NYS Court of Appeals Criminal-Related Decisions

for December 11, 2018

People v. Diaz

This is a 4 to 3 decision with a surprising appearance of Judge Garcia in the majority. Judge Feinman authored the majority's opinion, joined in by Judges Rivera, Garcia and Wilson. Judge Fahey wrote the dissent, with the Chief Judge and Judge Stein joining therein. Here the Court of Appeals affirmed the AD's reversal of the lower court's finding of defendant being a level 3 sex offender. At issue was the use of defendant's murder conviction from the State of Virginia, which required him to register in that state as a sex offender. Defendant shot and killed his 13-year-old half-sister in 1989. There was no sexual component to this crime. Defendant was ultimately released from prison in Virginia and moved to the Bronx.

In 1994, Congress conditioned federal funding for the states on their passing sex offender registration legislation. New York State responded in 1995 with it's own version of SORA under Correction Law §168. The statute of course targets the dangers of recidivism posed by sex offenders and encompasses non-sex offenses such as unlawful imprisonment and kidnapping a person under the age of seventeen. *See* People v. Knox, 12 NY3d 60, 66-69 (2009). Murder without a sexual component, however, has never been a registerable offense. Under Corr. Law §168-a(2)(d)(ii), enacted in 2002, a defendant must register under SORA if he or she was convicted of a felony in another jurisdiction for which the offender "is required to register *as a sex offender*" in that jurisdiction (emphasis added). Murder is a registerable offense in Virginia.

The majority opines that though he was required to register out of state for the murder, defendant was not required to register specifically as a "sex offender" in Virginia. *See* Va. Code Ann §9.1-902. The Virginia law does not define sex "offense" or "offender." The structure of the statute and the legislative history support the majority's conclusion. Blind deference to another jurisdiction's registry should not occur. Moreover, despite the court's holding, defendant is still required to continue registering in Virginia.

The dissent opines that despite Corr. Law §168-a(2)(d)(ii) being directly on point, the majority here invents its own unclear method of determining whether another jurisdiction's offense triggers the SORA registration requirement. The majority's "lengthy statutory construction exercise" and case law analysis of Virginia law will be difficult for the DCJS, the Board of Examiners of Sex Offenders and future courts to duplicate.

People ex rel. Erick Allen v. Yelich

This is a quick unanimous memorandum, affirming the Third Department's denial of defendant's state habeas corpus petition, which was converted to an Article 78 petition. A reading of the AD's decision is necessary to understand this case. *See* 159 AD3d 1202 (3rd Dep't 2018). Defendant argued that for post-release-supervision purposes, DOCCS failed to credit him with his time of incarceration in the State of New Jersey, which was a result of conduct committed while defendant was released on his New York case. Although the New Jersey sentencing court intended for defendant's time in New Jersey to run concurrent with his New York sentence, the Court of Appeals concluded that the AD's determination should not be disturbed. DOCCS was not bound by the New Jersey sentencing court's recommendation.

NYS Court of Appeals Criminal Decisions for December 13, 2018

People v. Flores, et al.

This is another quick and unanimous memorandum, affirming the AD. The trial court committed reversible error by empaneling an anonymous jury. The court acted "without any factual predicate for th[is] extraordinary procedure." Instead, the court relied on "anecdotal accounts from jurors in unrelated cases" and then took no steps to lessen the potential prejudice.

People v. Hakes

This was a 6 to 1 decision, with Judge Feinman writing for the majority and Judge Rivera dissenting. The Third Department is reversed. At issue is the legality of requiring a defendant to pay for the costs of a Secure Continuous Remote Alcohol Monitoring ("SCRAM") requirement as part of probation supervision under PL §65.10(4), which authorizes sentencing courts to require defendants to wear an electronic monitoring device.

This is a violation of probation ("VOP") matter regarding an underlying DWI conviction, where the defendant was financially unable to continuing paying for the SCRAM bracelet. Following a VOP hearing, defendant's probation was revoked and he was sent to prison by County Court. This judgment was reversed by the AD.

A probationer is in the legal custody of the court. The probationary sentencing structure is authorized by PL §65.10. Said conditions under subsection (2) must be reasonably necessary to insure that defendant will lead a law abiding life. They are imposed within

the court's discretion. If a defendant is unable to pay for the cost of the device despite bona fide efforts to do so, the court must attempt to fashion a reasonable alternative to incarceration. A willful failure to pay, however, may result in a revocation of probation and incarceration. The majority believed that the costs associated with the SCRAM were part and parcel of (and reasonably necessary for) satisfying the probationary requirement, as with PL §65.10(2) (enumerated conditions) and PL §65.10(5) (catchall provision).

Enacted in 1996, PL §65.10(4) was a reaction to case law requiring that probationary conditions be reasonably related to rehabilitation. Warning the public through a defendant's license plate that says "CONVICTED DWI" (People v. Letterlough, 86 NY2d 259, 260, 265-266 [1995]) or having to wear a GPS electronic monitoring device (People v. McNair, 87 NY2d 772, 774 [1996]) were found not to satisfy this requirement. Under subsection (4), the legislature now condones conditions that further the advancement of public safety, probationer control and surveillance. Electronic surveillance under that subsection allows a probationer to be closely supervised while still allowing for individual privacy.

In sum, the majority concluded that since there is no affirmative statement by the legislature that electronic surveillance is free to defendants, they must be responsible for the costs. There is, however, helpful language in this decision regarding costs. If a defendant is unable to feasibly pay (at the outset or as time goes by), the conditions may be adjusted. Defendants are entitled to a hearing in this regard, wherein he or she may be present, may call witnesses and may present documentary evidence. *See also generally* CPL 420.10(5) (regarding restitution issues). At such a hearing, a defendant must "adequately demonstrate" an inability to pay the costs. But if the court determines by a preponderance of the evidence (*see* CPL 410.70[3]) that nonpayment has been willful, revocation of probation and imprisonment may be an option. *(The defendant's burden here is apparently less than a preponderance of the evidence.)* An indigent defendant cannot be deprived of his or her liberty (i.e., being incarcerated because of a VOP) based on an inability to pay. Though agreeing with the AD's result, the matter was remitted by the Court of Appeals to the AD for a determination of facts and issues regarding the willful violation issue.

Judge Rivera opined in dissent that since the legislature did not explicitly state that defendants must pay the costs, which could run into the thousands, it cannot be required through a judicial decision. There is no implied shift in the statute to place the burden of paying for the costs on the defendant. Restitution and other fines, costs and fees are *affirmatively* required under the Penal Law. *See* PL §60.27; PL §60.35; CPL 410.10(1); CPL 420.10. If a statute is silent on an issue, it is an indication of legislative intent in that regard. The legislature authorized GPS monitoring through PL §65.10(4), not the SCRAM device. The catchall provision of PL §65.10(5) does not authorize this either, as the condition there must be reasonable and necessary to ameliorate the conduct in question. Unlike an ignition interlock device, the SCRAM does not immediately prevent a defendant from drinking and driving.

People v. Allen

This is a unanimous opinion, with Judge Rivera concurring. Judge Fahey wrote for the majority. The First Department's order is reversed and the matter is remitted to the AD. CPL 190.75(3) requires court authorization before a prosecutor may resubmit a case to a grand jury after it has been dismissed. *See* People v. Wilkins, 68 NY2d 269, 271-272, 276-277 (1986) (treating the DA's unilateral withdrawal of a case as effectively dismissing it for CPL 190.75[3] purposes); People v. Credle, 17 NY3d 556, 559-562 (2011) (treating a grand jury that deadlocks on a charge as having effectively dismissing it; good faith by the DA is immaterial).

The defendant was the get-away driver in a fatal shooting. The first grand jury deadlocked on a second-degree murder charge but indicted on other counts, including manslaughter. CPL 210.35(5) indicates that a grand jury proceeding is defective when the proceeding fails to conform with the requirements of CPL article 190 to such a degree that "the integrity thereof is impaired and prejudice to the defendant may result." Wilkins, 68 NY2d at 277, fn 7 (requiring that there be at least "a mere possibility of prejudice"). The lower court erred in denying defendant's motion to dismiss based on this CPL 190.75(3) error. But don't get out the champagne just yet. Though the People violated the statute by resubmitting the murder count to a second grand jury, it did not constitute reversible error under the Court of Appeals' "spillover analysis" for the trial jury to convict on the manslaughter count, as defendant was *acquitted* on the murder count.

The AD improperly applied People v. Mayo, 48 NY2d 245, 248-250 (1979), a case that involved a single improper robbery count with no other charges. Under principles of Double Jeopardy, defendant Mayo should never have been brought to trial on that count, as the trial court had found insufficient evidence to convict following a previous trial. Harmless error analysis considering how the trial was carried out would be inappropriate in Mayo, as the trial court's power to act was at issue. In other words, the conducting of the second trial, in and of itself, was the harm. Id. at 252-253. The improper presence of the murder count before the trial jury at bar, however, did not have a spill over effect because the proof was the same for both the manslaughter and murder counts. Both of these charges were met with the same defense: defendant could not be an accomplice under the circumstances regarding *any* crime. *See generally* People v. Morales, 20 NY3d 240, 250 (2012) (spillover analysis requires consideration of the individual facts of the case, the nature of error and its potential impact on the overall outcome). Here, there was no reasonable possibility that the tainted count influenced in any meaningful way the jury's decision to convict on the non-tainted count. The presence of the murder count did not result in the admission of evidence that the jury would not have otherwise been able to consider. Moreover, the jury was instructed to consider each count separately. Finally, though considered by the AD, defendant did not properly preserve his constitutional

argument that he had the right to be tried for a felony only upon a valid indictment (*see* fn 5 of the Ct Appeals decision).

In her concurrence, Judge Rivera agreed with the majority's ultimate conclusion; however, they erred in applying in applying the prejudice analysis under CPL 210.35(5). A CPL 190.75(3) error, in and of itself, requires dismissal.