NYS Court of Appeals Criminal Decisions: December 15, 2020

10 combined appeals: **People v. Bisono / Baker / Magee / Miller / Daniels / Hardin / Ogando / Biaselli / Torres / Rodriguez**

The Court of Appeals invalidated all ten of the appeal waivers presented, which included both upstate and NYC prosecutions. For nine out of the ten cases, the Court issued a brief memorandum unanimously revering the ADs. These appeals involved combination oral and written waivers, most of which challenged the propriety of sentences. In the Daniels appeal, Judges Garcia and Stein both dissented in separate opinions.

These appeals were a follow up to People v. Thomas / Lang / Green, 34 NY3d 545 (2019), where the Court invalidated two of the three appeal waivers which falsely indicated that no notice of appeal could be filed and that appellate counsel could not be assigned. The Court reminds us that a waiver of appeal is not an absolute bar to the taking of a first-tier appeal. In each appeal here, the rights encompassed by the appeal waivers were mischaracterized during oral colloquies and (or) written forms executed by the defendants. In the Orleans and Queens County appeals, the waivers also improperly included collateral relief. Moreover, several of the defendants had mental health issues.

As Judge Garcia observed in dissent, "Thomas worked a sea change in our approach to appeal waivers…" Indeed, no less than 90 appellate decisions, applying an expansive view of already broad language, invalidated appeal waivers in 2020 pursuant to Thomas, a decision that devalued individualized assessment when reviewing the voluntariness of a waiver. It created a check list without guidance. The impact of Thomas has been to undo plea bargains, undermine finality of judgments and enlarge appellate caseloads. While the majority points out in a footnote that defendant Daniels had a "serious mental health condition," the facts of his appeal closely resembled People v. Ramos, 7 NY3d 737 (2006), where the Court upheld the validity of an appeal waiver that included a single affirmative misstatement in court that was rectified by a written appeal waiver form. Daniels thus expanded the scope of Thomas. Judge Garcia believes that only the lower courts' full adoption of the catechism in the Model Colloquy of the Unified Court System Criminal Jury Instructions, as addressed in Thomas, 34 NY3d at 567, n 7, will stop the carnage from Thomas.

More commentary: The NYS Association of Criminal Defense Lawyers, the NYS Defenders Association, the NYS Chief Defenders, along with a number of other defense offices, submitted an *amicus curiae* brief, arguing for the overruling of People v. Seaberg, 74 NY2d 1, 11 (1989), the seminal decision that authorized appeal waivers in our state. Not one word in the decision on this critical issue.

NYS Court of Appeals Criminal Decisions: December 17, 2020

People v. Williams

Four judges voted to affirm the defendant's conviction, with Judge Stein writing for the majority and Judges Rivera and Wilson filing separate dissents. The Chief Judge did not participate. The jury convicted the defendant of criminal possession of a weapon while acquitting him of attempted murder and assault. The trial court correctly denied the defendant's request for a jury instruction regarding temporary and lawful possession of a firearm. The AD is affirmed.

The defendant was accused of shooting an acquaintance (victim #1) and a bystander in an apartment building lobby. The defendant and victim #1 had a history of violent confrontations. The defendant knew victim #1 believed the defendant had previously shot him. The defendant saw a gun in victim #1's possession and retreated into the building. He went to a friend's apartment therein and asked him to call the police. When the friend refused, the defendant secured a firearm, went to the lobby area and started shooting.

A particular jury instruction must be given where, viewing the evidence in a light most favorable to the defense, a reasonable view of the evidence supports it. *See*, CPL 300.10. The defendant requested a temporary and lawful possession jury instruction, consistent with his justification defense. The Court, however, distinguished "possession," as opposed to "use," being part of self-defense. For the instruction to apply, there must be a "legal excuse" for the possession, as well as facts showing that once obtained, the weapon was not used in a dangerous manner. A weapon is possessed under such circumstances only long enough to dispose of it safely. Examples of this would be where a gun is accidentally found shortly before its possession and the possessor intends to turn it over to the authorities, or where a would-be-assailant is disarmed without an intent by the possessor to use the weapon unlawfully. But the defendant's initial possession of the firearm here was neither innocent nor excusable. The threat the defendant faced was not imminent; there was no evidence, for instance, that victim #1 followed the defendant or that the defendant knew of victim #1's whereabouts at the pertinent time. Defendant was merely arming himself in anticipation of a *potential* confrontation.

The concurring judges agreed that defendant was entitled to a justification charge on the use, not the possession, of the weapon. Judge Rivera would have found the temporary and lawful possession request was appropriate but for the subsequent dangerous use of the gun (as the defendant fired indiscriminately into the lobby). Judge Wilson opines that the subsequent dangerous use requirement should only apply where it negates an inference of innocent use of the weapon, like where a would-be-assailant is disarmed but the gun is not timely turned over to authorities. Self-defense is an imminent situation, as opposed to having a weapon merely in anticipation of a future need. The limitations on this defense reflect our state's strong gun control policy.

People v. J.L.

This is a 4 to 3 decision, with Judge Rivera writing for the majority. The Chief Judge authored the dissent, joined by Judges Feinman and Garcia. The trial court erroneously denied the defendant's request for a jury instruction on voluntary possession regarding a criminal possession of a weapon ("CPW") charge. The AD is reversed and a new trial is ordered.

The 17-year-old defendant was a guest in an apartment. He was shot by an assailant located outside the apartment while defendant sat in the kitchen. The kitchen window was covered with bullet holes. After the shooting, the defendant testified to going into a bedroom to obtain towels for the bleeding. Inside a dresser drawer was a gun laying on top of an envelope addressed to defendant (at a different residence). One officer testified to seeing blood on the gun. The defendant's DNA, along with that of at least one other unknown person, was on the gun. A DNA expert testified, however, that defendant's DNA could have been transferred onto the weapon. There were no fingerprints recovered from the gun.

As averred above, a requested jury instruction must be given where, viewing the evidence in a light most favorable to the defense, a reasonable view of the evidence supports it. *See*, CPL 300.10. The instruction is warranted under the circumstances *even if* there is contrary proof submitted as well. Only where there is no reasonable view of the evidence should the requested instruction be denied. Otherwise a new trial is to be afforded. Voluntary possession means having sufficient time to terminate the possession. *See*, CJI 2d (NY) Voluntary Possession § 15.00(2). Here, the frantic teenage defendant may have had a fleeting awareness of the gun with little opportunity to legally dispose it. Just having control and access to the room where the gun is located does not preclude granting the instruction. It is not necessary to concede possession to qualify for a voluntary possession charge. If there is evidence pointing in two directions, the charge is to be given if one of those directions supports the charge.

The trial court denied the request, finding it too confusing. The instructions ultimately provided gave the impression that if the defendant controlled the room where the weapon was located, he had constructive possession of the gun, regardless of the temporal issue. The defendant was acquitted regarding two other guns found in the apartment, but convicted of CPW regarding the gun recovered in the bedroom. The trial court's denial constituted reversible error. The dissent's focus on the inconsistency of the evidence, effectively viewing it in the DA's favor, is misplaced.

The dissent was having none of this. The trial court's instructions on possession were sufficient. No reasonable view of the evidence supported the granting of this requested instruction. If the defendant's impeached trial testimony was to be believed, there was *no possession at all*. Despite law enforcement's testimony to the contrary, a criminologist testified there was in fact no blood on the gun. Defendant had control over the drawer

where the weapon was found for six hours. An involuntary possession of the weapon was not the defense theory at trial, which included a number of inconsistent statements made by the defendant.

NYS Court of Appeals Criminal Decisions: December 22, 2020

People v. Walley

This successful People's appeal is a unanimous memorandum reversing the AD. The superior court information is not jurisdictionally defective because of the approximate time of incident being omitted, as it is not an element of criminal possession of a weapon. *See*, People v. Lang, 34 NY3d 545, 567 (2019). The defendant was on notice of the crime charged. The matter is remitted.

People v. Del Rosario

This is another memorandum affirming the AD. All concur except the Chief Judge who did not participate. The defendant's SORA-related argument on appeal is not moot because of the defendant being subsequently deported. On the merits, the upward departure based on the defendant raping the victim in order to take revenge upon another person, a risk factor "not adequately captured" by the Guidelines, was not an abuse of discretion.

People v. Robinson

Nothing to see here. Appeal submitted pursuant to Court Rule 500.11. The issues presented on appeal have become moot and the appeal is dismissed.