NYS Court of Appeals Criminal Decisions for April 3, 2018

People v. Silburn

This is a 5 to 2 decision, affirming the AD, with the Chief Judge authoring the majority opinion. Judges Rivera and Wilson wrote separate dissents. The majority unfortunately held that the defendant failed to unequivocally request that he be permitted to proceed *pro se*, as he also sought stand-by counsel. On an unrelated issue, the defense was obligated under CPL 250.10 to provide notice to the People regarding the defendant's intention to challenge the voluntariness of his statements to the police.

Beginning with **the *pro se* request**, a defendant has a fundamental right to represent himself *pro se*. Faretta v. California, 433 US 806, 836 (1975). However, under People v. McIntyre, 36 NY2d 10, 17 (1974), the trial court must go through a three-part test to determine whether: (1) the request is unequivocal and timely; (2) there has been a knowing, intelligent (and voluntary) waiver; and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues. If part (1) is satisfied, the court must conduct a "searching inquiry" to ensure that part (2) is complied with. Part (1) means a clear and unconditional presentation to the court. Put another way, "unequivocal" means to demonstrate an actual fixed intention and desire to unambiguously proceed *without* professional assistance in his or her defense.

Prior to and during trial, the defendant sought to both represent himself and have stand-by counsel, i.e., "hybrid representation." The trial court, seemingly implementing its own policy, told defendant that he did not have the right to "dual representation;" he had to choose to be either *pro se* or have an attorney. The Court of Appeals held that standby counsel was not a constitutional right (following People v. Mirenda, 57 NY2d 261, 265 [1982]), but a rather a matter of the trial court's discretion (which in this case was not abused). The majority characterized defendant's request to proceed *pro se* as being "conditioned" upon receiving standby counsel. In sum, while the better practice would have been to clarify the situation, no further inquiry was required by the trial court, as part (1) of the McIntyre test was not satisfied.

In dissent, Judge Wilson opines that the defendant was deprived of the right to a fair opportunity to defend against the accusations by presenting his case in his own way. The right to represent your self is one of the most cherished ideals of our culture. If the accused has not agreed to have an attorney, it is no longer his or her defense anymore. At bar, the defendant unequivocally sought two things: to be *pro se* and to have stand-by counsel. The *pro se* request was not conditional. Like a customer in a fast food restaurant ordering a burger *and* fries, it would make no sense for the waitress to require the customer to only have a burger. There was some sniping between members of the Court on this point. In footnote 2, the majority describes Judge Wilson's fast-food analogy as "both inapt and inappropriate," in that it "trivializes" the constitutional rights of defendants. Judge Wilson, in the dissent's footnote 1, responds by asking who here is really trivializing the situation. The ironic part of all of this, notes

the dissent, is that the majority frees up trial courts from engaging in any particular catechism on the topic "at the price of imposing one on defendants." In other words, only the uneducated and untrained litigant is required to get the terminology just right. Citing out-of-state case law, Judge Wilson observes, "[t]o allow the uninformed to unwittingly waive their right of self-representation merely by requesting standby counsel 'is to imprison a man in his privileges and call it the Constitution.'" The dissent also does a nice overview of what true exercise of discretion is, as opposed to simply imposing a court policy, as was apparently done here. Finally, Judge Rivera's dissent emphasized the importance of appointing standby counsel when it is requested.

With regards to **the CPL 250.10 issue**, defendant sought to introduce the testimony of a psychiatrist who evaluated him and opined that he was bipolar with psychiatric features. This, according to the defense, rendered his Miranda waiver involuntary. No notice under the statute was given to the prosecution in this regard. The trial court precluded the testimony.

Under CPL 250.10 (1), the term "psychiatric evidence" means:

> (a) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect.
>
> (b) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of extreme emotional disturbance …
>
> (c) Evidence of mental disease or defect to be offered by the defendant in connection with any other defense not specified in the preceding paragraphs.

The majority held that challenging the voluntariness of a confession under CPL 710.70 is encompassed by the CPL 250.10 (1)(c) "any other defense" clause. The defendant sought too narrow an interpretation of the provision, i.e., only a complete defense such as a *mens rea* defense. But an involuntary statement may be a complete defense as well. The purpose behind CPL 250.10 was to eliminate surprise to the prosecution and avoid judicial delays in litigating these often complex issues. Proper notification, adversarial examination and preclusion, where appropriate, was the plan. The amendments to the law in the 1980's made its scope broader. Only good cause (under CPL 250.10 [2]) may excuse a violation of the notice provision.

Here, though the People knew early on of defendant's mental illness, they were still entitled to notice. Though inapplicable at bar, the prosecution will often have to deal with privileged medical records to obtain the information they need to confront a defendant's psychiatric evidence. The defense at bar knew of this information long before trial, but still failed to put the DA on notice.

In dissent, Judge Wilson believed the preclusion of defendant's psychiatric evidence constituted harmless error. The majority expanded CPL 250.10 (1)(c) from merely applying to defenses regarding elements of the crime to defense attacks on the weight that evidence may be given by a jury. Like the *pro se* argument, Judge Wilson sees this issue in the big picture context of the constitutional right to present a defense. The CPL 250.10 (1)(c) "defense" reference means just that - - a defense. Any other interpretation of CPL 250.10 (1) would make sections (a) and (b) unnecessary. Avoiding unnecessary adjournments and providing the DA an opportunity to obtain evidence are the purposes behind the statute. Subsection (1)(c) should not be applied to issues not typically raised at trial, and not generally fatal to the People's case. Here, the proposed evidence in question was a police form, not a privileged medical record. Its lack of probative value to the material issues makes its preclusion harmless under the circumstances.

NYS Court of Appeals Criminal Decisions for April 26, 2018

People v. Britton

This is a quick 6 to 1 memorandum (about a paragraph in length), with Judge Rivera authoring a twelve-page dissent. The AD is affirmed. The Court held here that conduct for which a defendant is acquitted of *(based on the criminal BRD standard)* may be utilized in determining a SORA risk assessment *(based on the civil clear and convincing evidence ["CCE"] standard)*. Here, the defendant properly received 25 points under factor number 2 of the risk assessment instrument.

In dissent, Judge Rivera set out the facts in detail. The jury here acquitted defendant of 1st degree rape and two counts of 1st degree criminal sexual acts, both felonies, regarding conduct involving defendant's eleven year old niece. They convicted him, however, of the misdemeanor, 2nd degree sexual abuse. There were no eyewitnesses or physical evidence, and the complainant's testimony was inconsistent regarding the charges. The CCE standard is an exacting one; it is the highest civil evidentiary burden in our law, requiring a high degree of reliability. The SORA court, according to the dissent, erred in utilizing the complainant's grand jury and trial testimony here. While reliable hearsay is admissible in a SORA proceeding, there was no credible evidence supporting the lower court's CCE finding. While facts previously established at trial or elicited at the time of a guilty plea are deemed established by CCE, unreliable evidence cannot serve as a basis for a risk assessment. The acquittal here should be understood as a reflection of the jury rejecting the complainant's version of the events.

This is the second SORA case in a row that appears to be expanding the broad net of information deemed admissible in SORA litigation. *See* People v. Francis, 30 N.Y.3d 737, 746-751 (decided February 13, 2018) (the Court holding, with Judge Rivera writing the decision, that a YO adjudication may be utilized in determining a risk assessment, a conclusion that seems to run counter to the scientific data supporting the theory that the brain is not fully developed until a person reaches his or her 20's, thus making a youth's conduct not a reliable indicator of potential recidivism).