NEW YORK APPELLATE DIGEST, INC.

Criminal Law
Reversal Report
August 2024

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Table of Contents

Contents

BATSON CHALLENGES, JUDGES, ATTORNEYS.

HERE TWO DISSENTERS ARGUED THE JUDGE DID NOT MAKE THE REQUIRED FINDINGS THAT THE PROSECUTOR'S RACE-NEUTRAL REASONS FOR PEREMPTORY CHALLENGES WERE NON-PRETEXTUAL (THIRD DEPT).

The Third Department, over a two-justice dissent, determined County Court properly denied Batson challenges to the prosecutor's peremptory challenges:

From the dissent:

Although trial courts are permitted to implicitly determine that the race-neutral explanations offered by the prosecutor are not pretextual … , we find that the language utilized by County Court cannot be construed as making an implicit determination. County Court did not state that it believed the race-neutral reasons offered by the prosecutor; instead, the court indicated that it "believe[d] there's a race-neutral reason . . . which would permit a . . . peremptory challenge by the People, not subject to Batson." This language demonstrates that the court only considered whether the People had proffered a race-neutral reason and not whether the race-neutral reason was pretextual as required under the third step of the Batson inquiry, despite defendant's arguments to this effect … . People v Morgan, 2024 NY Slip Op 04165, Third Dept 8-8-24

Practice Point: As part of a Batson juror challenge, the judge must determine whether the race-neutral reasons for a peremptory challenge are genuine (non-pretextual). Here two dissenters argued the judge did not make that determination.

AUGUST 8, 2024

SEXUAL ABUSE COUNTS RENDERED DUPLICITOUS BY VICTIM'S TESTIMONY.

ALTHOUGH THE SEXUAL ABUSE COUNT WAS FACIALLY VALID, THE VICTIM'S TESTIMONY RENDERED THE COUNT DUPLICITIOUS, REQUIRING REVERSAL ON THAT COUNT (THIRD DEPT).

The Third Department, reversing defendant's conviction of one count of sexual abuse, determined, although the count was facially valid, it was rendered duplicitous by the victim's testimony:

The evidence relative to these charges derived mostly from the victim's trial testimony, wherein she revealed that she and defendant lived in the same household during the relevant time frame and he touched her inappropriately on several occasions while in the basement of the residence. With respect to count 2, when asked on direct examination whether defendant had his clothes on, the victim answered that he would "sometimes . . . take off his shirt" and "sometimes he would have no shirt on at all" … . The prosecutor then asked the victim whether she remembered "more than one time that [defendant] didn't have a shirt on" and she stated: "I remember one time that he did not have his shirt on." On cross-examination, defense counsel asked the victim whether it was true that there were multiple times defendant "took his shirt off," to which she responded in the affirmative. She then explained that "[i]t was at least two" times and repeated this again when confronted with the fact that, during her grand jury testimony, she stated that defendant had taken his shirt off only once, clarifying that she "meant to say two."

… Where, as here, "trial testimony provides evidence of repeated acts that cannot be individually related to specific counts in the indictment, the prohibition against duplicitousness has been violated" … . People v McNealy, 2024 NY Slip Op 04230, Third Dept 8-15-24

Practice Point: Where an indictment court charges one incident and the trial testimony indicates there were multiple similar incidents, it is impossible to tell whether the jury was unanimous in convicting under that count. The count was rendered duplicitous by the trial testimony, requiring reversal.

AUGUST 15, 2024

SORA RISK-LEVEL ASSESSMENT, SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

A SORA RISK LEVEL ASSESSMENT SHOULD INCLUDE THE POTENTIAL FOR REHABILITATION; HERE PSYCHOLOGICAL EVIDENCE AND EVIDENCE OF FAMILY SUPPORT WARRANTED A DOWNWARD DEPARTURE (THIRD DEPT).

The Third Department, reducing defendant's SORA risk level from two to one, in a full-fledged opinion by Justice Garry, over an extensive dissent, determined the psychological evidence, evidence of family support, and evidence of defendant's long-term relationships warranted the downward departure. The nature and weight of the psychological evidence, including test results, is discussed in depth:

Defendant attended college in New Hampshire but left early and did not graduate as a result of grief stemming from the loss of multiple family members. He thereafter remained in New Hampshire and worked as a soccer coach at a local high school. In 2019, defendant cultivated a short-term sexual relationship with a 14-year-old student whom he was coaching; alcohol was involved. He ultimately pleaded guilty in New Hampshire to four counts of felonious sexual assault, and misdemeanor charges related to the provision of alcohol. * * *

The potential for rehabilitation should be recognized and considered in judicial review and imposition of SORA restrictions. As has been stated, "our application of SORA and its [g]uidelines holds the promise of the recognition of rehabilitation so as to incentivize a sex offender to achieve that which this defendant has achieved" … ; this quote applies in full measure here. Through his submission of multiple psychometric test results, expert opinions and expressions of familial support, defendant has demonstrated the presence of multiple mitigating factors not considered by the guidelines. The totality of the circumstances indicate defendant poses a low risk of reoffending. Thus, in the exercise of our independent discretion,

to avoid imposing lifetime and very public restrictions of a risk level two offender upon this young defendant (see Correction Law §§ 168-h [1]-[2]; 168-i; 168-l [6] [a]-[b]; 168-q [1]), we grant his motion for a downward departure and classify him as a risk level one sex offender subject to the applicable restrictions, for the requisite 20-year period … . Essentially, where we depart from the dissent is in our willingness to more fully consider the degree of evidence of rehabilitation and the resulting diminished potential for future criminal conduct. People v Waterbury, 2024 NY Slip Op 04169, Third Dept 8-8-24

Practice Point: Here defendant presented expert psychological testimony, the results of psychological tests and evidence of strong family support at the SORA risk-level-assessment hearing. On appeal the Third Department found the evidence should have been considered by the SORA court because it demonstrated a potential for rehabilitation.

AUGUST 8, 2024