NYS Court of Appeals Criminal-Related Decisions for November 21, 2019

People ex rel. Prieston v. Nassau Co. Sheriff's Dept.

This is a unanimous decision, authored by Judge Feinman. At issue is CPL 520.30(1), which governs the conducting of a bail sufficiency hearing regarding the use of collateral pledged on an insurance company bond in support of bail. Here, Supreme Court was correct in the first instance and the AD erred in granting the petitioner / respondent's state habeas corpus petition pursuant to CPLR article 70. The petition is dismissed.

In setting bail, courts must consider the kind and degree of control or restriction that is necessary to secure the defendant's court attendance. CPL 510.30. A bail bond is security which seeks to assure the defendant's appearance in court. Under CPL 520.30(1), the court is permitted to conduct an inquiry, including six enumerated factors, regarding the value and sufficiency of any security offered. The AD erred in its total deference to the insurance company's business judgment, which may not be consistent with the state's concern for having the defendant return to court. Supreme Court did not abuse its discretion in finding that the unspecified value of automobiles pledged by the defendant were insufficient to ensure defendant's return to court.

NYS Court of Appeals Criminal Decisions for November 25, 2019

People v. Rouse

This is a unanimous reversal of the AD, authored by Judge Fahey. Consistent with People v. Smith, 27 NY3d 652, 659 (2016) (addressing the cross-examination of a police officer regarding claims of a false arrest in a previous federal law suit), law enforcement may be cross-examined regarding acts of dishonesty just as other prosecution witnesses are. Defendant was convicted of attempted murder for unsuccessfully shooting at police officers in the Bronx. The weapon was not tested for DNA or fingerprints.

Though there's no explicit discussion of the Confrontation Clause, this decision contains good language regarding the importance of cross-examination as the "preeminent truth-seeking device." It is the "principle means by which the believability of a witness and the [veracity] of [the witness's] testimony are tested." Davis v. Alaska, 415 US 308, 316 (1974). Perception, memory and the plain discrediting of a witness are fair game on cross-examination. While admissibility is ultimately within the trial court's discretion, a trial attorney acting in good faith (i.e., having some reasonable basis) may cross-examine a witness regarding specific allegations of wrongdoing relevant to credibility.

The NY Court of Appeals rejected (in foot note 3) a seven-part test from the Second Circuit for determining the scope of cross-examination regarding a prior incident. *See*, United States v. Cedeno, 633 F3d 79, 82-83 (2d Cir. 2011). Instead, a three-part test is followed, consistent with Smith, 27 NY3d at 662 (requiring that there be a good faith basis for the inquiry, the content be relevant to credibility and that the examination not confuse, mislead the jury or prejudice the opposing party).

Identification was the pertinent issue at trial. The trial court abused its discretion as a matter of law in precluding defense counsel's attempt to inquire regarding one of the officers misleading a federal prosecutor as to his involvement in a ticket-fixing scheme, while preparing to testify in a federal proceeding. Defense counsel also pointed to two federal court (SDNY) suppression determinations wherein the officer provided unreliable testimony. A new trial was ordered.

NYS Court of Appeals Criminal Decisions for November 26, 2019

People v. Li

This is a 6 to 1 decision, with Judge Fahey authoring the majority decision and Judge Wilson dissenting. Defendant was a doctor from Queens who provided his addicted patients prescription pills at will. His manslaughter conviction was based on legally sufficient evidence, despite the lack of direct evidence between the two individuals who overdosed and defendant's conduct.

This is another horrible component of our country's opioid crisis. Blame the big pharmaceutical companies all you want, but here is the latest culprit: the criminally reckless doctor who doesn't care who overdoses. Patients at bar were not required to make appointments and were required to pay in cash. Physical exams were rare. Over 21,000 prescriptions were written in a three-year period. The defendant's clinic was only open on the weekends. Defendant prescribed whatever patients wanted. Non-opioid pain management treatment was never attempted. Family members of the decedents warned defendant of the victims' addictions. Defendant also altered medical records in response to the investigation into his conduct. There was a cycle of craving and addiction at play.

Second-degree manslaughter under PL § 125.15(1) requires here that the People must establish the requisite recklessness *mens rea* (under PL § 15.05 [3]) and that the defendant engaged in conduct through the sale of dangerous drugs that directly causes the death of another. Recklessness means that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk of such nature and degree that it constituted a gross deviation from the standard of a reasonable person under the circumstances.

People v. Pickney, 38 AD2d 217, 220-221 (2d Dep't 1972), which dealt with a one-time sale of heroin, was distinguished. The Pickney court ruled that defendant should not have been charged with murder, as the legislature criminalized the sale of illegal drugs but had not amended PL article 125 to include a specific reference to death caused by the sale of illegal drugs. Still, the Court of Appeals concluded that no inferences should be drawn from the legislature's failed-attempts to amend the homicide statute.

Causation was the prime issue here. A defendant's conduct must set in motion events which ultimately result in the victim's death. The defendant's actions need not be the sole cause of the death, nor does the defendant's conduct need to be the final, fatal act. But the conduct must be an actual contributory cause. The fatal result must be reasonably foreseeable. The evidence was sufficient here even though it was sketchy whether defendant actually provided the drugs that the victims ingested which led to their deaths.

Judge Wilson wrote an insightful dissent. The legislature has specifically provided for physician-assisted suicide under the manslaughter statute and has not enacted a reckless homicide statute related to the prescription of medicine. Because of the majority's decision, a reckless doctor may now be held criminally liable for all deaths of patients under his or her care where drugs prescribed by the doctor contributed to the patient's death. In other words, every heroin dealer may now be convicted of manslaughter for the deaths of all users who overdose from the drugs supplied. There was no reasonable foreseeability here for the direct cause of these two victims' deaths. Just because it was foreseeable that *some* patient may die from defendant recklessly prescribing a voluminous amount of opioids, that is not enough. A defendant's actions must be a sufficiently direct cause of the death. Unlike tort liability, a generally foreseeable risk and an action that ignites a chain of causation is not enough. Rather, the actual immediate triggering cause of the victim's death must be foreseeable to establish second-degree manslaughter.

People v. Thomas
People v. Green
People v. Lang

This 70-page splintered decision contains a number of opinions. The court here wrestles over what constitutes a knowing, intelligent and voluntary appeal waiver under circumstances where a written waiver form containing false information is used. The Chief wrote for the majority, which covered three combined separate cases wherein defendants pleaded guilty after waiving their right to appeal orally and in writing, and then perfected their appeals. Two of the three appeal waivers considered were found to be invalid, as those two oral allocutions failed to cure the errors contained in the written waiver forms.

The waivers originated in two corners of the state. The appeal waivers for Green and Lang, both out of Genesee County in WNY, were invalidated. Judge Wilson wrote a concurrence in these cases, which Judge Rivera joined. Judge Garcia dissented. The Thomas waiver, from Bronx County in NYC, was approved of. Here, Judges Rivera and Garcia authored separate concurrences, and Judge Wilson dissented.

The written waivers at bar mischaracterized the scope of the defendants' appellate rights being waived, specifically regarding whether defendants could file a notice of appeal and secure assigned counsel on appeal. False info in this regard could easily deter defendants from exercising their fundamental and constitutional rights to direct appellate review of their criminal judgments of conviction. *See*, CPL 450.10; People v. Ventura, 17 NY3d 675, 679 (2011); N.Y. Const., art. VI, § 4(k).

The court provides a full survey of its appeal waiver jurisprudence to date. Plenary appellate review transcends the individual concerns of a defendant; the role of the court is to protect defendants from misconduct and coercion. The court thus must ensure the reasonableness of the plea bargain and that a defendant appreciates the consequences of his or her decision. But there is no "uniform mandatory catechism" required for waiving the right to appeal. Moreover, a written form may cure an inadequate oral allocution (*see*, footnote 5 in this decision), and *vise versa*. But like the federal system, what happens in court generally trumps what is written down. *See, e.g.*, People v. Bradshaw, 18 NY3d 257, 267 (2011) (oral appellate waiver acknowledgment may cure incorrect language in written form); United States v. Washington, 904 F.3d 204, 206-208 (2d Cir. 2018) (remanded where supervised release condition was only delineated in written judgment and not referenced on the record during sentencing).

As the court reminds us, "a waiver of the right to appeal is not an absolute bar to the taking of a first-tier appeal." (internal citation omitted). At the very least, the validity of an appellate waiver must be reviewed. In other words, "the phrase 'waiver of the right to appeal' is a 'useful shorthand' reference to what is more precisely a narrowing of the issues for appellate review." *See also*, Garza v. Idaho, 586 US __ , 139 S.Ct. 738, 744 (2019) (recognizing that "no appeal waiver serves as an absolute bar to all appellate claims"); *but see*, People v. Kemp, 94 NY2d 831, 833 (1999) (deeming general appeal waiver to encompass CPL 710.70 right to review suppression issue).

In Green and Lang, which utilized identical waivers, the written forms falsely indicated that the defendants could not file an appeal, nor have assigned appellate counsel. The oral allocutions did not cure the situation. *See*, People v. Billingslea (companion to Lopez), 6 NY3d 248, 256-257 (2006). In Thomas, though the written form erroneously indicated that defendant could (and was) waiving the right to file a notice of appeal, the court found other language in the form to be "clarifying" and the oral allocution to be sufficient. At the risk of seeming too cynical, the moral of this story seems to be that written appeal waiver forms may continue to contain serious errors (and they frequently do), as long as the often vague and overbroad oral allocution with the defendant rings the right bells, which frankly are not hard to ring.

For what it's worth, the court does admonish future courts, indicating that "[g]reater precision in the courts' oral colloquies will provide more clarity on the record as to the issue of voluntariness." *See also*, NYS Unified Court System Model Colloquies, Waiver of Right to Appeal (at http://www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml); *see also*, discussion in footnote 7 of this decision; *see also*, People v. Batista, 167 AD3d 69, 80 (2d Dep't 2018) (Scheinkman, P.J., concurring) (analyzing the Model Waiver).

(Also addressed regarding Mr. Lang's case was the facial sufficiency of defendant's waiver of indictment regarding his superior court information. Therein the court found factual omissions regarding the date and approximate time and place of the offenses not to be jurisdictional or mode of proceedings errors under CPL 195.10 and 195.20, N.Y. Const., art. I, § 6 and People v. Boston, 75 NY2d 585, 589 [1990]. Judge Rivera's Lang concurrence discusses this issue in more depth.)

In this Lang / Green dissent, Judge Garcia criticizes the maze of appellate waiver rules from the court's jurisprudence, which seem to focus more on the failings of the courts, rather than the voluntariness of defendants. Prosecutors may be less willing to strike deals with defendants now.

In his Thomas dissent, Judge Wilson boldly argued for the abolition of all appeal waivers and the overruling of People v. Seaberg, 74 NY2d 1, 7-8 (1989), wherein the court first approved of appeal waivers. Judge Wilson criticized the parsing of language by the court in this case and in the past; here, the court was alright with a waiver form that was "incorrect" but invalidated two other waivers that "mischaracterize" info. There was thus no real guidance for courts to follow. If attorneys have trouble following these rules, how can we expect defendants to follow them? Appeal waivers have become "purely ritualistic." They have proven to be unworkable, are not based on "mutual concessions" and are rarely knowing, intelligent and voluntary. *See again*, Batista, 167 AD3d at 80-82 (Scheinkman, P.J., concurring) (estimating that approximately 380 appeal waivers have been invalidated by the appellate divisions in the last five years). Appeal waivers deprive the public a true system of appellate review.