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APPEALS (GROUNDS FOR SUPPRESSION NOT RULED ON).

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The Third Department determined the motion to suppress the shotgun and shotgun shell should have been granted on the ground raised on appeal. The People raised other grounds for suppression on appeal. The Third Department noted it cannot consider grounds for suppression on which the motion court did not rule on and remitted the matter for consideration of the other grounds for suppression raised by the People:

County Court found that the shotgun shell was discovered on defendant's person during a limited protective pat-down search of defendant, which then provided law enforcement with probable cause to search the vehicle. However, this finding is not supported by the evidence presented at the suppression hearing, which demonstrated that the search of the vehicle actually preceded the search of defendant's person and discovery of the shotgun shell. Although the People raised other arguments that could potentially justify the search of the vehicle and defendant's person, this Court is statutorily restricted from considering issues not ruled upon by the trial court … . We are therefore constrained to reverse the denial of defendant's suppression motion. Accordingly, we will hold the appeal in abeyance and remit the matter to County Court to review the evidence presented at the suppression hearing, consider any alternate bases to suppress the physical evidence and render a new determination on defendant's motion … . People v Kabia, 2021 NY Slip Op 00209, Third Dept 1-14-21

Practice Point: An appellate court cannot consider a ground for suppression which was not ruled on by the motion court. However the appellate court may hold the appeal in abeyance and remit to allow the motion court to consider the other grounds for suppression which were raised but not ruled on.

APPEALS, SPEEDY TRIAL, GUILTY PLEAS.

THE 202O AMENDMENT TO CPL 30.30 WHICH ALLOWS AN APPEAL ALLEGING A VIOLATION OF THE SPEEDY TRIAL STATUTE AFTER A GUILTY PLEA DOES NOT APPLY RETROACTIVELY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, determined the 2020 amendment to Criminal Procedure Law 30.30 which allows an appeal alleging the violation of the speedy trial statute after a guilty plea does not apply retroactively:

At the time of defendant's plea in November 2017 and his sentencing in April 2018, it was settled law that a guilty plea forfeited a defendant's right to claim that the trial court erred in denying his or her CPL 30.30 speedy trial motion … . However, CPL 30.30 (6), which was enacted as part of an omnibus budget bill in April 2019 and became effective on January 1, 2020 … , provides that "[a]n order finally denying a motion to dismiss pursuant to [CPL 30.30 (1)] shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." * * *

"… [I]t is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect" … . People v Duggins, 2021 NY Slip Op 00336, Third Dept 1-21-21

Practice Point: The January 2020 amendment which allows an appeal of the denial of a speedy trial motion after a guilty plea is not applied retroactively.

BURGLARY, UNCHARGED THEORY.

THE JURY WAS ERRONEOUSLY ALLOWED TO CONSIDER A THEORY OF BURGLARY WITH WHICH DEFENDANT WAS NOT CHARGED; BURGLARY CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's burglary convictions, determined the jury should not have been instructed to consider a theory of burglary (intent to assault versus intent to damage property) with which defendant was not charged:

A defendant has a right to be tried only for the crimes charged in the indictment … . "Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories" … . This rule applies in cases charging burglary, where it is not normally necessary for the People to demonstrate the exact crime which the defendant intended to commit while inside the building … .

Here, we agree with the defendant that the People limited their theory of burglary in their bill of particulars, which incorporated the allegations of the criminal complaint, to the intent to commit property damage and/or theft … . Therefore, the Supreme Court erred in permitting the prosecutor to argue, during summation, and in permitting the jury to consider, the uncharged theory that the defendant intended to assault the complainant … . People v Petersen, 2021 NY Slip Op 00193, Second Dept 1-13-21

Practice Point: The jury cannot consider a burglary theory which was not charged. Here defendant was charged with burglary with the intent to damage property but the jury was allowed to consider burglary with the intent to commit assault.

JUROR AS UNSWORN EXPERT, MOLINEUX (LOOKING AT PORNOGRAPHY).

A JUROR WHO WAS A RETIRED DETECTIVE ACTED AS AN UNSWORN EXPERT WITNESS IN THE DELIBERATIONS; "MOLINEUX" EVIDENCE DEFENDANT LOOKED AT PORNOGRAPHY BEFORE ALLEGEDLY COMMITTING THE SEX-RELATED OFFENSES SHOULD NOT HAVE BEEN ADMITTED (FIRST DEPT).

The First Department, reversing defendant's sex abuse and burglary convictions, determined: (1) a juror who was a retired detective acted as an unsworn expert witness in the deliberations; and (2) evidence defendant looked at pornography before allegedly committing the crimes was not necessary to prove identity and any probative value was outweighed by the prejudicial effect:

… [A] juror who was a retired detective opined on the feasibility of DNA and fingerprint extraction, the likelihood that tests were conducted and evidence was suppressed regarding a set of keys that were in evidence, and the probability that defendant was lying based on his speech patterns and body language. These opinions, which were communicated to and apparently influenced the jury, were within the scope of the juror's specialized expertise and were explicitly offered on the basis thereof, and at least some of these opinions concerned material issues, including defendant's credibility and whether he entered the victim's apartment by mistake … . …

… [E]vidence that defendant accessed a pornography website on the phone shortly before committing the charged offense should have been excluded at trial as improper propensity evidence. This evidence was not admissible to establish defendant's intent in sexually abusing the victim, which could be readily inferred from the charged conduct itself … . While it may have been admissible to establish defendant's intent in entering the victim's apartment, its probative value was outweighed by its prejudice … . People v Alvarez, 2021 NY Slip Op 00092, First Dept 1-7-21

Practice Point: Reversal was required because a juror who was a retired detective acted as an unsworn expert witness in deliberations. Evidence that defendant looked at pornography before allegedly committing burglary and a sex offense was highly

prejudicial and was not probative of identity. The evidence therefore should not have been admitted under Molineux.

SEVERANCE.

DEFENDANT'S MOTION TO SEVER THE TWO OFFENSES, WHICH OCCURRED ON DIFFERENT DATES AND WERE UNRELATED, SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing defendant's convictions, determined the two separate crimes which occurred on different dates should not have been joined for a single trial. Defendant was charged with leaving the scene of an accident on September 4, 2011, and DWI on January 15, 2012. The officer who arrested defendant in January 2012 for DWI testified he recognized the vehicle and driver from the video and stills taken during the September 2011 incident:

Offenses are joinable even though they are based on different criminal transactions if proof of one offense would be material and admissible as evidence in chief upon a trial of the other offense or the offenses are defined by the same or similar statutory provisions … . Severance of counts contained in a single indictment should be granted when a defendant shows that the counts were not joinable under the statutory criteria … .

… [N]one of the proof necessary for each offense was material to the other. The facts underlying defendant's conviction for leaving the scene of an accident stemmed from a September 4, 2011 incident. The victim was lying on the road of the Henry Hudson Parkway. After other drivers stopped to try and pull the victim out of the road, a dark Acura ran him over and continued driving without stopping. … There was video footage and still pictures from the toll plaza that showed the cars of the drivers who stopped to help, followed immediately by the dark Acura. … Defendant was the registered owner of the dark Acura.

The DWI conviction was based on an incident that occurred four months later, on January 15, 2012. At that time, defendant was observed by police officers weaving in and out of his lane and driving 85 mph in a 50-mph zone. The officer who arrested

defendant for the DWI was permitted to testify relative to the charge of leaving the scene that he recognized the vehicle and driver in the video and stills taken on September 4, 2011 as the same vehicle and person he stopped on January 15, 2012. People v Santiago, 2021 NY Slip Op 00130, First Dept 1-12-21

Practice Point: Where none of the evidence necessary for each offense is material to the other, the two offenses should not be tried together.

SUPPRESSION HEARING (REOPENING), MOLINEUX ("BACKGROUND" EVIDENCE).

THE SUPPRESSION HEARING SHOULD NOT HAVE BEEN REOPENED; EVIDENCE OF UNCHARGED DRUG TRAFFICKING AS BACKGROUND FOR POSSESSION OF A WEAPON SHOULD NOT HAVE BEEN ADMITTED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the suppression hearing should not have been reopened and (Molineux) evidence of uncharged drug-trafficking as background for possession of a weapon was too prejudicial:

The People's Voluntary Disclosure Form notified defendant of the People's intent to offer evidence of two statements he made while in custody following his arrest. In each instance, he was overheard urging a codefendant, who was his girlfriend, to tell the authorities that she was the possessor of a pistol recovered at the apartment where they were arrested. The first such statement was overheard by a special agent while defendant and the codefendant were in a holding cell. The second such statement was overheard by a detective while defendant and the codefendant were being driven to Central Booking.

At the initial Huntley hearing, the People called the special agent as a witness, but not the detective. The court ruled that the statement overheard by the special agent was admissible. No evidence was presented regarding the later statement overheard by the detective.

At a pretrial conference 16 months later, the prosecutor, explaining that the special agent was unavailable to testify because he had been transferred to an assignment

outside the United States, asked the court to reopen the suppression hearing to allow the detective to testify to the statement he allegedly overheard. …

The court should not have reopened the hearing. The prosecution had a full and fair opportunity to present both of its witnesses and seek admission of both statements, but chose not to … , and the court had issued a ruling on the suppression motion … . This is not a case in which the omission of evidence at the initial hearing resulted from "a flaw in the proceeding" … . People v Nunez, 2021 NY Slip Op 00266, First Dept 1-19-21

Practice Point: Where the prosecution has had a full opportunity to present its evidence and witnesses in a suppression hearing and the court has ruled on the suppression motion, the hearing should not be reopened. Evidence of uncharged drug trafficking was too prejudicial for admission under Molineux as proof of possession of a weapon.

TERRORISM.

THE EVIDENCE DID NOT SUPPORT FINDING THE APPELLANT IN THIS JUVENILE DELINQUENCY PROCEEDING MADE A TERRORISTIC THREAT IN VIOLATION OF PENAL LAW 490.20; THERE WAS NO EVIDENCE OF AN INTENT TO INTIMIDATE THE CIVILIAN POPULATION (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence in this juvenile delinquency proceeding did not support finding the appellant student made a terroristic threat. The issue was not preserved but the appeal was considered in the interest of justice:

The student testified that one morning during class some of the students were joking and talking when the appellant and another student got into "a little argument," and the appellant told that student that he "[was] going to be 14 years old, chopped up in somebody's backyard, and he's going to get a white person to shoot up the school." * * *

"Penal Law article 490 was enacted shortly after the attacks on September 11, 2001, to ensure that terrorists are prosecuted and punished in state courts with appropriate severity" … . "In construing the statute, courts must be cognizant that 'the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act'" … . As relevant here, Penal Law § 490.20 (1) provides that a person is guilty of making a terroristic threat when "with intent to intimidate . . . a civilian population . . . he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense." We agree with the appellant that the presentment agency presented no evidence of an intent by the appellant to intimidate a civilian population with his statements … . Matter of Jaydin R., 2021 NY Slip Op 00176, Second Dept 1-13-21

Practice Point: To constitute a terroristic threat there must be an intent to intimidate a civilian population.

TERRORISM.

THE THREAT MADE BY DEFENDANT WAS PERSONAL IN NATURE AND WAS NOT DIRECTED AT THE CIVILIAN POPULATION WITHIN THE MEANING OF THE TERRORISM STATUTE (PENAL LAW 490.20); THE CONVICTION WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department, reversing defendant's "terrorism" conviction, determined the evidence was legally insufficient and the conviction was against the weight of the evidence. The defendant threatened to shoot "you guys," but the threat was personal in nature and was not directed at a "civilian population:"

The evidence of defendant's "intent to intimidate or coerce a civilian population" (Penal Law § 490.20[1]) was legally insufficient to support the conviction … . We also find that the verdict was against the weight of the evidence in that respect … .

At the end of an altercation, defendant, a Muslim, threatened to shoot "you guys," referring to several Bangladeshi worshippers at defendant's mosque. Although there was evidence presented at trial that defendant bore animus toward Bangladeshi people, the threat mentioned no group or population and instead appears to have been based on a personal dispute defendant had with one or more of his fellow worshippers over money or a missing phone. Accordingly, this threat was not directed at a "civilian population" as that term was explained by the Court of Appeals in People v Morales (20 NY3d 240, 247 [2012]). To find that defendant's act amounted to a terroristic threat would trivialize the definition of terrorism by applying it "loosely in situations that do not match our collective understanding of what constitutes a terrorist act" … . People v DeBlasio, 2021 NY Slip Op 00376, First Dept 1-21-21

Practice Point: Again, a terroristic threat must be made with the intent to intimidate the civilian population.

TRAFFIC STOPS, CANINE SEARCHES.

THE TRAFFIC STOP AND CANINE SEARCH WERE JUSTIFIED; THE DISSENT ARGUED THE CANINE SEARCH WAS NOT (THIRD DEPT).

The Third Department, over a dissent, determined the traffic stop was valid and the extended detention for a canine search was justified. The dissent argued the canine search was not justified:

The trooper testified that it was fully dark at the time of the stop and that he and defendant had their vehicles' headlights on, as did other vehicles passing on the roadway. When the trooper turned off his headlights briefly to check the license plate light, he observed that it did not illuminate the plate. Thus, it was "objectively reasonable" for the trooper to conclude that the requisite visibility did not exist and that a traffic violation had been committed … . Additionally, the trooper was entitled to rely upon the investigator's previous observation that defendant was driving without a seatbelt — a separate traffic violation that also provided probable cause for the stop … .

… [T]he trooper's observations of defendant engaging in behaviors commonly seen in outdoor drug transactions at a location known for such activity, his "slow roll response" and furtive movements after the trooper initiated the stop and his evasive, inconsistent answers to the trooper's questions created a founded suspicion that criminal activity was afoot … . Thus, the trooper properly extended the stop beyond its initial justification and conducted the canine search — which, in any event, took place only nine minutes after the initial stop and, according to the trooper, was completed in less than a minute … . People v Blandford, 2021 NY Slip Op 00058, Third Dept 1-7-21

Practice Point: Even though the traffic stop was based on minor traffic infractions, behavior which was deemed consistent with drug transactions in an area known for drug activity justified the canine search.