI S. ROMAN, HECTOR D. LASALLE, BETSY BARROS, JJ.

DECISION & ORDER

***658** Appeal from an order of the Supreme Court, Queens County (Leonard Livote, J.), dated July 28, 2015. The order, insofar as appealed from, granted that branch of the plaintiffs' motion which was to confirm the results of an election held on May 31, 2015, in which their slate of candidates were elected as the members of the Board of Trustees of the plaintiff Queens Branch of the Bhuvaneshwar Mandir, Inc., and denied that branch of the defendants' cross motion which was pursuant to CPLR 3001 for a judgment declaring that its slate of candidates won the election.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In 2015, the plaintiffs commenced this action for injunctive relief after a dispute arose regarding the control of the plaintiff Queens Branch of the Bhuvaneshwar Mandir, Inc. (hereinafter the Mandir), a religious corporation. Following commencement of the action, the parties agreed to resolve the issue of control by holding an election for the Mandir's Board of Trustees. After the election was conducted, the plaintiffs moved, inter alia, to confirm the results of the election, in which their slate of candidates were elected as the Mandir's Board of Trustees. The defendants cross-moved, inter alia, pursuant to CPLR 3001 for a judgment declaring that their slate of candidates prevailed in the election on the ground that a substantial majority of individuals who cast votes in favor of the plaintiffs' slate of candidates were ineligible to vote in the election. The Supreme Court granted the plaintiffs' motion and denied the defendants' cross motion.

[1] **[2]** **[3]** "The First Amendment forbids civil courts from interfering ***659** in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d 282, 286, 849 N.Y.S.2d 463, 879 N.E.2d 1282; *see First Presbyt. Church of Schenectady v. United Presybt. Church in U.S. of Am.,* 62 N.Y.2d 110, 116, 476 N.Y.S.2d 86, 464 N.E.2d 454). However, "[c]ivil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d at 286, 849 N.Y.S.2d 463, 879 N.E.2d 1282). In applying neutral principles of law, "courts may rely upon internal documents, such as a congregation's bylaws, but only if those documents do not require interpretation of ecclesiastical doctrine" (*id.; see Matter of Ming Tung v. China Buddhist Assn.,* 124 A.D.3d 13, 20, 996 N.Y.S.2d 236, *affd* 26 N.Y.3d 1152, 28 N.Y.S.3d 355, 48 N.E.3d 497).

[4] **[5]** Here, resolution of the instant dispute, including determining whether any votes were cast by individuals who were not eligible to vote in the election, does not "require[ ] intrusion into constitutionally protected ecclesiastical matters" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d at 288, 849 N.Y.S.2d 463, 879 N.E.2d 1282). Rather, this question may be resolved based upon ****286** neutral principles of law and reference to the secular provisions of the Mandir's internal documents (*see Schwimmer v. Welz,* 56 A.D.3d 541, 543, 868 N.Y.S.2d 671; *Esformes v. Brinn,* 52 A.D.3d 459, 462, 860 N.Y.S.2d 547; *Malankara Archdiocese of Syrian Orthodox Church in N. Am. v. Thomas,* 33 A.D.3d 887, 888, 824 N.Y.S.2d 101).

The defendants failed to establish that any of the individuals who voted in favor of the plaintiffs' slate of candidates were ineligible to vote in the election. Accordingly, the Supreme Court properly granted that branch of the plaintiffs' motion which was to confirm the results of the election and denied that branch of the defendants' cross motion which was pursuant to CPLR 3001 for a judgment declaring that their slate of candidates won the election.

RIVERA, J.P., ROMAN, LASALLE and BARROS, JJ., concur.

All Citations

156 A.D.3d 658, 66 N.Y.S.3d 284, 2017 N.Y. Slip Op. 08546

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186 A.D.3d 1548
Supreme Court, Appellate Division,
Second Department, New York.

Christopher RAPUZZI, respondent,

v.

CITY OF NEW YORK, et al.,
appellants, et al., defendants.

2017–11337
|
(Index No. 29622/09)
|
Argued—February 3, 2020
|
September 23, 2020

Synopsis

Background: Arrestee filed action to against New York City Police Department and a detective to recover damages for false arrest and imprisonment, malicious prosecution, related federal claims under § 1983, negligent hiring and retention, and intentional infliction of emotional distress. The Supreme Court, Kings County, Katherine Levine, J., denied Department's and detective's motion for summary judgment. Department and detective appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] detective had probable cause to arrest arrestee based on information provided by citizens accusing arrestee of specific crimes, precluding claim for false arrest and imprisonment;

[2] any discrepancies between eyewitnesses' description of attackers and arrestee's appearance at arrest did not negate fact that police had probable cause to arrest, precluding claim for malicious prosecution; and

[3] arrestee failed to demonstrate causal link between policies customs, or practices of city and constitutional violations, precluding recovery for false arrest under § 1983.

Reversed.

West Headnotes (7)

[1] **False Imprisonment** Probable cause

Detective had probable cause to arrest arrestee based on information provided by citizens accusing arrestee of specific crimes, precluding arrestee's claim to recover damages for false arrest and imprisonment. U.S. Const. Amend. 4.

1 Case that cites this headnote

[2] **False Imprisonment** Probable cause

Probable cause to believe that a person committed a crime is a complete defense to claims of false arrest and imprisonment. U.S. Const. Amend. 4.

[3] **False Imprisonment** Questions for jury

The existence or absence of probable cause, as it relates to claim for false arrest and imprisonment, becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest. U.S. Const. Amend. 4.

[4] **Arrest** Information from Others

Generally, the information provided by an identified citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest. U.S. Const. Amend. 4.

1 Case that cites this headnote

[5] **Malicious Prosecution** Personal knowledge and statements of others

Any discrepancies between eyewitnesses' description of their attackers and arrestee's appearance at time of his arrest the following day failed to negate fact that police had probable cause to arrest and prosecute him based on eyewitnesses' information accusing arrestee of specific crimes, precluding arrestee's claim to

recover damages for malicious prosecution. U.S. Const. Amend. 4.

[6] **Civil Rights** Criminal law enforcement; prisons

Civil Rights Criminal law enforcement; prisons

Arrestee failed to demonstrate causal link between policies, customs, or practices of City of New York and any alleged constitutional violations related to arrest, precluding arrestee's claim to recover damages for false arrest under § 1983 against city, police department, and detective. 42 U.S.C.A. § 1983.

[7] **Damages** Privilege or immunity; exercise of legal rights

Public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity.

1 Case that cites this headnote

Attorneys and Law Firms

****77** James E. Johnson, Corporation Counsel, New York, N.Y. (Devin Slack and Susan P. Greenberg of counsel), for appellants.

David J. Hernandez, Brooklyn, N.Y. (David A. Bonilla of counsel), for respondent.

LEONARD B. AUSTIN, J.P., JOSEPH J. MALTESE, HECTOR D. LASALLE, VALERIE BRATHWAITE NELSON, JJ.

DECISION & ORDER

***1549** In an action, inter alia, to recover damages for false arrest and false imprisonment, ****78** the defendants City of New York, New York City Police Department, and Sidney Valerio appeal from an order of the Supreme Court, Kings County (Katherine A. Levine, J.), dated October 5, 2017. The order denied the motion of such defendants for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendants City of New York, New York City Police Department, and Sidney Valerio for summary judgment dismissing the complaint insofar as asserted against them is granted.

The plaintiff commenced this action to recover damages for false arrest and imprisonment, malicious prosecution, related federal claims asserted under 42 USC § 1983, negligent hiring and retention, and intentional infliction of emotional distress. After issue was joined, the defendants City of New York, New York City Police Department, and Sidney Valerio, a detective (hereinafter collectively the defendants), moved for summary judgment dismissing the complaint insofar as asserted against them. The Supreme Court denied the motion. The defendants appeal.

[1] [2] [3] [4] Probable cause to believe that a person committed a crime is a complete defense to claims of false arrest and imprisonment (*see MacDonald v. Town of Greenburgh*, 112 A.D.3d 586, 976 N.Y.S.2d 189; *Strange v. County of Westchester*, 29 A.D.3d 676, 815 N.Y.S.2d 155). The existence or absence of probable cause becomes a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest (*see MacDonald v. Town of Greenburgh*, 112 A.D.3d at 586–587, 976 N.Y.S.2d 189). Generally, the "information provided by an identified citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest" (*Carlton v. Nassau County Police Dept.*, 306 A.D.2d 365, 366, 761 N.Y.S.2d 98; *see Nasca v. Sgro*, 130 A.D.3d 588, 589, 13 N.Y.S.3d 188). Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for false arrest and imprisonment. In support of their motion, the defendants submitted, among other things, transcripts of deposition testimony establishing that identified citizens had provided information accusing the plaintiff of specific crimes, which was sufficient to provide the police with probable cause to arrest ***1550** him (*see Iorio v. City of New York*, 19 A.D.3d 452, 453, 798 N.Y.S.2d 437). In opposition, the plaintiff failed to raise a triable issue of fact (*see Nasca v. Sgro*, 130 A.D.3d at 589–590, 13 N.Y.S.3d 188; *Dioguardi v. City of New Rochelle*, 179 A.D.2d 798, 799, 578 N.Y.S.2d 660).

[5] The defendants also established their prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for malicious prosecution, as the plaintiff "failed to present sufficient evidence to rebut the presumption of probable cause created by the Grand Jury indictment" (*Hoyt v. City of New York*, 284 A.D.2d 501, 502, 727 N.Y.S.2d 317). Contrary to the plaintiff's contentions, any discrepancies between the eyewitnesses' description of their attackers and the plaintiff's appearance at the time of his arrest the following day failed to negate the fact that the police had probable cause to arrest and prosecute him (*see Batten v. City of New York*, 133 A.D.3d 803, 806, 20 N.Y.S.3d 160).

[6] The defendants also established their prima facie entitlement to judgment as a matter of law dismissing the federal ****79** claims asserted against them under 42 USC § 1983, insofar as such claims were premised upon allegations of false arrest (*see Holland v. City of Poughkeepsie*, 90 A.D.3d 841, 847–848, 935 N.Y.S.2d 583). The defendants established, prima facie, the lack of a causal link between the policies, customs, or practices of the municipality, and any alleged constitutional violations (*see Martin v. City of New York*, 153 A.D.3d 693, 694, 61 N.Y.S.3d 63). In opposition, the plaintiff failed to raise a triable issue of fact.

Furthermore, since the plaintiff pleaded no facts to establish that the municipality was negligent in its hiring or retention of any police officers or other personnel, the defendants demonstrated their entitlement to judgment as a matter of law dismissing this cause of action, and the plaintiff, in opposition, failed to raise a triable issue of fact (*see Eckardt v. City of White Plains*, 87 A.D.3d 1049, 1052, 930 N.Y.S.2d 22).

[7] Finally, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for intentional infliction of emotional distress, since "[i]t is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity" (*Lauer v. City of New York*, 240 A.D.2d 543, 544, 659 N.Y.S.2d 57). In opposition, the plaintiff failed to raise a triable issue of fact.

Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint insofar as asserted against them.

AUSTIN, J.P., MALTESE, LASALLE and BRATHWAITE NELSON, JJ., concur.

All Citations

186 A.D.3d 1548, 131 N.Y.S.3d 76, 2020 N.Y. Slip Op. 05067

123 A.D.3d 728
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of STATE DIVISION OF HUMAN RIGHTS, petitioner,

v.

STEVE'S PIER ONE, INC., et al., respondents.

Dec. 3, 2014.

Synopsis

Background: State Division of Human Rights filed petition to enforce determination finding that employer and its owner and general manager subjected employee to hostile work environment because of his sex, and constructively discharged employee because of his sex.

Holdings: The Supreme Court, Appellate Division, held that:

[1] amendment of complaint to add owner and general manager as individual respondent after statute of limitations had expired was not unreasonable or unfair, and

[2] substantial evidence supported award of $200,000 in compensatory damages.

Determination confirmed.

West Headnotes (2)

[1] Limitation of Actions Intervention or bringing in new parties

Former employee's hostile work environment and constructive discharge claims against restaurant's owner and general manager related back to those asserted in employee's original complaint against his restaurant, and thus amendment of complaint to add owner and general manager as individual respondent after statute of limitations had expired was not unreasonable or unfair.

1 Case that cites this headnote

[2] Civil Rights Employment practices

Substantial evidence supported award of $200,000 in compensatory damages for mental anguish and humiliation in former employee's action alleging that employer and its owner and general manager subjected employee to hostile work environment and constructively discharged him because of his sex.

4 Cases that cite this headnote

Attorneys and Law Firms

****206** Caroline J. Downey, Bronx, N.Y. (Michael K. Swirsky of counsel), for petitioner.

REINALDO E. RIVERA, J.P., SYLVIA O. HINDS–RADIX, COLLEEN D. DUFFY, and HECTOR D. LaSALLE, JJ.

Opinion

***729** Proceeding pursuant to Executive Law § 298 to enforce a determination of the Commissioner of the New York State Division of Human Rights dated October 12, 2011, which adopted the recommendation and findings of an administrative law judge dated April 12, 2011, made after a hearing, finding (a) that the complainant was subjected to a hostile work environment because of his sex, and constructively discharged from his employment because of his sex, (b) found that the respondents Steve's Pier One, Inc., Pier One on the Sound, LLC, Pier One Bayville on the Sound, Inc., Crocchiolo Pizzeria, Inc., Bayville ****207** Lobster, Inc., and Joseph Genova, individually, were liable for the sexual harassment, and (c) awarded the complainant damages in the principal sums of $3,248, plus interest at the rate of 9% per year from June 30, 2001, for back pay, and $200,000, plus interest at the rate of 9% per year from October 11, 2011, in compensatory damages for mental anguish and humiliation.

ADJUDGED that the petition is granted, with costs, the determination is confirmed, and the respondents Steve's Pier One, Inc., Pier One on the Sound, LLC, Pier One Bayville on the Sound, Inc., Crocchiolo Pizzeria, Inc., Bayville Lobster, Inc., and Joseph Genova are directed to pay to the complainant the principal sums of $3,248, plus interest at the rate of 9% per year from June 30, 2001, for back pay, and

$200,000, plus interest at the rate of 9% per year from October 12, 2011, in compensatory damages for mental anguish and humiliation.

The determination of the Commissioner of the New York State Division of Human Rights (hereinafter the Commissioner) that the complainant was subjected to a hostile work environment, based on sex, that led to his constructive discharge is supported by substantial evidence on the record considered as a whole (*see Matter of New York State Div. of Human Rights v. A.R. Heflin Painting Contr., Inc.,* 101 A.D.3d 1442, 1443–1444, 956 N.Y.S.2d 666; *Matter of Eastport Assoc., Inc. v. New York State Div. of Human Rights,* 71 A.D.3d 890, 891, 897 N.Y.S.2d 177; *Matter of New York State Dept. of Correctional Servs. v. New York State Div. of Human Rights,* 53 A.D.3d 823, 824, 861 N.Y.S.2d 494; *Matter of State Div. of Human Rights v. Dom's Wholesale & Retail Ctr., Inc.,* 18 A.D.3d 335, 336, 795 N.Y.S.2d 537).

Substantial evidence also supports the determination that Joseph Genova, as the owner and general manager of the restaurant where the complainant was employed at the time, is individually liable for the discrimination (*see Patrowich v. Chemical Bank,* 63 N.Y.2d 541, 542, 483 N.Y.S.2d 659, 473 N.E.2d 11; *Matter of Murphy v. Kirkland,* 88 A.D.3d 795, 796–797, 930 N.Y.S.2d 285; *Matter of Eastport Assoc., Inc. v. New York State Div. of Human Rights,* 71 A.D.3d at 891, 897 N.Y.S.2d 177).

[1] ***730** The amendment of the complaint to add Joseph Genova as an individual respondent after the statute of limitations had expired was not unreasonable or unfair, inasmuch as the claims against him "related back" to those asserted in the original complaint against his restaurant (*see Rio Mar Rest. v. New York State Div. of Human Rights,* 270 A.D.2d 47, 48, 704 N.Y.S.2d 230; *cf. Matter of New York State Div. of Human Rights v. A.R. Heflin Painting Contr., Inc.,* 101 A.D.3d at 1445, 956 N.Y.S.2d 666; *Matter of Murphy v. Kirkland,* 88 A.D.3d 267, 277, 928 N.Y.S.2d 333; *Matter of Adler v. Hooper,* 87 A.D.3d 633, 636, 928 N.Y.S.2d 731).

[2] The award of compensatory damages is reasonably related to the wrongdoing, supported by substantial evidence, and comparable to other awards for similar injuries (*see Matter of New York City Tr. Auth. v. State Div. of Human Rights,* 78 N.Y.2d 207, 218–219, 573 N.Y.S.2d 49, 577 N.E.2d 40; *Matter of Hartley Catering, Inc. v. New York State Div. of Human Rights,* 66 A.D.3d 1022, 886 N.Y.S.2d 822; *Matter of New York State Dept. of Correctional Servs. v. New York State Div. of Human Rights,* 53 A.D.3d at 826, 861 N.Y.S.2d 494; *Matter of Under the Elms v. Tolbert,* 1 A.D.3d 373, 373–374, 766 N.Y.S.2d 876; *Sier v. Jacobs Persinger & Parker,* 276 A.D.2d 401, 714 N.Y.S.2d 283; ****208** *Matter of Town of Hempstead v. State Div. of Human Rights,* 233 A.D.2d 451, 649 N.Y.S.2d 942).

Likewise, the award of back pay was supported by substantial evidence (*see* Executive Law § 297[4][c]; *Matter of Mize v. State Div. of Human Rights,* 33 N.Y.2d 53, 55–56, 349 N.Y.S.2d 364, 304 N.E.2d 231; *Matter of New York State Div. of Human Rights v. ABS Elecs., Inc.,* 102 A.D.3d 967, 969, 958 N.Y.S.2d 502; *Matter of Goldberg v. New York State Div. of Human Rights,* 85 A.D.3d 1166, 1167, 927 N.Y.S.2d 123), and the award of predetermination interest on it was appropriate (*see Matter of Aurecchione v. New York State Div. of Human Rights,* 98 N.Y.2d 21, 26, 744 N.Y.S.2d 349, 771 N.E.2d 231).

All Citations

123 A.D.3d 728, 998 N.Y.S.2d 206, 2014 N.Y. Slip Op. 08445

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132 A.D.3d 28
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of STATE
of New York, respondent,
v.
TED B. (Anonymous), appellant.

July 29, 2015.

Synopsis

Background: State petitioned for civil commitment of respondent, a convicted sex offender. Following bench trial, the Supreme Court, Orange County, Nicholas DeRosa, J., determined that the respondent suffered from a mental abnormality and directed commitment. Respondent appealed.

Holdings: The Supreme Court, Appellate Division, Chambers, J., held that:

[1] as a matter of a first impression, an on the record colloquy is required in order to accomplish a valid waiver of the right to a jury trial in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment;

[2] respondent's letter to court purporting to waive his right to a jury trial was not sufficient to show that he knowingly and voluntarily waived his right; and

[3] a written waiver of the right to a jury trial is not required.

Reversed and remitted.

West Headnotes (23)

[1] **Statutes** Intent

In interpreting a statute, a court should attempt to effectuate the intent of the legislature.

[2] **Statutes** Plain language; plain, ordinary, common, or literal meaning

Where statutory language is clear and unambiguous, a court should construe it so as to give effect to the plain meaning of the words used.

[3] **Statutes** Language and intent, will, purpose, or policy

In interpreting a statute, the best evidence of the legislature's intent is the text of the statute itself.

[4] **Jury** Necessity for demand

Rule that provides that, if no party affirmatively demands a trial by jury, the right to trial by jury is waived, is inapplicable in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment; statute setting forth procedures for such proceedings states that a court "shall" conduct a jury trial. McKinney's Mental Hygiene Law § 10.07(a); McKinney's CPLR 4102(a).

[5] **Jury** Necessity for demand

Respondent's failure to demand jury trial in proceeding to determine if a respondent was a dangerous sex offender requiring civil commitment did not constitute an implicit waiver of his right to a jury trial in the proceeding. McKinney's Mental Hygiene Law § 10.07; McKinney's CPLR 4102(a).

2 Cases that cite this headnote

[6] **Jury** Mental health determinations

A respondent in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment does not have a federal constitutional right to a jury trial under the Sixth Amendment. U.S.C.A. Const. Amend. 6; McKinney's Mental Hygiene Law § 10.01 et seq.

[7] **Jury** Mental health determinations

A respondent's statutory right to a jury trial in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment is protected by article of New York Constitution providing that trial by jury in all cases in which it has heretofore been guaranteed by the constitution shall remain inviolate forever. McKinney's Const. Art. 1, § 2; McKinney's Mental Hygiene Law § 10.07(a).

[8] **Jury** Nature of Cause of Action or Issue in General

The right to a jury trial guaranteed under State Constitution is not strictly limited to those instances in which it was actually used in 1894, but also extends to new cases that are analogous to those traditionally tried by a jury. McKinney's Const. Art. 1, § 2.

[9] **Jury** Mental health determinations

Since civil commitment statutes in New York have historically provided a right to a jury trial regarding questions of a person's mental illness, a respondent in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment has a state constitutional right to a jury trial to determine the issue of mental abnormality. McKinney's Const. Art. 1, § 2; McKinney's Mental Hygiene Law § 10.07(a).

3 Cases that cite this headnote

[10] **Constitutional Law** Commitment and proceedings therefor

Mental Health Jurisdiction and proceedings in general

The Due Process Clauses of the Fifth and Fourteenth Amendments govern the scope of procedural due process in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment. U.S.C.A. Const. Amends. 5, 14; McKinney's Mental Hygiene Law § 10.01 et seq.

1 Case that cites this headnote

[11] **Constitutional Law** Commitment and proceedings therefor

Jury Form and sufficiency of waiver

A respondent's waiver of the right to a jury in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment must comport with the procedural due process requirements under both the United States and New York Constitutions, and thus there must be effective procedures in place so as to guard against the erroneous deprivation of life, liberty, or property. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.07(b).

[12] **Constitutional Law** Fairness in general

Constitutional Law Factors considered; flexibility and balancing

Due process is a flexible concept but, at its core, is concerned with fundamental fairness. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6.

[13] **Constitutional Law** Factors considered; flexibility and balancing

Due process requires consideration of three factors: (1) the private interest that will be affected by an official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6.

1 Case that cites this headnote

[14] **Constitutional Law** Commitment and confinement

Jury Form and sufficiency of waiver

"Private interest that will be affected by an official action" factor of test used to determine whether procedural due process requirements are met weighed in favor of requiring additional procedural protections to ensure that the waiver of a jury trial in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment is knowing and voluntary. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.07(b).

[15] **Jury** Nature and functions in general

The purpose of a jury trial is to prevent oppression by the Government, and this purpose is attained by the participation of the community.

[16] **Jury** Nature and functions in general

Between the state and the individual lies the jury, with its commonsense judgment and its shared responsibility for the determination it must make.

[17] **Constitutional Law** Commitment and confinement

Jury Form and sufficiency of waiver

"Risk of erroneous deprivation of private interest through procedures used" factor of test used to determine whether procedural due process requirements are met weighed in favor of affording additional procedural protections to ensure that the waiver of a jury trial in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment is knowing and voluntary, since right to a jury trial was a substantial one. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.07(b).

1 Case that cites this headnote

[18] **Constitutional Law** Classification and registration; restrictions and obligations

Mental Health Jurisdiction and proceedings in general

For purposes of the government interest factor of the test used to determine whether procedural due process standards are met, the state has a significant interest in the prompt and reliable adjudication of whether a detained sex offender suffers from a mental abnormality for purposes of treating him while protecting the community. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.01 et seq.

[19] **Jury** Form and sufficiency of waiver

The essence of a waiver of the right to a jury trial is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it; knowledge and intent are essential elements, and the waiver must be clear, unmistakable, and without ambiguity.

1 Case that cites this headnote

[20] **Constitutional Law** Commitment and confinement

Jury Form and sufficiency of waiver

For purposes of the test used to determine whether procedural due process standards are met, requiring additional procedural protection to ensure that a waiver of the right to a jury trial in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment is knowing and voluntary would not be unduly burdensome on the state. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.07(b).

[21] **Constitutional Law** Commitment and confinement

Jury Form and sufficiency of waiver

In order to accomplish a valid waiver of the right to a jury trial in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment, and in accordance

with due process, there must be an on-the-record colloquy, in order to ensure that the respondent understands the nature of the right, and that the respondent's decision is knowing and voluntary after having had sufficient opportunity to consult with counsel; this requirement is a minimal burden on the state that does not impede its interest in promptly and reliably adjudicating whether a detained sex offender suffers from a mental abnormality, and thus, the state's interest is outweighed by the need to ensure that a respondent's decision to forego his state constitutional and statutory right to a jury trial is the product of an informed and intelligent judgment and, thereby, protect the important liberty interests at stake in such a proceeding. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.07(b).

3 Cases that cite this headnote

[22] **Jury** Form and sufficiency of waiver

Respondent's letter to court purporting to waive his right to a jury trial in proceeding to determine if he was a dangerous sex offender requiring civil commitment was not sufficient to demonstrate that he knowingly and voluntarily waived his right to a jury trial, even though letter articulated legitimate reason for wanting to forego jury trial, arising from concern that jury would judge him based on his past offenses, where there was no on-the-record colloquy regarding the decision to waive his right, the letter provided no assurance that he came to the conclusion after having consulted with his attorney, and the letter reflected that the respondent misapprehended key legal concepts. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.07(b).

[23] **Constitutional Law** Commitment and confinement

Jury Form and sufficiency of waiver

A written waiver of the right to a jury trial, such as is mandated for criminal proceedings, is not required in order to satisfy procedural due process requirements in a proceeding to determine if a respondent is a dangerous sex offender requiring civil commitment; all that a trial court must do is explain to a respondent the nature of the right to a jury trial and confirm that he or she has decided to waive that right after consulting with his or her attorney. U.S.C.A. Const. Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's Mental Hygiene Law § 10.07(b); McKinney's CPL § 320.10.

Attorneys and Law Firms

****369** Craig S. Leeds, New York, N.Y., for appellant.

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PETER B. SKELOS, J.P., CHERYL E. CHAMBERS, COLLEEN D. DUFFY, and HECTOR D. LASALLE, JJ.

Opinion

CHAMBERS, J.

***30** Under article 10 of the Mental Hygiene Law, Ted B., a detained sex offender, has both a statutory and state constitutional right to a jury trial to determine whether he suffers from a mental abnormality requiring civil management. For the reasons that follow, we conclude that an on-the-record colloquy is required to ensure that a detained sex offender validly waives that right to a jury trial on the issue of mental abnormality. This requirement was not satisfied here, where the waiver of Ted B.'s right to a jury trial was apparently based solely upon a letter he wrote to the Supreme Court, and where there is nothing in the record to show that the waiver was knowing and voluntary.

I.

On April 12, 1993, Ted B. was convicted of multiple offenses including five counts of rape in the first degree, five counts of ****370** sodomy (now criminal sexual act) in the first degree, and sexual abuse in the first degree. For these offenses, which stemmed from his sexual assault of two women in the City of Newburgh, Ted B. was sentenced to an aggregate

indeterminate term of 13 to 26 years of imprisonment. On February 2, 2010, as Ted B.'s scheduled discharge date approached, the State of New York commenced this proceeding pursuant to Mental Hygiene Law article 10, known as the Sex Offender Management and Treatment Act, seeking to civilly manage Ted B.

Prior to trial, Ted B. sent a letter to the Supreme Court explaining at length why he did not want a jury trial. He cited two reasons for requesting a nonjury trial. First, he expressed his belief that, with a nonjury trial, he could have a polygraph test admitted into evidence that would otherwise be inadmissible in a jury trial. Second, Ted B. offered, "I want you to judge me for who I am today not the past which I strongly feel a jury would." Ted B. reiterated, at the end of his letter, "I want to prove the State was wrong about me ... which is why I want a[ ] judge trial and a polygraph test to not only show that I never told [a forensic evaluator] those things but also that you are not setting a[ ] sex-offender free that['s] seeking revenge or another victim." The letter is stamped with the date and Justice DeRosa's name. There is no indication in the record that Ted B. discussed his letter with his attorney or with the court. Moreover, during the course of the proceedings, neither ***31** Ted B. nor his counsel confirmed in court or made a public record of his purported waiver of his right to a jury trial.

A nonjury trial was conducted, and the Supreme Court found that Ted B. suffers from a mental abnormality within the meaning of Mental Hygiene Law § 10.03. After a dispositional hearing, the Supreme Court determined that Ted B. is a dangerous sex offender requiring confinement, and directed that he be confined (*see* Mental Hygiene Law § 10.07[f]).

II.

Initially, we reject Ted B.'s contention that the State failed to sustain its burden of proving by clear and convincing evidence that he suffers from a mental abnormality and is a dangerous sex offender requiring confinement (*see id.; State v. Raul L.,* 120 A.D.3d 52, 58–60, 988 N.Y.S.2d 190; *Matter of State of New York v. Clarence D.,* 82 A.D.3d 776, 777, 917 N.Y.S.2d 700).

Next, Ted B. contends that Mental Hygiene Law § 10.07 affords an absolute right to a jury trial in an article 10 proceeding, and that he did not knowingly and voluntarily waive that right since he did not execute a written waiver or acknowledge on the record that he was foregoing his right to a jury trial.

[1] **[2]** **[3]** To address these contentions, we begin with an examination of the applicable statutes. It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the legislature (*see Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978), and the best evidence of the legislature's intent is the text of the statute itself (*see Matter of Theroux v. Reilly,* 1 N.Y.3d 232, 239, 771 N.Y.S.2d 43, 803 N.E.2d 364). Where the statutory language is clear and unambiguous, a court should construe it so as to give effect to the plain meaning of the words used (*see Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce,* 21 N.Y.3d 55, 60, 967 N.Y.S.2d 876, 990 N.E.2d 114).

Mental Hygiene Law § 10.07(a) provides that upon a finding of probable cause to ****371** believe that a respondent is a sex offender requiring civil management, "the court *shall* conduct a jury trial to determine whether the respondent is a detained sex offender who suffers from a mental abnormality" (emphasis added). Mental Hygiene Law § 10.07(b) further provides, with certain exceptions not relevant here, that article 41 of the Civil Practice Law and Rules shall apply to "the formation and conduct of [the] jury trial." Mental Hygiene § 10.07(b) also states that "[t]he right to a trial by jury may be waived by the respondent" in an article 10 proceeding.

[4] **[5]** ***32** Relying on Mental Hygiene Law § 10.07(b), which specifies that CPLR article 41 applies to the formation and conduct of jury trials, the State argues that the threshold question of whether the respondent in an article 10 proceeding is entitled to a jury trial is governed by CPLR 4102(a). CPLR 4102(a) provides that, "if no party shall demand a trial by jury as provided herein, the right to trial by jury shall be *deemed* waived by all parties" (CPLR 4102[a] [emphasis added]). The State contends that, since Ted B. never made a demand for a jury trial as required by CPLR 4102(a), a trial by the court was properly held. Contrary to this contention, in the context of an article 10 proceeding, any reliance on CPLR 4102(a) is inappropriate. The CPLR 4102(a) requirement that a party make an affirmative demand for a jury trial is inconsistent with the plain language of Mental Hygiene Law § 10.07(a), which expressly states that the court "shall" conduct a jury trial. The word "shall" is clear and absolute.[1] Critically, Mental Hygiene Law § 10.07(b) ends with the

sentence, "[t]he right to a trial by jury may be waived by the respondent." We believe that the legislature's inclusion of a "waiver" clause in Mental Hygiene Law § 10.07(b) was deliberate and contemplated that, in order to waive the right to a jury trial in an article 10 proceeding, a respondent must take some affirmative action. There is a significant distinction between an automatic right to a jury trial in an article 10 proceeding, which may be waived, and a right to a jury trial that is conditioned upon a demand pursuant to CPLR 4102(a). Accordingly, we find that Ted B.'s failure to demand a jury trial does not constitute an implicit waiver of his right to a jury trial. Thus, we now turn to a pivotal question on this appeal: what is required to validly waive the right to a jury trial in an article 10 proceeding?

The plain reading of Mental Hygiene Law § 10.07(b) evinces that a respondent in an article 10 proceeding may waive a jury trial, but does not explicitly state the requirements for a valid waiver. By comparison, statutes which govern the right to jury trial in other types of proceedings contain specific requirements. For example, in a criminal prosecution, where a defendant's constitutional right to a jury trial is ***33** guaranteed by the Sixth Amendment to the United States Constitution, CPL 320.10(2) requires that a written waiver must be "signed by the defendant in person in open court in the presence of the court, and with the approval of the court." In contrast, in both a proceeding under Mental Hygiene Law § 9.35 for the civil retention of a patient, and in a proceeding for the appointment of a guardian for an alleged incapacitated person, the failure to make a demand is deemed to be ****372** a waiver of the right to a jury trial (*see* Mental Hygiene Law § 81.11[f]).

Notably, Mental Hygiene Law § 10.07(b) does not fill this statutory void. It simply directs that the provisions of article 41 of the CPLR shall apply to the "formation and conduct of [the] jury trial," with certain exceptions where the Criminal Procedure Law is to be applied. The "formation and conduct of [the] jury trial" relates to matters such as the number of jurors necessary to form a jury, challenges to the panel, examination of prospective jurors, and the number of peremptory challenges, but does not prescribe the procedure for waiving the right to a jury trial (Mental Hygiene Law § 10.07[b]).

[6] In determining the requirements for a valid waiver of the right to a jury trial in an article 10 proceeding, we must consider the nature of the proceeding and the extent to which constitutional protections must be afforded. The Court of Appeals has made clear that proceedings pursuant to the Sex Offender Management and Treatment Act "are civil proceedings" (*Matter of State of New York v. Floyd Y.,* 22 N.Y.3d 95, 104, 979 N.Y.S.2d 240, 2 N.E.3d 204; *see* Mental Hygiene Law § 10.01[b] [in its legislative findings, the legislature stated that "confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public" (emphasis added)]). Indeed, the Court of Appeals has held that the constitutional protections afforded to criminal defendants do not apply to sex offenders facing civil confinement (*see Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 103, 979 N.Y.S.2d 240, 2 N.E.3d 204). Thus, a respondent in an article 10 proceeding does not have a federal constitutional right to a jury trial under the Sixth Amendment (*see Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 103, 979 N.Y.S.2d 240, 2 N.E.3d 204).

[7] **[8]** **[9]** However, a respondent's statutory right to a jury trial in an article 10 proceeding is protected by Article I, § 2 of the New York State Constitution, which provides that "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitution shall remain inviolate forever." The Court of Appeals has held that a jury trial is guaranteed in all ***34** cases to which the Legislature by statute extended such a right at the time the New York State Constitution was enacted in 1894 (*see Matter of State v. Myron P.,* 20 N.Y.3d 206, 212, 958 N.Y.S.2d 71, 981 N.E.2d 772). "In addition, it has been held that the right to a jury trial is not strictly limited to those instances in which it was actually used in 1894, but also extends to new cases that are analogous to those traditionally tried by a jury" (*Matter of DES Mkt. Share Litig.,* 79 N.Y.2d 299, 305, 582 N.Y.S.2d 377, 591 N.E.2d 226; *see Matter of State v. Myron P.,* 20 N.Y.3d at 212–213, 958 N.Y.S.2d 71, 981 N.E.2d 772). Since civil commitment statutes in New York have historically provided a right to a jury trial regarding questions of a person's mental illness (*see Matter of State v. Myron P.,* 20 N.Y.3d at 213, 958 N.Y.S.2d 71, 981 N.E.2d 772), a respondent in an article 10 proceeding has a state constitutional right to a jury trial to determine the issue of mental abnormality.

[10] **[11]** **[12]** **[13]** In view of the fact that article 10 proceedings are civil in nature, "the Due Process Clauses of the Fifth and Fourteenth Amendments, as expressed by the *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 balancing test, govern the scope of procedural due process" (*Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 103, 979 N.Y.S.2d 240, 2 N.E.3d 204). Accordingly,

a respondent's waiver of the right to a jury must ****373** comport with the procedural due process requirements under both the United States and New York Constitutions. Thus, there must be effective procedures in place so as to guard against the erroneous deprivation of life, liberty, or property (*see Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 104, 979 N.Y.S.2d 240, 2 N.E.3d 204; *People v. David W.,* 95 N.Y.2d 130, 136, 711 N.Y.S.2d 134, 733 N.E.2d 206; *Matter of New York v. Raul L.,* 120 A.D.3d 52, 64–65, 988 N.Y.S.2d 190). Due process is a flexible concept but, at its core, is concerned with "fundamental fairness" (*Lassiter v. Department of Social Servs. of Durham Cty.,* 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640; *see Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484). In order to discover what fundamental fairness requires in a particular situation, both relevant precedents and the interests at stake must be considered (*see Lassiter v. Department of Social Servs. of Durham Cty.,* 452 U.S. at 24–25, 101 S.Ct. 2153). The specific dictates of due process require consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute ***35** procedural requirement would entail (*see Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18; *Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 105, 979 N.Y.S.2d 240, 2 N.E.3d 204; *People v. David W.,* 95 N.Y.2d at 136–137, 711 N.Y.S.2d 134, 733 N.E.2d 206). We apply these three factors to the current case.

[14] The Court of Appeals has noted that "[t]he Federal and State Constitutions protect individual liberty, and it is one of our most cherished and protected rights" (*Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 105, 979 N.Y.S.2d 240, 2 N.E.3d 204). Here, the potential for indefinite confinement threatens a liberty interest of the highest order (*id.*). Thus, the first factor weighs in favor of requiring additional procedural protection to ensure that the waiver of a jury trial in an article 10 proceeding is knowing and voluntary (*see id.; see Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323).

[15] **[16]** **[17]** Under the second factor, which considers the risk of erroneous deprivation in the absence of additional or substitute procedures, we note that the purpose of a jury trial is " 'to prevent oppression by the Government' " (*Ballew v. Georgia,* 435 U.S. 223, 229, 98 S.Ct. 1029, 55 L.Ed.2d 234, quoting *Williams v. Florida,* 399 U.S. 78, 100, 90 S.Ct. 1893, 26 L.Ed.2d 446). This purpose is attained by the participation of the community (*see Williams v. Florida,* 399 U.S. at 100, 90 S.Ct. 1893; *Duncan v. Louisiana,* 391 U.S. 145, 155–156, 88 S.Ct. 1444, 20 L.Ed.2d 491). Between the state and the individual lies the jury, with its commonsense judgment and its shared responsibility for the determination it must make (*see Williams v. Florida,* 399 U.S. at 100, 90 S.Ct. 1893). Thus, the risk of erroneous deprivation of the right to a jury trial is a substantial one, and this factor also weighs in favor of affording additional procedural protection to a respondent's waiver of a jury trial in an article 10 proceeding.

[18] **[19]** **[20]** In considering the third factor, we recognize that the State has a significant interest in the prompt and reliable adjudication of whether a detained sex offender suffers from a mental abnormality for purposes of treating him while protecting the community (*see* Mental Hygiene Law § 10.01). However, requiring additional ****374** procedural protection to ensure that a waiver of the right to a jury trial in an article 10 proceeding comports with due process would not be an unduly burdensome requirement. The essence of a waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it (*see Johnson v. Zerbst,* 304 U.S. 458, 464–465, 58 S.Ct. 1019, 82 L.Ed. 1461; *People v. Harris,* 61 N.Y.2d 9, 17, 471 N.Y.S.2d 61, 459 N.E.2d 170; *City of New York v. State of New York,* 40 N.Y.2d 659, 669, 389 N.Y.S.2d 332, 357 N.E.2d 988; *Georgetown Unsold Shares, LLC v. Ledet,* 130 A.D.3d 99, 12 N.Y.S.3d 160 [2d Dept.2015]). "[K]nowledge and intent are essential elements" ***36** (*People v. Cox,* 71 A.D.2d 798, 798, 419 N.Y.S.2d 345). The waiver "must be clear, unmistakable and without ambiguity" (*Matter of Civil Serv. Empls. Assn. v. Newman,* 88 A.D.2d 685, 686, 450 N.Y.S.2d 901, *affd.* 61 N.Y.2d 1001, 475 N.Y.S.2d 379, 463 N.E.2d 1231).

Since the issue of procedural due process raised in this appeal is a matter of first impression in our Court, we look to other courts for guidance. For example, in *Matter of State of New York v. Robert C.,* 113 A.D.3d 937, 979 N.Y.S.2d 173, the Third Department reviewed the validity of a waiver of a jury trial in an article 10 proceeding. The respondent, during a pretrial conference in which he participated by video, waived his right to a jury trial on the issue of whether he suffered from a mental abnormality and consented to a finding that he had a mental abnormality. The respondent thereafter moved to withdraw his waiver of the right to a jury trial and his consent to a finding of mental abnormality. The Supreme Court denied the motion. In affirming, the Third Department stated that

"[a] waiver of the right to a jury trial, in a proceeding that may affect the party's liberty interests, will be upheld if the court made an inquiry to establish that the waiving party understood the implications of such waiver and the waiver was knowingly, intelligently, and voluntarily made" (*id.* at 939, 979 N.Y.S.2d 173). In concluding that this standard had been satisfied, the Third Department noted that there was an on-the-record discussion between counsel, the respondent, and the Supreme Court, which demonstrated that the waiver and consent were knowing and intelligent.

In *Commonwealth v. Dresser,* 71 Mass.App.Ct. 454, 883 N.E.2d 306, the Commonwealth of Massachusetts sought to indefinitely commit the defendant to the Massachusetts Treatment Center as a sexually dangerous person. At the time, Massachusetts law required that a trial "shall be by jury unless affirmatively waived by the person in the petition" (G.L. c. 123A, § 14[a]). Trial notices were sent out shortly before the trial, indicating a date for a "trial without jury." In addition, a writ of habeas corpus, indicating the "jury-waived" trial date, was faxed to the treatment center where the defendant was being held. At the outset of the trial, defense counsel stated that the defendant was present and "prepared to be jury waived." Also, counsel responded affirmatively to the court's question, "And it's going to be jury waived?" ***37** However, no colloquy between the defendant and the trial court ever occurred, and a written waiver was never filed. After the nonjury trial, the court directed that the defendant be committed. On appeal, the Appeals Court of Massachusetts noted that the right to a jury trial in this type of proceeding was statutorily based and not a fundamental federal or state constitutional right. Hence, under Massachusetts law, traditional indicia of waiver, such as waiver by inaction, by express agreement, by untimely motion, and by failure to object, had to be employed. The court stated ****375** that counsel, presumably after conferring with the defendant, indicated on two separate occasions that the trial would be jury-waived. No more was needed, the court held. However, in accord with due process protections, the court stated that, going forward, "the better practice in such situations is to engage the defendant in a colloquy and to execute a written waiver" because of the potential deprivation of liberty that these defendants face (*Commonwealth v. Dresser,* 71 Mass.App.Ct. at 458, 883 N.E.2d 306; *see Commonwealth v. Brown,* 83 Mass.App.Ct. 1110, 2013 WL 409739).

[21] **[22]** With these general principles in mind, we hold that in order to accomplish a valid waiver of the right to a jury trial in an article 10 proceeding under Mental Hygiene Law § 10.07(b), and in accordance with due process, there must be an on-the-record colloquy, in order to ensure that the respondent understands the nature of the right, and that the respondent's decision is knowing and voluntary after having had sufficient opportunity to consult with counsel (*see Johnson v. Zerbst,* 304 U.S. at 465, 58 S.Ct. 1019 ["it would be fitting and appropriate" for the determination as to whether there has been a valid waiver "to appear upon the record"]). This requirement is a minimal burden on the State that does not impede its interest in promptly and reliably adjudicating whether a detained sex offender suffers from a mental abnormality. Thus, the State's interest is outweighed by the need to ensure that a respondent's decision to forego his state constitutional and statutory right to a jury trial is the product of an informed and intelligent judgment and, thereby, "protect the important liberty interests at stake in article 10 proceedings" (*Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 106, 979 N.Y.S.2d 240, 2 N.E.3d 204; *see Matter of State of New York v. Myron P.,* 20 N.Y.3d at 213, 958 N.Y.S.2d 71, 981 N.E.2d 772; *People v. Duchin,* 12 N.Y.2d 351, 352, 239 N.Y.S.2d 670, 190 N.E.2d 17).In this case, there was no on-the-record colloquy regarding Ted B.'s decision to waive his right to a jury trial. Therefore, ***38** we cannot conclude that he knowingly and voluntarily waived that right. In his letter to the Supreme Court, Ted B. articulated a legitimate reason for wanting to forego a jury trial, arising from his concern that a jury would judge him upon his past offenses.[2] However, the letter provides no assurance that he came to that conclusion after having consulted with his attorney (*see People v. Calvi,* 89 N.Y.2d 868, 871, 653 N.Y.S.2d 89, 675 N.E.2d 843 ["Something ... must be placed on the record, and nothing was done here, including no manifest review of the waiver itself"]). Indeed, the letter itself reflects that Ted B. misapprehended key legal concepts. More specifically, Ted B. expressed the erroneous belief that a polygraph test could be admissible in a nonjury trial to show that he did not make certain statements to a forensic evaluator and was not seeking revenge against another victim, and that he had the burden of showing that "the State was wrong about [him]" when it is the State's obligation to establish, by clear and convincing evidence, that a detained sex offender suffers from a mental abnormality (*see* Mental Hygiene Law §§ 10.07[d]; 10.03[e]). Under these ****376** circumstances, the letter cannot be viewed as an adequate substitute for an on-the-record colloquy.

[23] We note, however, that a written waiver such as is mandated by CPL 320.10 in criminal proceedings is not required in order to satisfy the requirements of Mental

Hygiene Law article 10 or due process (*see Matter of State of New York v. Floyd Y.,* 22 N.Y.3d at 105, 979 N.Y.S.2d 240, 2 N.E.3d 204). The additional burden of requiring a written waiver in the context of a civil proceeding militates against such a requirement (*see id.*). All that a trial court must do is explain to a respondent the nature of the right to a jury trial and confirm that he or she has decided to waive that right after consulting with his or her attorney.

Ted B.'s remaining contention is academic in light of our determination.

ORDERED that the order is reversed, on the law, without costs or disbursements, the finding of mental abnormality is set aside, and the matter is remitted the Supreme Court, Orange ***39** County, for a new trial on the issue of mental abnormality and, if necessary, a new dispositional hearing.

SKELOS, J.P., DUFFY and LASALLE, JJ., concur.

All Citations

132 A.D.3d 28, 15 N.Y.S.3d 366, 2015 N.Y. Slip Op. 06352

Footnotes

1 "Shall" has been referred to as a mandatory directive (*see Wager v. Pelham Union Free Sch. Dist.,* 108 A.D.3d 84, 88, 966 N.Y.S.2d 126), mandatory language (*see Matter of Home Depot U.S.A., Inc. v. Town Bd. of the Town of Southeast,* 70 A.D.3d 824, 826, 895 N.Y.S.2d 142) or a mandatory verb form that leaves no doubt as to its meaning (*see Thomas v. Alleyne,* 302 A.D.2d 36, 40, 752 N.Y.S.2d 362).

2 In the bill jacket to the Sex Offender Management and Treatment Act, one not-for-profit organization expressed "the wisdom of allowing sex offenders to waive a jury trial during their commitment hearings, having learned from other states that juries typically vote to civilly commit, whereas judges tend more to form opinions based on the merits of each individual case" (Letter from New York State Alliance of Sex Offender Service Providers, Bill Jacket, L.2007, ch. 7, at 51).

129 A.D.3d 1066
Supreme Court, Appellate Division,
Second Department, New York.

Tarrell WILLIAMS, respondent,
v.
CITY OF NEW YORK, defendant,
William Danchak, et al., appellants.

June 24, 2015.

Synopsis

Background: Arrestee brought § 1983 action against city and police officers, alleging excessive use of force in violation of the Fourth Amendment. The Supreme Court, Kings County, Ash, J., denied defendants' motion for summary judgment. Defendants appealed.

[Holding:] The Supreme Court, Appellate Division, held that fact issues precluded summary judgment on the excessive force claims.

Affirmed.

West Headnotes (6)

[1] **Arrest** Use of force

A claim that a law enforcement official used excessive force during the course of an arrest is to be analyzed under the objective reasonableness standard of the Fourth Amendment. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

[2] **Arrest** Use of force

The reasonableness of a particular use of force is judged from the perspective of a reasonable law enforcement officer on the scene, rather than with the 20/20 vision of hindsight, and takes into account the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

[3] **Arrest** Use of force

A law enforcement officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

[4] **Arrest** Use of force

Because of its intensely factual nature, the question of whether a law enforcement officer's use of force was reasonable under the circumstances is generally best left for a jury to decide. U.S.C.A. Const.Amend. 4.

1 Case that cites this headnote

[5] **Civil Rights** Sheriffs, police, and other peace officers

If found to be objectively reasonable, a law enforcement officer's use of force in the course of an arrest is privileged under the doctrine of qualified immunity. U.S.C.A. Const.Amend. 4.

3 Cases that cite this headnote

[6] **Judgment** Public officers and employees, cases involving

Genuine issue of material fact existed as to whether police officers' use of deadly force against arrestee was objectively reasonable under the circumstances, precluding summary judgment on arrestee's excessive force claims brought against the officers under § 1983. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

1 Case that cites this headnote

Attorneys and Law Firms

****257** Zachary W. Carter, Corporation Counsel, New York, N.Y. (Kristin M. Helmers, Margaret G. King, and Alison E. Estess of counsel; Avi Strauss on the brief), for appellants.

Sivin & Miller, LLP, New York, N.Y. (William C. House of counsel), for respondent.

MARK C. DILLON, J.P., JOHN M. LEVENTHAL, LEONARD B. AUSTIN, and HECTOR D. LaSALLE, JJ.

Opinion

***1066** In an action, inter alia, to recover damages for civil rights violations pursuant to 42 U.S.C. § 1983, the defendants William Danchak, Richard E. Pignatelli, James E. Halleran, Edward J. Deighan, and Michael E. Knott appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Ash, J.), dated September 18, 2013, as denied that branch of their motion, made jointly with the defendant City of New York, which was for summary judgment dismissing the first cause of action insofar as asserted against them.

****258** ORDERED that the order is affirmed insofar as appealed from, with costs.

[1] [2] [3] [4] [5] The Supreme Court properly denied that branch of the motion of the defendants William Danchak, Richard E. Pignatelli, James E. Halleran, Edward J. Deighan, and Michael E. Knott, police officers employed by the defendant City of New York (hereinafter collectively the officers), made jointly with the City, which was for summary judgment dismissing the first cause of action insofar as asserted against them. The first cause of action alleged a violation of 42 USC § 1983 predicated upon allegations of excessive force. "A claim that a law enforcement official used excessive force during the course of an arrest ... is to be analyzed under the objective reasonableness standard of the Fourth Amendment" (*Washington–Herrera v. Town of Greenburgh,* 101 A.D.3d 986, 989, 956 N.Y.S.2d 487 [internal quotation marks omitted]; *see Lepore v. Town of Greenburgh,* 120 A.D.3d 1202, 1203, 992 N.Y.S.2d 329; *Holland v. City of Poughkeepsie,* 90 A.D.3d 841, 844, 935 N.Y.S.2d 583). The reasonableness of a particular use of force is judged from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Washington–Herrera v. Town of Greenburgh,* 101 A.D.3d at 989, 956 N.Y.S.2d 487 [internal quotation marks omitted]; *see Lepore v. Town of Greenburgh,* 120 A.D.3d at 1203, 992 N.Y.S.2d 329; *Campagna v. Arleo,* 25 A.D.3d 528, 529, 807 N.Y.S.2d 629), and takes into account "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight" ***1067** (*Vizzari v. Hernandez,* 1 A.D.3d 431, 432, 766 N.Y.S.2d 883 [internal quotation marks omitted]). "[A]n officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others" (*Cowan v. Breen,* 352 F.3d 756, 762 [2d Cir.] [internal quotation marks omitted]; *see Tennessee v. Garner,* 471 U.S. 1, 11–12, 105 S.Ct. 1694, 85 L.Ed.2d 1; *Farley v. Town of Hamburg,* 34 A.D.3d 1294, 1295, 824 N.Y.S.2d 549). "Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" (*Lepore v. Town of Greenburgh,* 120 A.D.3d at 1203, 992 N.Y.S.2d 329; *Holland v. City of Poughkeepsie,* 90 A.D.3d at 844, 935 N.Y.S.2d 583). "If found to be objectively reasonable, the officer's actions are privileged under the doctrine of qualified immunity" (*Lepore v. Town of Greenburgh,* 120 A.D.3d at 1203, 992 N.Y.S.2d 329; *see Holland v. City of Poughkeepsie,* 90 A.D.3d at 844, 935 N.Y.S.2d 583; *Higgins v. City of Oneonta,* 208 A.D.2d 1067, 1070 n. 1, 617 N.Y.S.2d 566).

[6] Here, the officers' deposition testimony established their prima facie entitlement to judgment as a matter of law dismissing the first cause of action, which was predicated upon an alleged use of excessive force, insofar as asserted against them (*see Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Washington–Herrera v. Town of Greenburgh,* 101 A.D.3d at 989, 956 N.Y.S.2d 487). However, in opposition, the plaintiff's deposition testimony raised a triable issue of fact as to whether the officers' use of deadly physical force against him was objectively reasonable under the circumstances (*see* ****259** *Zuckerman v. City of New York,* 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Lepore v. Town of Greenburgh,* 120 A.D.3d at 1203, 992 N.Y.S.2d 329).

Accordingly, the Supreme Court properly denied that branch of the officers' motion, made jointly with the City, which was for summary judgment dismissing the first cause of action insofar as asserted against them.

All Citations

129 A.D.3d 1066, 12 N.Y.S.3d 256, 2015 N.Y. Slip Op. 05470

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