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Criminal Law Reversal Report
August 2023

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Criminal Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in August 2023. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

Table of Contents

Contents

BATSON.

DEFENSE COUNSEL RAISED A BATSON OBJECTION TO THE STRIKING OF FIVE JURORS; THE JUDGE RESTRICTED THE CHALLENGES TO TWO OF THE FIVE STRUCK IN THE MOST RECENT ROUND OF JURY SELECTION; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the trial judge should not have limited the defense Batson objections to the prosecutor's striking non-white potential jurors. Defense counsel challenged the striking of five jurors but the judge limited the challenges to the two struck in the most recent round of jury selection:

… [D]efense counsel made an application pursuant to Batson as to the five prospective nonwhite jurors stricken from the three rounds. Defense counsel stated: "that will be a total of . . . five non-white jurors that were struck by the People, and

there have not been that many non-white potential jurors we have seen." Defense counsel added, "so out of the 11 strikes, five of them were for non-white jurors," and "I believe that makes a prima facie case regarding the protective class". The court responded: "Let's talk about this round only." The People proceeded to proffer reasons for striking only the two panelists from the third round. The defense renewed its Batson challenge when the prosecution struck a sixth nonwhite potential juror in a subsequent round, stating that the People "are deliberately striking non-white jurors." The court specifically stated it was "not going to address that" and defense counsel noted their exception. …

The trial court erred in denying defendants an opportunity to present their full Batson challenge when it improperly limited the inquiry to only two of the challenged prospective jurors. As this Court held in People v Frazier (125 AD3d 449, 449 [1st Dept 2015]), "[a]lthough the court did not make a specific ruling that defendants satisfied step one of Batson (prima facie case of discrimination), once it ordered the prosecutor to provide the reasons for his peremptory challenges to two of the . . . panelists who were the subject of defendants' application, it should have required the prosecutor to articulate his reasons for striking the remaining . . . panelists, as defendants specifically requested." The People argue that unlike Frazier, the trial court here simply directed the parties to focus on the panelists challenged in round three of jury selection and the prosecutor volunteered race-neutral reasons without being ordered to do so. This is a distinction without a difference. As in Frazier, once the trial court asked the prosecutor to offer race-neutral reasons for striking two of the prospective jurors, it should have also requested an explanation for striking the remaining panelists that were part of the same application. The court failed to do so, and consequently, the case should be remanded for a new trial. People v Julio, 2023 NY Slip Op 04349, First Dept 8-17-23

Practice Point: When defense counsel raised Batson challenges to five jurors who had been struck, the judge limited the challenges to the two struck in the most recent round of jury selection. That was reversible error.

AUGUST 17, 2023

Table of Contents

DNA.

ALTHOUGH THE ERROR WAS DEEMED HARMLESS, THE FORENSIC STATISTICAL TOOL (FST) DNA ANALYSIS SHOULD NOT HAVE BEEN ADMITTED WITHOUT HOLDING A FRYE HEARING (SECOND DEPT).

The Second Department determined the DNA analysis using the forensic statistical tool (FST) should not have been admitted in the absence of a Frye hearing. However, there error was deemed harmless:

Supreme Court improperly admitted into evidence the results of DNA analysis conducted using the forensic statistical tool (hereinafter FST) without first holding a hearing pursuant to Frye v United States (293 F 1013 [DC Cir]) … . However, this error was harmless. The evidence of the defendant's guilt was overwhelming. The surviving police officer who was shot at by the defendant at close range, under good lighting conditions, and without obstruction identified the defendant within hours of the shooting. Other uncontested, single-source, non-FST DNA testing connected the defendant to the gun used in the shooting. Witnesses who knew the defendant and lived in the vicinity of the shooting testified that they saw the defendant running through their yards just after they heard the gun shots, holding a gun similar to the gun identified as the one used in the shooting. The defendant provided a false name to law enforcement officers canvassing the area of the shooting when he was approached by them, by which point he had abandoned some of the clothing he was wearing during the shooting, and he was apprehended wearing someone else's ill-fitting clothes and shoes. Additionally, the People's evidence offered in rebuttal to the defendant's extreme emotional disturbance defense was compelling. Therefore, there is no significant probability that the jury would have acquitted the defendant had it not been for this error. People v Blackwell2023 NY Slip Op 04211, Second Dept 8-9-23

Practice Point: A DNA analysis using the forensic statistical tool (FST) should not be admitted in the absence of a Frye hearing.

AUGUST 9, 2023

Table of Contents

SEARCH WARRANTS.

THE SEARCH WARRANT FOR DEFENDANT'S CELL PHONE DID NOT MEET THE PARTICULARITY REQUIREMENT, THE EVIDENCE GLEANED FROM THE CELL PHONE SHOULD HAVE BEEN SUPPRESSED; NEW TRIAL ORDERED; KIDNAPPING SECOND DEGREE IS AN INCLUSORY CONCURRENT COUNT OF KIDNAPPING SECOND DEGREE AS A SEXUALLY MOTIVATED FELONY, THE COUNTS MUST BE SUBMITTED TO THE JURY IN THE ALTERNATIVE (FOURTH DEPT).

he Fourth Department, reversing defendant's conviction, determined the search warrant for defendant's cell phone was overly broad. Therefore the evidence derived from the cell phone should have been dismissed. The court noted that kidnapping in the second degree is an inclusory concurrent count of kidnapping in the second degree as a sexually motivated felony … and that the court upon retrial should submit to the jury the kidnapping in the second degree count in the alternative only:

A warrant must be "specific enough to leave no discretion to the executing officer" … . To meet the particularity requirement, a warrant must (1) "identify the specific offense for which the police have established probable cause," (2) "describe the place to be searched," and (3) "specify the items to be seized by their relation to designated crimes" … . Here, the search warrant simply stated that the police were directed to search defendant's cellular phone for "digital and/or electronic evidence from August 13, 2016 to August 15, 2016." The warrant contained no language incorporating any other documents or facts. Significantly, the search of the phone was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion of the search to the executing officers … . People v Saeli, 2023 NY Slip Op 04268, Fourth Dept 8-11-23

Practice Point: A search warrant for a cell phone which simply states to search for "digital and/or electronic evidence from August 13, 2016 to August 15, 2016" does not meet the particularity requirement (the warrant is overly broad).

Practice Point: Kidnapping in the second degree is an inclusory concurrent count of kidnapping in the second degree as a sexually motivated felony.

AUGUST 11, 2023

STREET STOPS, APPEALS.

THE SUPPRESSION MOTION WAS PROPERLY GRANTED; THE POLICE DID NOT HAVE REASONABLE SUSPICION WHEN DEFENDANT'S CAR WAS BLOCKED BY A POLICE CAR; THE APPELLATE COURT MAY CONSIDER A RULING WHICH WAS NOT EXPLICIT BASED ON THE CONTEXT OF THE RULING WITHIN THE RECORD (SECOND DEPT).

The Second Department, over a two-justice dissent, determined the suppression motion was properly granted because the police blocked defendant's car before there was reasonable suspicion of criminal activity or danger to the public. The majority also concluded the issue could be decided on appeal in the absence of a specific ruling by the motion court by relying on the record for the context of the ultimate ruling:

Officer Cox's conduct in stopping the police vehicle "directly in front of the driveway" in a position "blocking the location" where the Audi was stopped with the engine running "constituted a stop, which required reasonable suspicion that the defendant or other occupants of the vehicle were either involved in criminal activity or posed some danger to the police" … . Joyette, the driver of the Audi, could not have pulled out of the driveway due to the police vehicle blocking the driveway, and thus, the police conduct constituted a "'significant interruption with an individual's liberty of movement'" … .

Further, the People failed to present any evidence showing that Officer Cox and his fellow officers observed any criminal activity at the time Officer Cox blocked the Audi from leaving the driveway. * * *

While CPL 470.15 bars this Court from deciding an appeal on a ground not ruled upon by the trial court … , "nothing in the language of CPL 470.15(1) . . . prohibits an appellate court from considering the record and the proffer colloquy with counsel to understand the context of the trial court's ultimate determination" … . Moreover, "where the trial court gives a reason [for its decision] and there is record support for inferences to be drawn from that reason, the Appellate Division does not act beyond the parameters legislatively set forth in CPL 470.15(1) when it considers those inferences" … . People v Joyette, 2023 NY Slip Op 04216, Second Dept 8-9-23

Practice Point: When the police blocked defendant's car they did not have reasonable suspicion of criminal activity. Therefore the suppression motion was properly granted.

Practice Point: When a court's ruling is not explicit the context of the ruling can be turned to by the appellate court to determine the exact nature of the ruling.

AUGUST 9, 2023