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ATTORNEYS, CONFLICT OF INTEREST, DOUBLE JEOPARDY.

MISTRIAL BASED UPON DEFENSE COUNSEL'S CONFLICTS OF INTEREST WAS PROPERLY GRANTED WITH DEFENDANT'S CONSENT; DOUBLE JEOPARDY DID NOT ATTACH (THIRD DEPT).

The Third Department determined the mistrial, based upon defense counsel's conflicts of interest (representation of prosecution witnesses) was properly granted with defendant's consent. Therefore double jeopardy did not attach:

Upon learning of defense counsel's potential conflicts of interest, County Court engaged in a lengthy colloquy with the parties, during which they explored — to no avail — ways to avoid the conflict, including the possibility of the Special Prosecutor foregoing testimony from the witnesses. The court explained the ramifications of the conflict to defendant more than once, emphasizing that defense counsel's ethical obligations to his prior clients — the intended prosecution witnesses — could "impact his ability to cross-examine them as vigorously or as effectively or as thoroughly as he otherwise would." Following this explanation, County Court presented defendant with the choice to waive any conflict and proceed with his assigned counsel or request the assignment of new counsel, thereby necessitating a mistrial and a retrial. Although defendant asserted that he did not "want to do this again," he also expressed discomfort with being at a disadvantage should his assigned counsel be unable to fully cross-examine either of the prosecution witnesses and ultimately stated, "I'd like to seek new counsel, I guess." Later, in response to County Court's additional queries, defendant confirmed that he wanted a new attorney and reasserted his unwillingness to waive any potential conflict of interest. Thereafter, County Court asked if there was an application for a mistrial, to which defendant — through his assigned counsel — stated that there was. … Upon our review of the entire colloquy, we find that defendant requested and, thus, consented to a mistrial … . Inasmuch as the record wholly belies defendant's further contention that County Court and/or the Special Prosecutor deliberately engaged in misconduct intended to provoke a mistrial, defendant's retrial was not barred by double jeopardy protections … . People v Ellis, 2020 NY Slip Op 02292, Third Dept 4-16-20

DISCLOSURE.

DISCLOSURE OF WITNESS CONTACT INFORMATION SHOULD HAVE BEEN DELAYED UNTIL 15 DAYS BEFORE TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined disclosure of contact information re: the complainant's mother and two 911 callers must be delayed until 15 days before trial:

Where, as here, "the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion" … .

Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in directing immediate disclosure of the subject materials to counsel for the defendant, counsel's investigator, and the defendant. Under the particular facts and circumstances of this case, the Supreme Court should have delayed disclosure of the address and contact information of the complainant, and of the name, address, and contact information of the complainant's mother and the individuals identified as the first and second 911 callers … . People v Harper. 2020 NY Slip Op 02193, Second Dept 4-2-20

FIRST AMENDMENT, FALSELY REPORTING AN INCIDENT.

THE "FALSELY REPORTING AN INCIDENT" STATUTE IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT'S FALSE TWEETS ALLEGING A RACIALLY-MOTIVATED ASSAULT (THIRD DEPT).

The Third Department, reversing defendant's "falsely reporting an incident" conviction, in a full-fledged opinion by Justice Pritzker, determined defendant's tweets were protected by the First Amendment. Defendant was accused of falsely tweeting she was the victim of a racially-motivated assault:

… [A]lthough it was "not unlikely" that defendant's false tweets about a racial assault at a state university would cause public alarm (Penal Law § 240.50 [1]), what level of public alarm rises to the level of criminal liability? Indeed, United States v Alvarez (567 US at 734 [Breyer, J., concurring]) informs us that criminalizing false

speech requires either proof of specific harm to identifiable victims or a great likelihood of harm. Certainly, general concern by those reading defendant's tweets does not rise to that level, nor does the proof adduced at trial, which established that defendant's tweets were "retweeted" a significant number of times. In fact, because these "retweets" led to nothing more than a charged online discussion about whether a racially motivated assault did in fact occur, which falls far short of meeting the standard set forth in United States v Alvarez (567 US at 734 [Breyer, J., concurring]), we reach the inescapable conclusion that Penal Law § 240.50 (1), as applied to defendant's conduct, is unconstitutional. …

… "[T]he remedy for speech that is false is speech that is true" (United States v Alvarez, 567 US at 727) and "social media platforms are information-disseminating fora. By the very nature of social media, falsehoods can quickly and effectively be countered by truth, making the criminalizing of false speech on social media not 'actually necessary' to prevent alarm and inconvenience" … . This could not be more apparent here, where defendant's false tweets were largely debunked through counter speech; thus, criminalizing her speech by way of Penal Law § 240.50 (1) was not actually necessary to prevent public alarm and inconvenience … . People v Burwell, 2020 NY Slip Op 02205, Third Dept 4-9-20

GRAND JURY.

DEFENDANT WAS NOT GIVEN TIME TO EXERCISE HIS RIGHT TO APPEAR BEFORE THE GRAND JURY; INDICTMENT WAS PROPERLY DISMISSED (THIRD DEPT).

The Third Department determined defendant was not accorded a reasonable time to exercise his right to appear before the grand jury and affirmed the dismissal of the indictment:

… [T]he People were required pursuant to CPL 190.50 (5) (a) to "accord . . . defendant a reasonable time to exercise his right to appear as a witness" before the grand jury. The statute "does not mandate a specific time period for notice; rather 'reasonable time' must be accorded to allow a defendant an opportunity to consult with counsel and decide whether to testify before a [g]rand [j]ury" … . As County Court duly recognized, defendant had no such opportunity, for the order assigning counsel was not initially provided to [the conflict defender] by the local court. Defendant, who remained incarcerated, was in no position to know that the appointment order had been misdirected. Nor did the generic presentment notice issued by the People … clarify matters, as it was sent to a number of attorneys, including [the conflict defender]. The People contend, nonetheless, that defendant had an opportunity to testify after the grand jury vote but before the indictment was filed pursuant to CPL 150.5 (5) (a). That contention is unavailing because, under the circumstances presented, defendant was deprived of an

opportunity to testify before the grand jury voted … . People v Clark, 2020 NY Slip Op 02204, Third Dept 4-9-20

GRAND JURY.

THE EVIDENCE SUBMITTED TO THE GRAND JURY IN THIS DRUNK-DRIVING-ACCIDENT CASE SUPPORTED THE TWO COUNTS OF DEPRAVED INDIFFERENCE ASSAULT STEMMING FROM INJURIES SUFFERED BY THE TWO PASSENGERS; SUPREME COURT SHOULD NOT HAVE DISMISSED THOSE COUNTS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the evidence submitted to the Grand Jury supported the depraved indifference assault counts stemming from injuries suffered by the two passenger in a drunk driving accident after a police pursuit:

The … accident reconstruction revealed that defendant was driving 119 miles an hour five seconds before the accident, then slammed on his brakes and steered hard to the right, hurtling into the parking lot and striking a concrete barrier at approximately 60 miles per hour. * * *

Drunk driving cases do not ordinarily lend themselves to a finding of depraved indifference, nor does "every vehicular police chase resulting in death [or serious injury] . . . take place under circumstances evincing" it … . Unlike in cases where a defendant attempted to avoid harming others in the course of a chase … , however, the intoxicated defendant here was warned by one of his passengers that he should slow down and "was well aware that [he] was endangering [their] lives" by flouting traffic laws and fleeing a police officer at ludicrous speeds on local roads … . Moreover, the same passenger testified that defendant knew that the parking lot was a shortcut to another street and that he suddenly "turned into" it when she mentioned seeing a police cruiser. The grand jury could infer from this proof that defendant did not care about the welfare of his passengers and that he lost control of the vehicle not in an unsuccessful effort to navigate a bend in the road, but rather in a near-suicidal gambit to escape police by making an abrupt turn at high speed and trying to traverse the parking lot. It follows from those inferences that defendant "appreciated that he . . . was engaging in conduct that presented a grave risk of death and totally disregarded that risk, with catastrophic consequences" … . Although innocent inferences could also be drawn from the evidence presented, legally sufficient proof nevertheless existed for the grand jury's finding that defendant exhibited depraved indifference toward his passengers and, thus, Supreme Court

erred in dismissing the two counts of assault in the first degree … . People v Edwards, 2020 NY Slip Op 02503, Third Dept 4-30-20

HEARSAY.

ADMISSION OF A HEARSAY STATEMENT BY A BYSTANDER WHO TOLD A POLICE OFFICER DEFENDANT HAD RUN INTO A HOUSE WAS (HARMLESS) ERROR (FOURTH DEPT).

The Fourth Department determined it was (harmless) error to admit the hearsay statement attributed to a bystander who told a police officer the defendant had run into a house after a car chase:

Defendant contends that County Court erred in allowing inadmissible hearsay testimony when the police officer was allowed to testify at trial that the bystander told him that the fleeing suspect ran into the house. We agree. The statement of the bystander was inadmissible hearsay because it was admitted for the truth of the matters asserted therein … . Indeed, the import of the bystander's statement was to confirm that the suspect had indeed fled into the house, and thereby confirm that someone inside the house, i.e., defendant, perpetrated the crime. Nevertheless, we conclude that the error was harmless because the evidence of defendant's guilt is overwhelming and there is no significant probability that defendant would have been acquitted but for the admission of the hearsay testimony … . Defendant was identified by the victim and the other eyewitness as a perpetrator of the robbery, which had occurred in broad daylight, close in time to the show-up identification procedure. Those identifications of defendant were corroborated by testimony of the police officer, who observed the suspect flee from the stolen vehicle toward the house where defendant was apprehended. Moreover, the evidence strongly supported an inference that defendant was not in the house for innocent purposes because he did not live at that address and had tried to conceal his identification in an uninhabited part of the house. People v Harrington, 2020 NY Slip Op 02399, Fourth Dept 4-24-20

INCLUSORY CONCURRENT COUNTS.

CPL 300.40 (3) (b), WHICH REQUIRES DISMISSAL OF INCLUSORY CONCURRENT COUNTS, APPLIES ONLY TO VERDICTS AFTER TRIAL, NOT TO GUILTY PLEAS (THIRD DEPT).

The Third Department determined that Criminal Procedure Law 300.40 (3) (b), which requires dismissal of inclusory concurrent counts, applies only to verdicts after trial and not to cases resolved by guilty plea. Defendant confessed to killing a mother and daughter and he was charged with two counts of first degree murder and two counts of second degree murder. He pled guilty to the two counts of second degree murder. On appeal defendant argued the second degree murder counts should have been dismissed as inclusory concurrent counts of first degree murder:

CPL 300.40 (3) (b) provides, with respect to inclusory concurrent counts, that "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted" … . Even assuming, without deciding, that counts 3 and 4 of the indictment indeed are inclusory concurrent counts of counts 1 and 2, defendant's reliance upon both the statute and the cases applying it … is misplaced, as CPL article 300 "'deals only with trials, and has no application to convictions obtained on a plea of guilty'" … . Having elected to plead guilty to the entire indictment, as was defendant's right (see CPL 220.10 [2]), he cannot now avail himself of the provisions of CPL 300.40 (3) (b) … . People v Redden, 2020 NY Slip Op 02502, Third Dept 4-30-20

INDICTMENTS, AMENDMENT.

SHORTLY BEFORE TRIAL, THE PEOPLE WERE PROPERLY ALLOWED TO AMEND THE REFERENCE TO A DATE IN THE INDICTMENT (THIRD DEPT).

The Third Department noted that the People were properly allowed to amend the designation of the date of an offense alleged in the indictment shortly before the trial began:

"At any time before or during trial, the court may, upon application of the [P]eople and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to . . . time . . ., when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits" (CPL 200.70 [1]). Here, the original indictment asserted that

defendant's first assault upon the victim took place on June 15, 2017. About two weeks before the commencement of the trial, the People sought leave to amend it to provide that the incident occurred "on or about" June 15, 2017, on the ground that the initial date had been an approximation and that subsequent investigation had narrowed down the time to the late evening hours of June 15, 2017 and/or the early morning hours of June 16, 2017. The amendment did not alter the theory of the prosecution; the People consistently maintained, both before the grand jury and at trial after the amendment, that defendant strangled and assaulted the victim in their room after the gathering in the motel office and before her first treatment at the hospital on the morning of June 16, 2017. The amendment merely served to address the possibility that the incident began in the evening of June 15, 2017 and continued past midnight into the early morning hours of the next day. There was no prejudice to defendant, who did not proffer an alibi defense … . People v Baber, 2020 NY Slip Op 02294, Third Dept 4-16-20

INFORMATION, OFFICIAL MISCONDUCT.

THE INFORMATION SUFFICIENTLY ALLEGED THE ELEMENTS OF OFFICIAL MISCONDUCT; THE 'OBTAIN A BENEFIT' ELEMENT OF THE OFFENSE CAN BE INFERRED FROM THE OTHER ALLEGATIONS (CT APP).

The Court of Appeals determined the information charging defendant with official misconduct in violation of Penal Law section 195 was not jurisdictionally defective because the "obtain a benefit" element of the offense could be inferred from the allegations. The defendant, an alcohol and substance abuse treatment program aide at a prison, was charged with the unauthorized provision of prison documents concerning an incident at the prison to an inmate. The allegations were sufficient to infer that the defendant intended that providing the documents benefited the inmates involved:

With respect to the third element—that defendant must act with the intent to obtain a benefit or deprive another of a benefit—defendant's intent may be reasonably inferred from her conduct and the surrounding circumstances … . …[T]he information, with defendant's statement attached as a supporting deposition, sufficiently alleged that defendant disclosed information to an inmate that the inmate was not authorized to have, and that defendant knew that this disclosure was unauthorized. From those allegations, coupled with defendant's admissions in her statement regarding inappropriate contact with and favors conducted for inmates involved in the unusual incident and the disclosure, one can reasonably infer that defendant committed the unauthorized disclosure with the intent to benefit herself or the inmates involved. Notably."benefit" is defined as "any gain or advantage to the

beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary" (Penal Law § 10.00 [17]). In this case, the People were not required to specify in the information whether defendant intended to benefit herself or the inmates, because either or both would satisfy this element of the statute and both theories are supported by defendant's statement to police … . People v Middleton, 2020 NY Slip Op 02530, CtApp 4-30-20

JUROR MISCONDUCT.

CPL 330.30 MOTION ALLEGING JUROR MISCONDUCT DURING DELIBERATIONS, I.E. CONDUCTING A REENACTMENT, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the Criminal Procedure Law 330.30 motion alleging misconduct during jury deliberations should not have been denied without a hearing. The defendant was charged with menacing a police officer and whether the defendant heard the announcement that the people knocking on his door were deputy sheriffs was a critical issue. Defense counsel learned after the trial that the jurors had conducted a reenactment in the jury room to determine whether defendant heard the sheriffs:

… [I]n support of the motion, defendant submitted the affirmation of his attorney. Defendant's attorney alleged that, during post-verdict discussions with the jury, he learned that the jurors had attempted during their deliberations to determine whether defendant was aware that the people knocking at his door were sheriff's deputies by using the bathroom door in the deliberation room to reenact the moment when one of the deputies knocked on defendant's door and announced the deputies' presence. The court did not conduct a hearing and instead summarily denied the motion, ruling that, although the alleged jury reenactment constituted a conscious, contrived experiment that placed before the jury evidence not introduced at trial, the experiment was not directly material to any critical point at issue. That was error.

As defendant correctly contends, whether he could hear the announcement by the deputy was directly material to a critical point at issue in the trial—indeed, to an element of menacing a police officer—i.e., whether defendant "knew or reasonably should have known" that the people at his door were sheriff's deputies (Penal Law § 120.18 …). We conclude under the circumstances of this case that a hearing is required to ascertain whether and in what manner the alleged reenactment occurred, and whether such conduct "created a substantial risk of prejudice to the rights of the defendant by coloring the views of the . . . jur[y]" … . People v Newman, 2020 NY Slip Op 02449, Fourth Dept 4-24-20

JURY INSTRUCTIONS, CIRCUMSTANTIAL EVIDENCE.

DEFENDANT WAS CONVICTED OF STABBING THE VICTIM AT A CROWDED PARTY BUT NO ONE SAW DEFENDANT WITH A KNIFE; DEFENSE REQUEST FOR THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GRANTED; CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's murder conviction, determined that the defense request fot eh circumstantial evidence jury instruction should have been granted. It was alleged defendant stabbed the victim but no one saw the defendant with a knife:

The victim was stabbed five times at a crowded house party where there were multiple ongoing fights, and the evidence established that the victim was involved in physical altercations with at least two other partygoers. One of the wounds was almost five inches deep, meaning that the blade of the knife must have been at least five inches long. None of the witnesses who observed defendant fighting with the victim observed anything in defendant's hand during the altercation, and no blood was discovered in the room in which defendant and the victim engaged in their altercation. All of the evidence at trial required the jury to infer that defendant was the perpetrator who had the knife and that he used that knife to stab the victim. We thus conclude that a circumstantial evidence instruction was warranted … . Contrary to the People's contention, this is not "the exceptional case where the failure to give the circumstantial evidence charge was harmless error" … . People v Swem, 2020 NY Slip Op 02435, Fourth Dept 4-24-20

PRIOR UNCHARGED CRIMES.

ALTHOUGH IT WAS ERROR TO ALLOW THE PROSECUTION TO CROSS-EXAMINE A DEFENSE WITNESS ABOUT PRIOR UNCHARGED OFFENSES ALLEGEDLY INVOLVING THE DEFENDANT, THE ERROR WAS HARMLESS; THE DISSENTERS ARGUED THE ERROR WAS REVERSIBLE (FIRST DEPT).

The First Department, over a two-justice dissent, determined, although the trial court erred in allowing cross-examination of a defense witness (and co-defendant), Calderon, about prior uncharged offenses allegedly involving defendant, the error was harmless. The dissenters argued the error was reversible:

We agree with the dissent that the prosecutor improperly cross-examined Calderon concerning three other crimes in which he had left the scene in a dark SUV. Some of the questions included a partial or complete recitation of the license plate number of the SUV used in the instant crime. This was a clear attempt to associate defendant with uncharged crimes, and the court should have sustained defense counsel's objections to this line of questioning. Similarly, the prosecutor should not have made two references in her summation to the use of this "getaway vehicle" in other crimes when discussing Calderon's testimony. * * *

The evidence at trial demonstrates that there is no "significant probability, rather than only a rational possibility," that the jury would have acquitted defendant had it not been for the references to the SUV's connection with Calderon's other crimes … . People v Vasquez, 2020 NY Slip Op 02237, First Dept 4-9-20

PRO SE, RIGHT TO REPRESENT ONESELF.

DEFENDANT'S REPEATED REQUESTS TO REPRESENT HIMSELF SHOULD NOT HAVE BEEN DENIED; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversed defendant's conviction and ordered a new trial, finding that defendant had been denied his right to represent himself. The opinion is basically a detailed rendition of the facts demonstrating that defendant repeatedly requested that he be allowed to represent himself and was repeatedly assigned new counsel after he repeatedly was found mentally fit for trial. There was no evidence defendant was seeking to delay the trial or otherwise interfere with the proceedings:

When a defendant desires to exercise the right to represent himself, "the court's only function is to ensure that the defendant is acting knowingly and voluntarily, that is, that the defendant is aware of the disadvantages and risks of waiving his right to counsel" … . If the waiver is knowing and voluntary, the request must be granted … . * * *

The court's belated finding … that defendant intended to "disrupt" the proceedings cannot be used as post-hoc justification of its earlier denials of repeated requests to proceed pro se. Defendant's requests to proceed pro se were denied throughout 2008, 2009, and much of 2010, without mention of "disruption" as a basis.

It was hardly surprising that defendant expressed increasing frustration with the process, given that he had repeatedly been found fit to proceed, and yet the court continued to deny his requests to proceed pro se and to ignore his complaints regarding counsel. As the Court of Appeals has observed, in finding a defendant's "outburst" insufficient to trump his right to self-representation,

"Just as the court may not rely on a postruling outburst to validate an erroneous denial, the court may not goad the defendant to disruptive behavior by conducting its inquiry in an abusive manner calculated to belittle a legitimate application. An outburst thus provoked will not justify the forfeiture of the right to self-representation" … .

That defendant on occasion agreed to the appointment of new lawyers does not render his requests to proceed pro se equivocal … . A defendant who elects to proceed pro se "is frequently motivated by dissatisfaction with trial strategy or a lack of confidence in counsel" … .

An erroneous denial of the right to defend onself is not subject to a harmless error analysis. We are therefore obliged to reverse the conviction and remand for a new trial. People v Trammell, 2020 NY Slip Op 02190, First Dept 4-2-20

RESTITUTION.

HEARING REQUIRED TO DETERMINE THE AMOUNT OF RESTITUTION AND TO WHOM RESTITUTION SHOULD BE PAID; UNPRESERVED ERRORS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department determined the record did not include sufficient evidence to support the restitution order and remitted the matter for a hearing:

Defendant's contention in her main brief that the court erred in ordering her to pay restitution without a hearing is not preserved for our review inasmuch as defendant "did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" … . We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice … . Moreover, even assuming, arguendo, that defendant's further challenge to the court's purported failure to direct restitution to an appropriate person or entity… required preservation under these circumstances … , we likewise exercise our power to reach that unpreserved contention as a matter of discretion in the interest of justice … . As the People correctly concede, the record does not contain sufficient evidence to establish the amount of restitution imposed, nor does it establish the recipient of the restitution … . We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to County Court for a hearing to determine restitution in compliance with Penal Law § 60.27. People v Meyers, 2020 NY Slip Op 02419, Fourth Dept 4-24-20

SEARCHES, INVENTORY.

THE PEOPLE DID NOT DEMONSTRATE THE IMPOUNDMENT OF DEFENDANT'S CAR AND THE INVENTORY SEARCH WERE LAWFUL; SEIZED EVIDENCE SUPPRESSED AND INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment, determined the People did not demonstrate the impoundment of defendant's car and the inventory search which turned up a weapon and a marijuana cigarette were lawful. Therefore the seized items should have been suppressed. The defendant

parked in a visitor's space and went into the police station to pick up a friend's property. After presenting his ID, the police discovered a bench warrant, arrested him, impounded his car and conducted an inventory search:

The People failed to establish the lawfulness of the impoundment of the defendant's car and subsequent inventory search … . The arresting officer testified that the defendant's vehicle was legally parked in a visitor's parking space, and the officer was unaware of posted time limits pertaining to the visitor parking spaces. Although the officer testified that he impounded the defendant's vehicle to safeguard the defendant's property against a potential burglary, the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function … . Moreover, the People failed to present any evidence as to whether the New York City Police Department had a policy regarding impoundment of vehicles, what that policy required, or whether the arresting officer complied with that policy when he impounded the defendant's vehicle … . People v Weeks, 2020 NY Slip Op 02198, Second Dept 4-2-20

SEX OFFENDER REGISTRATION ACT (SORA).

ALTHOUGH PETITIONER WAS ADJUDICATED A LEVEL THREE SEX OFFENDER AFTER HIS RELEASE FROM PRISON ON A PRIOR RAPE CONVICTION, HE WAS NOT SUBJECT TO THE RESIDENCY REQUIREMENTS OF THE SEXUAL ASSAULT REFORM ACT AFTER HIS RELEASE FROM PRISON ON A SUBSEQUENT ROBBERY/BURGLARY CONVICTION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined petitioner, who was adjudicated a level three sex offender when released after a prior rape conviction, was not subject to the residential restrictions under the Sexual Assault Reform Act (Executive Law § 259-c (14)) upon release after his subsequent robbery/burglary convictions and incarceration:

In 2007, petitioner was convicted of robbery in the second degree and burglary in the third degree, resulting in a sentence of concurrent prison terms, the maximum of which was 13 years in prison, followed by five years of postrelease supervision. In 2017, petitioner reached the conditional release date of that sentence and the Board of Parole determined that, because he was a risk level three sex offender as a result of his 1989 conviction, he was subject to the provisions of the Sexual Assault Reform Act as set forth in Executive Law § 259-c (14) (L 2000, ch 1, as amended by L 2005, ch 544), which, as relevant here, prohibits him from residing within 1,000

feet of school grounds. Petitioner failed to offer any proposed residence that would permit him to comply with that condition, other than the New York City homeless shelter system, which the Department of Corrections and Community Supervision regarded as inappropriate. As such, petitioner was maintained in the custody of the Department of Corrections and Community Supervision. …

For the reasons stated in People ex rel. Negron v Superintendent, Woodbourne Corr. Facility (170 AD3d 12 [2019]), we agree with petitioner and find that he is not subject to the conditions of Executive Law § 259-c (14) (see Matter of Cajigas v Stanford, 169 AD3d 1168 [2019] … . Matter of Green v LaClair, 2020 NY Slip Op 02338, Third Dept 4-23-20

STATEMENTS, SILENCE.

REVERSIBLE ERROR TO ADMIT INTO EVIDENCE A VIDEO OF THE INTERROGATION OF DEFENDANT SHOWING HIM REMAINING SILENT WHILE THE POLICE RECOUNTED THE CASE AGAINST HIM (THIRD DEPT).

The Third Department reversed defendant's conviction because a video of his interrogation, which showed him remaining silent while the police recounted the case against him, was admitted into evidence:

"It is a well-established principle of state evidentiary law that evidence of a defendant's pretrial silence is generally inadmissible" … . There are many reasons why an individual may choose not to speak to the police; however, there is a substantial risk that jurors might construe such silence as an admission and draw an unwarranted inference of guilt … . Here, the admitted video consists of the police recounting their case against defendant, including reading his texts aloud and being met largely, if not completely, with silence. Defendant is shown slouching, with an ankle shackle securing him to the chair, and he is dressed in a hooded sweatshirt with oversized sweatpants worn in a manner so as to expose his underwear. His attitude appears to be dismissive and, at one point, he laughs in response to police questioning. Throughout the video, defendant makes no inculpatory statements. Both detectives who appear in the video were presumably available to testify and, in fact, one of them did testify.

Allowing evidence of defendant's selective silence was highly prejudicial because there was a significant risk that the jurors deemed defendant's failure to answer the police officer's questions to be an admission of guilt … . Given its highly prejudicial nature and that it contained little to no probative value, we agree with defendant that County Court erred in allowing the redacted video to be shown to the jury … . This error was compounded

by the People's use of the video during summation, wherein the prosecutor highlighted and commented upon defendant's silence during the police interrogation. In doing this, the People improperly shifted the burden to defendant … . People v Chapman, 2020 NY Slip Op 02330, Third Dept 4-23-20

STATEMENTS.

AFTER THE INITIAL INVESTIGATION AT THE SCENE AND AFTER DEFENDANT WAS HANDCUFFED AND SEATED IN THE BACK OF THE POLICE CAR, THE OFFICER ASKED DEFENDANT "WHAT HAPPENED?"; DEFENDANT'S RESPONSE SHOULD HAVE BEEN SUPPRESSED; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined statements made by defendant when he was handcuffed in the back of a police car should have been suppressed. The officer (Nellis) asked the defendant "What happened?" after the initial investigation was over:

After Nellis arrived at the scene and discovered defendant in the driveway, he entered the residence and found the victim being treated by defendant's mother. The victim was convulsing and making gurgling sounds, and Nellis observed bruises and dried blood on her face. Nellis radioed emergency services to respond immediately, exited the residence and informed defendant that he was being detained for questioning. The officer did not immediately ask defendant what happened, but, after defendant was handcuffed and placed in the backseat of the patrol car, Nellis asked defendant, "What happened?" In response, defendant told him that he "snapped" and he "wanted her to feel the pain he had." Defendant also admitted, "I choked her with a rope but never struck her in the face." County Court allowed the statements, reasoning that the purpose of Nellis' questioning was to clarify the nature of the volatile situation rather than to elicit evidence of a crime. We disagree.

The incident had been completed, the parties had been identified and medical assistance requested; defendant had been cooperative and responsive. "[W]here criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation" … . …

We cannot say beyond a reasonable doubt that these statements did not contribute to defendant's conviction and, as such, the error was not harmless. People v McCabe, 2020 NY Slip Op 02288, Third Dept 4-16-20

SUPERIOR COURT INFORMATION.

THE OMISSION OF THE TIME AND PLACE OF THE OFFENSE FROM THE SUPERIOR COURT INFORMATION WAS NOT A JURISDICTIONAL DEFECT AND ANY ERRORS WERE FORFEITED BY THE GUILTY PLEA (THIRD DEPT).

The Third Department determined that the failure to include the time and place of the crime in the superior court information (SCI) was not a jurisdictional defect and any errors were forfeited by the guilty plea:

… [D]efendant contends that the waiver of indictment and SCI omitted essential information required by CPL 195.20, rendering the waiver of indictment invalid and the SCI jurisdictionally defective. In support of this claim, defendant points to the fact that neither the waiver of indictment nor the SCI sets forth the approximate time of the crime, and the waiver of indictment also failed to set forth the place where it occurred. While we acknowledge these deficiencies, we do not find that they mandate dismissal of the SCI and reversal of the judgment of conviction given our recent decisions in People v Shindler (179 AD3d 1306, 1307 [2020]) and People v Elric YY., (179 AD3d 1304, 1305 [2020]), and the Court of Appeals' decision in People v Lang (___ NY3d ___, ___, 2019 NY Slip Op 08545, *7-9 [2019]). As is relevant here, the Court of Appeals found in Lang that the date, approximate time and place of the crime in the waiver of indictment constituted non-elemental factual information, the omission of which did not amount to a jurisdictional defect (see People v Lang, 2020 NY Slip Op 08545 at *8-9). In view of this decision, we abandoned the standard enunciated in People v Busch-Scardino (166 AD3d 1314 [2018]) and concluded in Shindler and Elric YY. that the omission of the approximate time and place was not a jurisdictional defect rendering the waiver of indictment invalid.

Here, defendant was provided adequate notice of the crime charged based upon a reading of the waiver of indictment and the SCI together … , as well as the felony complaint, which set forth in detail the nature of the crime and the approximate time and place where it occurred … . Significantly, defendant did not raise any objection to the sufficiency of the waiver of indictment or the SCI before County Court, or demand a bill of particulars. Therefore, the subject omissions are nonjurisdictional defects that were forfeited by defendant's guilty plea … .People v Morgan-Smith, 2020 NY Slip Op 02501, Third Dept 4-30-20

VACATE CONVICTION, MOTION TO, INEFFECTIVE ASSISTANCE.

THE MOTION COURT APPLIED THE WRONG CRITERIA WHEN RULING ON WHETHER THE DEFENDANT WAS PREJUDICED BY THE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL; DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON DEFENSE COUNSEL'S ALLEGED FAILURE TO INFORM HIM OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING; ASSESSING DEFENDANT'S CHANCES AT TRIAL IS NOT THE PROPER ANALYSIS (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Renwick, over a dissent, determined the motion court applied the wrong criteria for assessing whether the defendant was prejudiced by the alleged ineffective assistance of counsel. Defendant moved to vacate his conviction, alleging defense counsel did not inform him of the deportation consequences of his guilty plea. The defendant's chance of success at trial is irrelevant to whether defendant was entitled to a hearing. The First Department succinctly summarized the issues and the ruling as follows:

We find that the trial court improperly denied the motion without a hearing pursuant to CPL 440.30(4)(d) (i) & (ii). This section permits a court to reach the merits of a postjudgment motion without a hearing to dismiss frivolous claims … . In the case at bar, however, as the dissent concedes, there is independent support for defendant's assertion that his plea was induced by erroneous advice given by his trial counsel, namely that his felony guilty plea would not subject defendant to mandatory deportation. Nevertheless, the dissent argues that summary denial of the CPL 440.10 motion is still proper, because defendant's allegations did not raise a reasonable possibility that he was prejudiced by the misadvice. We disagree. Like the court below, the dissent applies the wrong prejudice standard, by focusing exclusively on defendant's alleged lack of a viable defense and the likelihood he would have been convicted after trial, and disregards the particular circumstances of defendant's desire to remain in the United States. The dissent's reasoning is contradicted by the recent United States Supreme Court holding in Lee v United States (582 US __, 137 S Ct 1958, 1966 [2017]), which rejects any per se rule that prevents a defendant from establishing prejudice by an attorney's erroneous advice simply because the defendant may not have a strong defense. Instead, as Lee v United States mandates, even if the chance of success at trial is low, the prejudice inquiry should focus on the defendant's decision-making and whet

her it was reasonable for one in defendant's position, facing mandatory deportation, to choose to take a shot a trial. People v Lantigua, 2020 NY Slip Op 02557, First Dept 4-30-20

YOUTHFUL OFFENDER.

PRIOR CONVICTION OF CRIMINAL POSSESSION OF A WEAPON DID NOT DISQUALIFY DEFENDANT FROM ELIGIBILITY FOR YOUTHFUL OFFENDER STATUS; IT IS NOT AN 'ARMED FELONY' (FIRST DEPT).

The First Department, vacating defendant's sentence, determined the prior conviction of criminal possession of a weapon was not an "armed felony" did not render defendant ineligible for youthful offender status:

Defendant's prior conviction of criminal possession of a weapon in the second degree, for "possess[ing] a loaded firearm" (Penal Law § 265.03[1][b]) was not an "armed felony" within the meaning of CPL 720.10(2)(a). As relevant here, CPL 1.20, which CPL 720.10(2)(a) incorporates, defines "armed felony" as "any violent felony offense defined in section 70.02 of the penal law that includes as an element . . . possession . . . of a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged" … . The statutory definition of "loaded firearm" explicitly does not require that the firearm be "actually" loaded, because it includes within the definition a "firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm" (Penal Law § 265.00[15]). In contrast, the definition of "deadly weapon" contains no proviso indicating that an actually unloaded weapon is deemed "loaded," and the definition is therefore met, where usable ammunition is readily available. Accordingly, "in order to be a deadly weapon, a gun must actually be loaded, as that term is commonly understood" … . Since a "loaded firearm" is therefore not always a "deadly weapon," the crime to which defendant pleaded guilty did not "include[] as an element . . . possession . . . of a deadly weapon" (CPL 1.20[41][a]), and the court should not have found that defendant's conviction rendered him presumptively ineligible. People v Ochoa, 2020 NY Slip Op 02156, First Dept 4-2-20