NYS Court of Appeals Criminal Decisions for June 6, 2019

People v. Esposito

This successful DA's appeal is a unanimous memorandum, reversing the Appellate Term. The factual allegations in the accusatory instrument were sufficient to support the inference that defendant was the operator of the vehicle in the accident. The instrument should not have been dismissed.

People v. Smith

This is a unanimous reversal of the AD, authored by Judge Feinman. A woman is shot in front of her boyfriend in Rochester. He is not called as a witness, despite being on the People's list of potential witnesses. The defendant unsuccessfully sought a missing witness charge. People v. Gonzalez, 68 NY2d 424, 427-428 (1986); People v. Vasquez, 76 NY2d 722, 724 (1990); People v. Savinon, 100 NY2d 192, 196-197 (2003). The trial court erroneously shifted to the defense the burden of establishing that the proposed testimony in question would not have been cumulative. That was the People's responsibility; and their argument in this regard was conclusory. The defendant will often not possess sufficient info to address the cumulative issue. A proponent of a missing witness charge, which permits a negative jury instruction inference for failing to present the testimony of a witness one would expect to testify in the party's favor, must show the witness to be available, in the opponent's control and in possession of material info. The trial court abused its discretion here. A new trial was ordered.

People v. Gregory

This unanimous memorandum affirmed the AD. The defendant's request to represent himself *pro se* was properly denied, as he engaged in conduct that would have prevented the fair and orderly disposition of the issues. People v. McIntyre, 36 NY2d 10, 17 (1974) (addressing factor number three). The De Bour (40 NY2d 210, 223 [1976]) issue was a mixed question of law and fact; here there was record support for the lower court's determination.

NYS Court of Appeals Criminal Decisions for June 11, 2019

People v. Giuca

This is a 5 to 1 decision, authored by the Chief Judge, with Judge Fahey not participating and Judge Rivera dissenting. The People are successful here on appeal in this felony-murder prosecution. The Second Department's reversal is reversed. There was no Brady violation by the prosecution failing to turn over numerous details regarding a purported plea agreement with a prosecution witness. There was no reasonable possibility that the verdict would have been different *(where the court's confidence in the result would have been undermined)* had the information regarding a jailhouse informant been turned over.

The informant supposedly heard a number of admissions from defendant while they were in custody together. The informant had some fifteen prior convictions, mostly for larceny. The defense believed that the People violated Brady by not revealing before trial that the informant was not violated during his time in drug treatment court, despite failing to comply with required conditions on numerous occasions. The trial prosecutor actually became personally involved in the drug court matter, yet did not correct erroneous trial testimony from the informant on this subject. The informant denied that he was provided a favorable plea deal. Defense counsel was able to attack his credibility in summation, but not regarding the unrevealed info. According to the majority, the defense had "ample impeachment evidence" already in its possession. A CPL 440 hearing was conducted, wherein the defendant was required to prove every material fact in his motion by a preponderance of the evidence. Though there was a lot of smoke, the CPL 440 court ruled that there was no favorable agreement established. The AD, without analyzing the materiality requirement, disagreed, concluding that a tacit agreement existed.

The Brady rule is a matter of fundamental fairness and professional responsibility. Even negligent nondisclosure may deny a defendant due process where either exculpatory or impeachment evidence is suppressed by the prosecution or its agents. Giglio v. United States, 405 US 150, 153-155 (1972); People v. Vilardi, 76 NY2d 67, 73 (1990); People v. Garrett, 23 NY3d 878, 884-885 (2014). Promises of leniency given to a witness in exchange for favorable testimony against an accused must be disclosed. People v. Steadman, 82 NY2d 1, 7 (1993). This standard is not dependent on the DA's view of what information is credible; nondisclosure of material Brady evidence is not excusable. The case at bar, however, is different from People v. Cwikla, 46 NY2d 434, 441 (1979), where there were objective circumstances that reasonably substantiated the expectation of the witness of receiving a benefit. A subjective hope for favorable treatment cannot unilaterally form the basis of a tacit agreement for Brady purposes. Information just being "possibly useful" is not enough. According to the majority, the undisclosed info was cumulative to what the defense already knew. The majority acknowledges, however, that

the ADA did fail to correct the informant's mischaracterization during his testimony regarding his progress in drug treatment. Still, the Court says it's not a Brady violation.

Judge Rivera in dissent points out that the majority is acknowledging that the prosecution withheld info about the relationship between this informant and the DA's Office. This was a high publicity homicide prosecution. A number of high-level players in the DA's Office became personally involved in the informant's other matter. The DA's Office failed to correct the informant's misleading testimony. The jury never got to hear about the extent of the prosecution's involvement in the informant's other case. The defense attorney only had generic credibility info with which to attack the informant. In accepting this, the majority underestimates the power of cross-examination in the hands of a skilled defense lawyer. Indeed, where a specific Brady request is made and "[w]here a prosecutor elicits or fails to correct [knowingly false or mistaken material testimony of a prosecution witness], reversal and new trial are necessary unless there is no reasonable possibility that the error contributed to the conviction." People v. Colon, 13 NY3d 343, 349 (2009). Expansive disclosure by the prosecution should be the norm. Turner v. United States, __ U.S. __ , 137 S.Ct. 1885, 1893 (2017). At bar, the prosecution misled the trial court, the jury and the defense. It should have been reversed.

More commentary: Despite referencing the helpful language from the recent Turner decision from the Supreme Court, there was no mention in the dissent of the November 7, 2017 statewide administrative order requiring criminal courts to order that prosecutors, as of January 1, 2018, disclose Brady material at least thirty days before trial or face potential trial court sanctions. This order was inspired by a 2016 report of the Uniform Court System's Justice Task Force.

NYS Court of Appeals Criminal Decisions for June 13, 2019

People v. Mendoza

This a unanimous decision, authored by the Chief Judge, affirming the AD. Defense counsel had his hands full on this one. Defendant was caught on a surveillance video stealing doggie diapers and (human) pants from packages received in the mail at an apartment building. During the crime he can also be seen eating a sandwich. He was charged with burglary.

Counsel decided to pursue a jury nullification defense. So in his opening statement and summation, counsel effectively conceded defendant's commission of the elements of the crime as he pointed out the overzealousness of prosecuting such a ridiculous set of facts. To quote counsel, though there was no "great mystery" to this case, this was not the "crime of the century." *See also generally*, McCoy v. Louisiana, __ U.S. __ , 138 S. Ct. 1500, 1510-1511 (2018) (finding reversible error where counsel conceded guilt during guilt phase of capital trial, an action taken against his client's specific wishes).

Officially, jury nullification is not a legally sanctioned function of the jury. However, the US Supreme Court long ago recognized that juries apply the facts to the law as they "upon their conscience" believe them to me. Sparf v. US, 156 US 51, 102 (1895). While the jury is officially not authorized to refuse to render a verdict which the facts necessarily require, jury nullification is "an inevitable consequence of the jury system." People v. Mussenden, 308 NY 558, 563 (1955).

The court here rejected defendant's CPL 440 ineffective assistance of counsel argument (under People v. Baldi, 54 NY2d 137, 147 [1981]), as there were enough non-bad things that counsel did at trial, including his *thorough* cross-exam and *cogent* opening statement and summation.

Commentary: This is a dicey topic for appellate courts, as jury nullification is a long-recognized and unreviewable vehicle for granting mercy to an accused. It does appear that defense counsel at bar was in a no-win situation in light of the overwhelming evidence of his client's guilt.

People v. Lopez-Mendoza

This is a 6 to 1 decision, authored by Judge Wilson, with Judge Rivera writing for the dissent. The defendant's ineffective assistance of counsel claim was rejected. The AD is affirmed. A young couple checks into a hotel and then goes out partying. They returned after 2:30 a.m. and were too drunk to enter their room without the assistance of a hotel employee (the defendant). The woman wakes up to a person on top of her having sex with her. She screams and the perpetrator runs away. The defendant asserts that the sex was consensual. Defendant testified in the grand jury, claiming that the encounter occurred shortly after he entered the room with the couple. Unbeknownst to the defendant at the time of his grand jury testimony, there were numerous surveillance videos establishing that his story made no sense. Unfortunately, defense counsel followed the defendant's lead in his opening statement and promised the jury that defendant would testify at trial (which he didn't). When the People sought to introduce parts of the surveillance video during the trial, it seemed as if counsel had never even reviewed the video, which was received by the defense a month before trial.

The court opined that there was an insufficient record to establish that counsel failed to investigate. The defendant failed to establish the absence of strategic or legitimate explanations for counsel's actions.

In dissent, Judge Rivera argued that there must some basis to a defense attorney's so-called strategy. It must be reasonable and legitimate under the circumstances. Counsel's failure to investigate buried his client; he pursed a defense with no strategic value that was proven false by the surveillance video.

NYS Court of Appeals Criminal Decisions for June 25, 2019

People v. Malloy

This is a unanimous memorandum, affirming the AD. Defendant's Batson argument was rejected. Great deference on appeal is afforded to a trial judge's resolution of this issue. According to the prosecutor, the prospective juror was dismissive and rude. The defendant's consecutive sentences for weapon possession and murder were proper, as the weapon was possessed several minutes before the victim was approached.

People v. Ulett

This is a unanimous reversal of the AD, authored by Judge Garcia. This is a Brady issue, and it's a good one.

The defendant was convicted of murder following a shooting outside an apartment building. There were three main eye-witnesses, but no forensic evidence connecting defendant to the crime. One witness said defendant was present and the other two claimed to have seen him commit the actual shooting. One of the witnesses who saw the shooting had a bad criminal history and credibility problems. He claimed to have been alone with the victim before and after the shooting. In summation, defense counsel criticized the prosecution for failing to have the surveillance video from the lobby near the location of the crime. The prosecution responded in its summation that there was no video. In fact, there was. Years after the trial, a FOIL request revealed that the ADA had a video in her file that showed that one of the eye witnesses was lying regarding the details of the shooting. The video also revealed two other individuals in the vicinity of the crime, not previously known.

Brady v. Maryland, 373 US 83, 87 (1963), prohibits the People from suppressing favorable evidence from the accused that is material to either guilt or punishment. People v. Vilardi, 76 N.Y.2d 67, 73 (1990). This a matter of due process. Granting a new trial because of a Brady violation is not for the purpose of punishing the prosecution. This, the ADA's good or bad faith in not turning over the info is irrelevant. Exculpatory and impeachment info are encompassed under the rule. The prosecution is responsible for the items in the possession of its agents. Info that may lead to admissible evidence is also encompassed by the Brady doctrine. Terrific decision.

NYS Court of Appeals Criminal Decisions for June 27, 2019

People v. McIntosh

This is a brief unanimous memorandum, affirming the AD. Any error in the trial court denying the defense request for a lesser included offense instruction of criminally negligent homicide and 2nd degree manslaughter (as lesser offenses of murder in the second degree) was harmless. The AD properly dismissed a 1st degree manslaughter count as a lesser inclusory count under CPL 300.40(3)(b). The jury elected to convict on the highest available count.

People v. Hill

This is a 4 to 3 memorandum, affirming the AD. Judge Fahey authored the dissent, joined by Judges Rivera and Wilson. The AD did not violate People v. LaFontaine (92 NY2d 470 [1998]); *see also*, People v. Nicholson, 26 NY3d 813, 826 (2016). This is a Fourth Amendment issue addressing whether the illegal search of the defendant's clothing tainted the subsequent searches of his vehicle and apartment. The AD reached an issue not addressed by Supreme Court, but affirmed the judgment.

The dissent says the AD exceeded its jurisdiction by determining an issue not resolved against the defendant below. *See*, CPL 470.15(1); *see also*, People v. Concepcion, 17 NY3d 192, 195 (2011); People v. Garrett, 23 NY3d 878, 885, n2 (2014). CPL 470.15 is a legislative restriction on the AD's power to review issues. CPL 470.35(1) further grants the Court of Appeals no broader power than the AD has. The LaFontaine doctrine may not be a desirable policy, but it is the law. Accordingly, the Court of Appeals was prohibited from affirming the AD; the matter should have been remitted.

People v. Almonte

This is a 4 to 2 memorandum, with the Chief Judge not participating. Judges Rivera and Wilson wrote separate dissents. The AD is affirmed. There were two issues here; including lesser-included-offense ("LIO") instructions and the excited utterance exception to the hearsay rule.

Defendant failed to show that a reasonable view of the evidence supported a finding that he committed third degree assault, but not the greater offense of second-degree assault. The trial court's admission of a 911 call made by the victim as an excited utterance, even if error, was harmless. A spontaneous declaration or excited utterance is made contemporaneously or immediately after a startling event, asserting circumstances of that

occasion as observed by the declarant. People v. Cummings, 31 NY3d 204, 209 (2018); People v. Edwards, 47 NY2d 493, 496-497 (1979).

In dissent, Judge Rivera addressed the CPL 300.50(1) LIO issue first. This evaluation requires that the court review the evidence in a light most favorable to the defense. This is so because "[a]t its core, the standard reflects the jury's authority to make findings of fact and power to dispense mercy." *See also*, People v. Mendoza, __ N.Y.3d __ (decided on 6/13/19, *see summary above*; where the court analyzed the mercy-dispensing authority of the jury in the context of jury nullification). The jury acquitted defendant of robbery in the first degree (PL §160.15 [3]), which would have required a finding that a dangerous instrument was possessed and either used or threatened to be used. According to Judge Rivera, there *was* a reasonable view of the evidence, when viewed most favorable to the defendant, that the victim suffered injuries through other means than the use of a gun. The victim was beaten and could have hit his head on the stairs or railing during the attack. The medical testimony could not identify the weapon that caused the victim's injuries.

Regarding the excited utterance issue, the dissent observed that such statements are admissible under this hearsay exception when they are impulsive and unreflective responses of the declarant to the startling event, thus showing a high degree of trustworthiness. The unsettling event must be strong enough to render the declarant's normal reflective processes inoperative. People v. Vasquez, 88 NY2d 561, 574 (1996). This was not the case at bar, as the declarant omitted identifying the assailants, whom he knew. The declaration also occurred several minutes after the incident and the declarant did not provide his mother this info before making the 911 call. The issue of abolishing excited utterance as a hearsay exception, an idea presented by Judge Rivera in her concurrence in Cummings, 31 NY3d at 213-214, was not preserved for appellate review.