NYS Court of Appeals Criminal Decisions for May 2, 2019

People v. Hill

This is a 6 to 0 memorandum, reversing the AD. Judge Feinman did not participate. Suppression is granted in this NYC housing project matter. The initial inquiry for information from the defendant was a level 1 encounter under De Bour (40 NY2d 210, 223 [1976]). *See also* People v. Hollman, 79 NY2d 181, 191 (1992). The police intrusion that followed went beyond this level and the record did not establish that it was lawful.

People v. Brown (Boris)

This is a 6 to 1 memorandum, modifying the AD decision. Judge Stein dissented. This depraved indifference murder case involves a Gomberg (38 NY2d 307, 311-314 [1975]) conflict of interests inquiry. Defendant's attorney was retained to represent a witness to the present homicide on an unrelated charge. The People indicated that they were not likely to call this witness. The court appointed separate counsel to consult with defendant regarding the potential conflict. Defendant indicated he wanted to waive the conflict. He was ultimately convicted after trial and sentenced to 25 to life.

Defendant moved to vacate his judgment, as he was purportedly not fully advised of the conflict. He was told that he would not be able to cross-examine the witness, but was not informed regarding the legal fees paid to his attorney by the witness. This information came from post-conviction counsel's hearsay account of having spoken with the prior attorney.

Conflicts, where counsel has divided and incompatible loyalties within the same matter and which preclude single-mindedness advocacy, are distinguished between actual and potential. Potential conflicts (and some actual ones) may be knowingly waived. A defendant has the heavy burden of establishing that a potential conflict actually operates on the defense. This is a mixed question of law and fact.

CPL 440.30 requires that the court review the pleadings to determine if a hearing is warranted. *See generally* People v. Jones, 24 NY3d 623, 634 (2014). At such a hearing the defendant must prove every essential fact by a preponderance of the evidence. Supreme Court abused its discretion at bar in summarily denying the 440 motion. A CPL 440.30 hearing is ordered.

The dissent believed that there were no questions of fact warranting a hearing. Without an affirmation from trial counsel, a summary denial was appropriate.

NYS Court of Appeals Criminal Decisions for May 7, 2019

People v. Towns

The court here was unanimous in result, with Judge Rivera authoring a concurrence. Judge Stein wrote for the majority. The AD is reversed. This Monroe County assault prosecution brings up issues of judicial neutrality. A new trial before a different judge was ordered at bar, as the trial court *personally* negotiated and entered into a cooperation agreement with a witness. The deal was that the witness would testify truthfully for the prosecution at trial and would receive a sentencing commitment in return. The problem, as the majority notes in footnote 4, is this: disclosed sentencing commitments between *the prosecution* and a witness are fine, but a judge cannot take on the role of an advocate and procure a witness for trial (effectively inducing the testimony).

The court recalled other cases where judges went too far in terms of not maintaining both actual and perceived neutrality: De Jesus, 42 NY2d 519, 523 (1977) (comments by judge towards defense counsel); Arnold, 98 NY2d 63, 68 (2002) (the court calling its own witness); and Novak, 30 NY3d 222, 226 (2017) (presiding over both a trial and an appeal in the same case). A fair trial in a fair tribunal is a basic requirement of due process, under both the state and federal constitutions. US Const., Amend. XIV; NY Const., art. I, §6. Judges can take "an active role in the resolution of the truth" - - but not *too* active. Besides defending against the charges, a defendant should not have to also overcome a judge's abdicating his or her responsibility to act in a neutral and detached manner.

At bar, the defendant was deprived of a fair trial, as the judge created the specter of bias, effectively becoming an interested party. Prior to the defendant's trial, in a *quid quo pro* exchange for truthful testimony *(i.e., being consistent with a prior statement)*, one of the co-defendants was offered by the court a sentencing range of between 9 and 15 years. Defense counsel unsuccessfully moved to preclude this co-defendant's testimony. Even the prosecution could not hide its discomfort on the record with this arrangement; it actually took the DA's Office to push the trial court to allow defense counsel the opportunity to fully cross-examine the witness about the arrangement. Though the AD explicitly criticized the trial court for its actions, it was not enough to reverse, as the jury did not learn all of the details (*see* 151 AD3d 1638, 1639 [4th Dep't 2017]). But as the Court of Appeals concludes, consistent with the principles of Novak, the trial judge taking on dual roles created a facial appearance of impropriety which impermissibly conflicted with the notion of fundamental fairness. In concurrence, Judge Rivera opined that this was a case of actual bias, not just the appearance of it.

People v. Brown (Darryl)

This successful People's appeal is a unanimous opinion authored by Judge Wilson, reversing the 3 to 2 reversal by the First Department. The trial court erroneously granted the defendant's requested justification charge. The People bear the burden of disproving a justification charge beyond a reasonable doubt. The defendant shot his daughter's boyfriend in the lobby of a Bronx apartment. The unarmed victim did not threaten deadly physical force; therefore, considering the evidence in a light most favorable to the defendant, there was no reasonable view of the evidence that defendant was justified in using deadly physical force against the victim. The defendant, being the first to use or threaten the imminent use of physical force in the encounter, was the initial aggressor because he displayed an operable firearm (which was in a position where the defendant was readily able to fire it).

A defendant must reasonably believe that the other person is using or is about to use deadly physical force before the defendant may use deadly physical force himself. *See* P.L. §35.15 (2)(a); People v. Goetz, 68 N.Y.2d 96, 114-115 (1986). A defendant is never justified in using deadly physical force if he (or she) is the initial aggressor. P.L. §35.15 (1)(b). A defendant cannot use deadly physical force in response to the threat of mere *physical* force. The "initial aggressor" rule barred defendant from claiming justification, as defendant did not withdraw from the encounter, communicate the withdrawal and then have the victim threaten deadly physical force.

Both the sequence and the nature of the attacks must be analyzed. Verbal comments by the victim were insufficient to justify defendant's behavior here. *See also* People v. Petty, 7 N.Y.3d 277, 280-281, 285-286 (2006). The trial court abused its discretion in giving the justification charge to the jury. The jury acquitting defendant of intentional murder (and convicting him of manslaughter) does not change this result.

People v. Vega

This a 6-0-1 memorandum affirming the AD. This second-degree assault case raises another justification charge issue. Judge Garcia authored a concurrence. The trial court instructed the jury on the justified use of non-deadly physical force in connection with the lesser included offense of assault in the third degree, which does not contain a dangerous instrument element. P.L. §120.00 (1). At the People's request, the court also instructed the jury that if it found beyond a reasonable doubt that defendant used a dangerous instrument (P.L. §10.00 [13]; *at bar, it was a belt with a metal buckle)*, then it should apply the legal rules regarding the justified use of deadly physical force. P.L. §35.15 (2).

The majority opined that a non-deadly physical force instruction could be proper even where a dangerous instrument was used. Every case is fact-sensitive; the facts must be viewed in a light most favorable to the defense in determining whether to give this

instruction. No reasonable view of the evidence indicated that defendant used the belt in a manner that could cause death or serious physical injury. In his concurrence, Judge Garcia opines that second-degree assault with a dangerous instrument cannot be committed without using deadly physical force.

People v. Rkein

This is a unanimous memorandum, affirming the AD. This is another justification case. There was no reasonable view of the evidence to support the deadly physical force justification instruction (requested by the defense) in this assault prosecution. P.L. §35.15(2).

NYS Court of Appeals Criminal Decisions for May 9, 2019

People v. Meyers

This is a 6-0-1 memorandum affirming the AD. Judge Garcia authored a concurrence. The court here revisits the 2018 Parker / Morrison chapter of the O'Rama (78 NY2d 270, 276 [1991]) / CPL 310.30 jurisprudence. A potential jury note was found in the clerk's file by appellate counsel. The AD, seemingly in contravention to Parker (32 NY3d 49, 62 [2018]) and Morrison (32 NY3d 951, 952, 960-962 [2018]), directed that Supreme Court conduct a reconstruction hearing because of the ambiguity of the record as to whether the document found by appellate counsel was actually a jury note. The hearing at bar was supposedly not meant to address compliance with O'Rama, but rather just to determine whether the note was actually a request for information (which would then trigger the statute). The note, entitled "JURY NOTE," was redundant with other info requested in another note. It was referenced with a time stamp after the verdict note was marked, but some 4 hours before the verdict was actually announced.

Judge Garcia, who strongly dissented in both the Parker and Morrison cases last year, was dead on in his concurrence here, calling out the majority for not being consistent with the Parker rule, which prohibits reconstruction hearings. Judge Garcia disagrees with the result of Parker, et al., so the result here is fine with him. The hearing that was held answered questions that would not otherwise have been known if Parker had actually been complied with. But it violates the new prohibition. Said the court in Parker (32 NY3d at 62): "the sole remedy is reversal and a new trial." Many jury notes are marked out of sequence and are redundant with other notes - - like the one at issue at bar. Records on appeal are often ambiguous. In other words, reconstruction is prohibited under Parker to ascertain the existence, or nonexistence, of error.

Judge Garcia provides here an overview of the evolution of the O'Rama jurisprudence that led to the Parker rule, including the mode of proceedings rule requiring the verbatim notice of the jury note (the core responsibility of O'Rama), as well as the response prong, which requires preservation. *See, e.g.,* People v. Walston, 23 NY3d 986, 988, 991 (2014); People v. Nealon, 26 NY3d 152, 160-162 (2016); People v. Mack, 27 NY3d 534, 537, 539, 542 (2016). The legislature should act to correct the absurd result created by the majority: at this point, only partial and incomplete notice scenarios appear to be controlled now by the strict Parker prohibition.