NYS Court of Appeals Criminal Decisions for May 1, 2018

People v. Epakchi

This memorandum addresses a successful People's appeal from a local court, reversing and remitting the matter, as no affidavit of errors was filed despite there not having been a stenographer recording the proceedings. The appeal was thus not properly taken under CPL 460.10 (3)(a).

People v. Gates

This is a 6 to 1 memorandum, with Judge Garcia dissenting. The People lost this appeal. The AD is affirmed and the evidence in this car stop case is suppressed. As there is record support for the lower court's determination, it is beyond the Court of Appeals' review. The dissent's questioning of the continued validity of the De Bour paradigm is not properly before the Court.

Don't ever let it be said that I don't let both sides speak. In dissent, Judge Garcia rallies against the De Bour doctrine, particularly in this scenario, where De Bour and traffic stops converge. *See generally* People v. Garcia (no relation), 20 NY2d 317 (2012). Judge Garcia observes that it has been over forty years since People v. De Bour, 40 NY2d 210 (1976), and it is time to take a big picture look at the situation. The judge likes the simpler federal way of doing things. There aren't four levels of intrusion with all of their messy subtleties; instead you have a "single, familiar standard" of asking whether the officer's conduct was reasonable under the circumstances. Levels one and two under De Bour are too closely related. This hyper-technical scrutinizing of an officer's every move is inconsistent with the constant on-the-spot law enforcement assessments that a police officer must make every day. These are fluid situations. The De Bour progeny has been confusing and law enforcement needs more discretion in detecting problems early on in a citizen encounter. In sum, "the analytical framework of De Bour serves, in many ways, to undermine the goals of clarity, public safety, and judicial economy." This is even truer in the traffic stop scenario, as there is the risk of injury from passing cars, the suspect has more potential access to weapons and the vehicle itself is readily mobile. For sure, the roadside encounter is fundamentally different and more dangerous than the run-of-the-mill street encounter.

At bar, the officer observed a sagging trunk, indicating something heavy being contained therein. Defendant was acting nervous and there were nylon bags observed in the back seat. Defendant also refused to make eye contact. Defendant was ultimately charged with transporting untaxed cigarettes. The Appellate Division, however, found that a level two inquiry occurred without a founded suspicion of criminality existing.

Commentary: Judge Garcia ends his opinion by reminding us that in order to combat terrorism, we tell our citizenry that if they see something they should say something. As Judge Garcia observes, the De Bour approach, which scrutinizes the preliminary stages of a police investigation with the threat of suppression hanging over the officer's head as he or she attempts to quickly interpret a fluid situation, flies in the face of how we approach terrorism. Exactly. We should not be attempting, as we interpret our state constitution, to make detecting terrorism our guide. The criminal justice system is meant to be a vehicle for protecting citizens from overreaching governmental authority exercised in the name of crime control, not for acting on hunches when a guy on a subway seat carrying a knapsack *just doesn't seem right to us*.

NYS Court of Appeals Criminal Decisions for May 3, 2018

People v. Odum

This unsuccessful People's appeal is a 4 to 3 decision, affirming the appellate term, which affirmed the trial court's DWI-related suppression order. Judge Stein authored the majority's opinion, with Judge Wilson concurring. The Chief Judge authored the dissent, which was joined in by Judges Fahey and Garcia. Here, defendant's blood alcohol results were suppressed, as the two hour rule under VTL §1194 (2) was violated. The breathalyzer was not administered in accordance with the statute and defendant's consent was not voluntary. *More than two hours* after his arrest, the police asked defendant if he would take a breathalyzer. He said no and was then given refusal warnings, which included the inaccurate statement that if he refused to submit to the test, it would be introduced at trial against him *(this was wrong because more than two hours had passed)*. Defendant then submitted to the test, which showed him to have a blood alcohol level above the legal limit (.09%).

VTL §1194 (2)(a)(1) indicates that every operator of a motor vehicle is deemed to have consented to providing a blood test if the police have reasonable grounds for arrest and the test is given within two hours of the arrest. If you refuse, your license is suspended and the refusal (if within the two-hour limit) is admissible at trial. This rule was enacted in 1973. There is no constitutional right not to submit to a chemical test after having operated a motor vehicle. But a defendant can voluntary and expressly consent to submit to a chemical test after the two-hour period has passed. *See* People v. Atkins, 85 NY2d 1007, 1008 (1995). The police either need to secure the test within two hours, obtain a court order or secure a voluntary consent. Here, the consent was not voluntary as it was a consequence of inaccurate refusal warnings.

Judge Wilson says in his concurrence that the first part of the refusal warning was not coercive regarding the defendant's license being suspended or revoked.

In dissent, the Chief Judge noted the 2012 DMV policy that allowed for the suspension or revocation of a license after the two-hour limit had passed. The majority's decision encourages refusals, which contravenes the statutory purpose. Here, according to the dissent, the consent was voluntary, as the two hour rule has no applicability outside of the deemed consent scenario; it does not apply to a refusal fact pattern.

People v. Aleynikov

This is a unanimous decision authored by Judge Fahey, who is turning into quite the philosopher *(see May 8th chimpanzee decision below)*, beginning this opinion, which addresses the legal sufficiency of unlawful use of scientific material, this way: "Ideas begin in the mind. By its nature, an idea, be it a symphony or computer source code, begins as intangible property…" More on this later.

PL §165.07 was at issue. Goldman Sachs ("GS") is a major investment banking and financial services company. Defendant was a computer programmer for GS, who worked with the company's high-frequency trading software that performed market data calculations and traded securities at a rapid pace. GS operated in a very competitive industry. Defendant had access to the entire computer system, including the system's source code ("SC"), which was located inside the software repository. The company prohibited employees from removing the SC from their computer network; access to the company's network from the outside was restricted. Simply put, if a competitor, especially a start-up competitor, got its hands on the company's SC, it would hurt business.

Defendant changed jobs in 2009, and joined another company, a start-up firm that planned to develop its trading infrastructure from scratch. Defendant was to be the architect of this new system and guess where he got all his ideas from? On his last day on the job at GS, defendant uploaded a large quantity of SC data to a website, using his personal e-mail account. Defendant uploaded the SC to a German server. He also deleted files and backdated computer script to make it appear that transactions occurred two years before. He also downloaded the SC to his home computer. Though he tried to cover his tracks on his office computer before he left, GS figured it out what happened.

Defendant was convicted after trial in federal court under 18 USC §2314, the National Stolen Property Act ("NSPA"). In 2012, the Court of Appeals for the Second Circuit reversed, holding that the SC itself was "intangible property" at the time of the theft and was therefore not a "good" under the NSPA. So then the state prosecutor took a shot, charging defendant with two counts of unlawful use of scientific material ("UUSM") under PL §165.07 and one count of unlawful duplication of computer related material in the 1st degree under PL §156.30(1). The jury only convicted on one of the UUSM counts. The People appealed and the First Department reversed and reinstated the charge. The NYS Court of Appeals affirmed.

Unlike the federal NSPA statute, the question under New York's UUSM statute is whether there was a tangible "reproduction" of the SC when defendant uploaded the SC to the hard drive of the German server, not whether the SC *itself* was tangible. The copied SC on the computer server occupied physical space and was physically present; the server's hard drive was a physical medium. *See also* People v. Kent, 19 NY3d 290, 301-302 (2012) (finding that images of child pornography downloaded and permanently placed on a computer hard drive was tangible and could be accessed later). This 21st century technology evidence was legally sufficient under the 1967 UUSM statute, which prohibits the copying of scientific material, while leaving behind the original.

The Court also analyzed what "appropriate" means under PL §§165.07 and 155.00 (4), as the SC was only copied and GS was still able to use it after the crime occurred. The UUSM and larceny statutes work in tandem here, as the legislature sought to criminalize misappropriations that were not traditional larcenous takings. Though defendant did not intend to permanently deprive GS of the SC, he did intend to exercise control over the SC permanently. Appropriation may involve depriving another of rights or benefits of a piece of property, and does not require depriving anther of the property (as would occur if a thief takes physical possession of one's property).

People v. Roberts
People v. Rush

This opinion was authored by Judge Rivera. Both judgments of conviction were affirmed, with Judge Wilson concurring in Rush but dissenting in Roberts. At issue is whether there was legally sufficient evidence for the defendants' convictions for identity theft in the first and second degrees under P.L. §§ 190.79 and 190.80 (enacted in 2002). The "assumes the identity of another" language of the statute was at issue. Defendant Roberts attempted to use someone else's credit card number with a fictitious name to purchase merchandise in a sporting goods store. He had a fraudulent driver's license with a name matching the credit card, with defendant's photo included. The name used on the card and license were fictitious. The Court says that pretending to be a fake person is sufficient under the statute. Defendant Rush stole the ID of her victim and deposited false and stolen checks in a bank account in the name of this innocent third person. She ultimately withdrew funds from this account, but did not give the impression that she was that person. This qualified under the statute as well.

The law was made to address the often significant financial harm caused to people when their personal information is surreptitiously stolen, i.e., one's name, signature, address, phone number, SS number, bank or credit card account number. The majority believed that the "assumes the identity of another" clause was an explanation of three potential methods of identity theft which came next in the statute; it was the "operational text that sets forth the *actus reus* of identity theft." It defines the essence, says the majority, of identity theft. (Moreover, it is not a separate element; there was no conjunctive "and" between this phrase and the three methods subsequently described.)

The Court also rejected defendant Rush's courtroom closure argument (i.e., the constitutional right to a public trial [*see generally* People v. Martin, 16 NY3d 607, 611 [2011]), as it was unclear that defendant's family was in fact kept from entering the court room. It also appeared that defense counsel failed to object to the *voir dire* continuing despite the issue being known to the defense.

Judge Wilson, in dissenting in the Roberts decision, opines, rather convincingly, that the majority's interpretation renders the "assumes the identity of another" clause as meaningless. In interpreting a criminal statute, appellate courts should assume that the Legislature had a purpose in using each phrase. Judge Wilson compares this provision of the identity theft statute with analogous ones in statutes prohibiting arson (PL §150.10), gambling (PL §225.10) and menacing (PL §120.14). The judge further raises hypotheticals involving a child lying to a vendor about her own birthday in order to get a free ice cream cone; wouldn't that be assuming the ID of others who actually had that birthday? Indeed, "many ordinary people misstate some bit of [personal identification info] with the intent to deceive and thereby obtain something of value." The majority's interpretation "criminalizes a good deal of commonplace, innocent behavior." What defendant Roberts did, in using an innocent party's credit card information, was a larcenous crime; but he simply did not assume another's identity and thus, did not violate this specific statute. And finally, as usual, Judge Wilson gets off the best line of the decision:

> I have no difficulty accepting the import the legislature intended (cf. majority op. at 16 n 7). What is "unacceptable to the dissent" is the majority's theft of the legislature's identity, by striking the words "assumes the identity of" from the statute.

NYS Court of Appeals Criminal-Related Decisions for May 8, 2018

People v. Wallace

This decision was authored by Judge Feinman. The entire court agreed to affirm the AD, with Judge Stein concurring. The court, for the first time, interpreted what the "place of business" exception to the criminal possession of a weapon statute (P.L. §265.03[3]) means. The statute itself provides no definition. If the exception *("if such possession takes place in such person's home or place of business")* applies, the charge is a misdemeanor instead of a felony. The defendant at bar was a "swing" manager at McDonalds who accidentally shot himself in the leg while off duty and sitting in the lobby of the restaurant. Some general rules of statutory construction (i.e., give all terms meaning, consider the context and do not interpret in such a way that reaches an absurd result) are addressed.

The court held that a place of business is not the same thing as a place of employment. Rather, it refers to the merchant, storekeeper or principal owner. The Court observed that P.L. §400.00 permits a license to be issued in order to possess a gun in one's place of business by a merchant or storekeeper. The "merchant or storekeeper" language was in the 1913 version of the weapon possession law. Though the 1964 version of the law, which is still in place, did not include the "merchant or storekeeper" language in its place of business exception, the Court was still comfortable in its narrow interpretation of the statute. Employees cannot just arm themselves at work; but a licensed owner can, as he or she would purportedly have a greater interest in protection of their premises and the safety and security of the establishment where goods and services are sold.

In her concurrence, Judge Stein described in more detail what the place of business of exception should mean. It applies for the individual who has a significant proprietary or possessory interest - - beyond that of a mere employee.

Commentary: First of all, the Court travels in this decision as far as it can from the actual text of the statute, looking at the licensing statute, going to the trouble of enforcing the *text* of the *legislative history* (discussing gun safety concerns) and prohibiting interpretation of the *previous version* of the statute in a way that would make any of *that* statute's language unnecessary. The Court, without implying anything close to the rule of lenity (*see generally* People v. Golb, 23 NY3d 455, 468 [2014]), which would require any ambiguity in the law's interpretation to fall in defendant's favor, had no intention of reaching a result against gun control.

Secondly, it seems strange that the Court is so comfortable recognizing gun rights for the owner of the store who is likely not the one *physically at the store* with his hands up, forking over money to an armed robber. The financially secure owner might be either hiding in the back under a table or at home with family having dinner - - but he or she is *legally armed* as the minimum wage earning store clerk is facing the barrel of a felon's gun.

Matter of Nonhuman Rights Project Inc. on Behalf of Tommy v. Lavery
Matter of Nonhuman Rights Project Inc. on Behalf of Kiko v. Presti

This is a denial of a civil leave application, wherein the Court issued no majority opinion. Judges Stein and Feinman did not participate. But Judge Fahey wrote a concurring opinion that is worth reading. This is the case of two captive *chimpanzees* seeking habeas corpus relief under CPLR Article 70. You heard that right. Their goal (or rather the goal of their attorneys) was not be released, but rather to be transferred to a better facility.

Judge Fahey, in a thought provoking piece, wonders aloud whether a non-human being may be entitled to habeas relief, or must it just be treated as property. Does a chimp

qualify as a "person" who has the rights and legal duties of a human being, with the ability and capacity to be held accountable for its actions? Before you answer that, does an infant or comatose adult lose their rights because they cannot bear the duties that the rest of us can? *(Note that corporations and governmental entities are not humans, but are treated as "persons" under Penal Law §10.00 [7].)* Judge Fahey suggests that whether or not a chimp has the same rights as humans, it still must (eventually) be answered whether habeas relief may be afforded to it. As we ponder these questions, we should be mindful that chimps have advanced cognitive abilities. They can make tools to catch insects; recognize themselves in mirrors, photos and TV images; imitate others; exhibit compassion and depression when a community member dies and display a sense a humor.

Relevant to imprisoned *human* habeas cases, Judge Fahey notes that habeas relief is not confined to outright release; it can indeed be also used to seek a *transfer* to an institution separate and different from the facility in which a prisoner is presently housed.

Here's how *Professor* Fahey closes this opinion:

> The issue of whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing.

People v. Cummings

Judge Wilson authored this reversal, with Judge Rivera concurring. The trial court erred in admitting a 911 call, despite inadmissible hearsay comments being audible in the background of the call. These statements did not qualify as excited utterances, as the declarant did not observe the events commented about. A witness called 911 to provide part of the license plate number of the vehicle which carried the shooter of two individuals on the street. Twenty seconds into the call, someone in the background is twice heard saying it was "Twanek" (which is defendant's first name). The vehicle in question was ultimately pulled over. Only the driver was caught. The passenger (believed to be the defendant) took off; defendant's fingerprint, however, was found on the car door. No weapon was recovered; no ID was made by the witnesses at the scene. A surveillance video in the area did not corroborate the background statements of the 911 call.

A spontaneous declaration or excited utterance made contemporaneously or immediately after a startling event, which asserts circumstances of that occasion as observed by the declarant, is an exception to the prohibition on hearsay. People v.

Edwards, 47 NY2d 493, 496-497 (1979). It is the impulsive and unreflecting responses of the declarant to the startling event (after having made direct observations), that creates a high degree of trustworthiness. Though this issue presents a mixed question of law and fact, there was no record support for the trial court's ruling. The declarant must have an adequate opportunity to observe the event and must be in close enough proximity to it. The declaration must also occur soon after the event. Here, the declarant was unidentified and made conclusory statements providing no basis from which personal knowledge can reasonably be inferred. There was no corroboration that the declarant was physically present for the event.

The Court also addressed the law of the case doctrine, finding that the second trial court judge in the case was not bound by the first judge's hearsay ruling. This doctrine expresses the general practice of courts to refuse to reopen what has been decided, normally applying to courts of coordinate jurisdiction. It directs a court's discretion but does not restrict its authority. *See generally* People v. Evans, 94 NY2d 499, 504 (2000). Absent prejudice to the defendant, a judge may revisit his or her own evidentiary rulings. Here, the second judge on the case did not err in reversing the hearsay ruling of the previous judge; the trial court had independent discretion to revisit this ruling.

Judge Rivera in her concurrence questions the validity of the excited utterance exception in general, as legal scholarship and jurists have addressed many instances of falsehoods being made immediately after an event which is described. Spontaneous lies in emotional situations are common. Judge Rivera wants more confrontation of witnesses under these scenarios. This hearsay exception should be abandoned.

People v. Kuzdzal

This one was authored by the Chief Judge, with Judge Wilson writing a concurrence and Judge Rivera dissenting. The matter is remitted to the AD, with a kind of strange form of relief ordered. This was a very disturbing child sex crime prosecution regarding a five-year-old victim. There was evidence of a sexual assault and a fractured skull. A court spectator, who happens to have been a longtime friend (and possibly girlfriend) of the defendant, overheard two jurors speaking and the defendant being described as a scumbag. This was reported to defense counsel, who in turn informed the court. This purportedly occurred after the evidence was closed. Sounds like a Buford / CPL 270.35 inquiry needed to be conducted in order to determine whether the sworn juror was grossly disqualified. *See* People v. Buford, 69 NY2d 290, 298-299 (1987) (explaining that it must be "obvious" that the juror possesses a state of mind that would prevent the rendering of an impartial verdict).

But not so fast. As a trial court, is it better to dive in and make an inquiry of the jurors in question if the allegations have no credibility to begin with? While the defendant has a

constitutional right to be tried by a jury that he or she had a voice in choosing (NY Const., art. 1, §2), if the allegations are just made up, by questioning a sitting juror, the court may be negatively impacting the jury and its mission of fairly deciding defendant's case. This is why there is no one size fits all approach to this issue. Each case be considered on its own unique facts *(considering the content and seriousness of the allegations, and the credibility of the source)*. The trial court is to be afforded broad discretion in this regard in evaluating how to be the least disruptive to (and avoid tainting) the sanctity of the jury's domain. This is a delicate and complex task.

So the trial court at bar, which had already conducted a Buford inquiry of a sitting juror earlier in the trial on an unrelated issue, placed the spectator under oath and questioned her. The court seemed to implicitly determine that the allegations were not true and elected, over defendant's objection, not to inquire of the jurors in question. In other words, a Buford inquiry of the jurors was unnecessary. In her testimony, the spectator's account of the events were inconsistent. Further, she had a motive to provide a false account which might create an issue for her friend, the defendant.

The Court of Appeals reversed the AD, which reversed by a 3 to 2 vote. The AD believed that a probing and tactful Buford inquiry should have been conducted of the jurors, and that no findings were made at all by the trial court. The high court here remitted the case back to the AD to exercise its own fact-finding power to consider and determine whether the trial court's finding as to the spectator's credibility was supported by the weight of the evidence. The Court of Appeals also noted that the best practice for trial courts is to make a record of its express findings in denying a defendant's request for a Buford inquiry; appellate review would be enhanced.

Judge Wilson in concurrence believed that the "substantial misconduct" prong of CPL 270.35, not the "grossly disqualified" prong, was at issue. Thinking that the defendant, based on the horrible testimony of his crimes, was a scumbag only means that they formed an opinion. Expressing this opinion as they did may have been misconduct, but having formed an opinion did not make them grossly disqualified. If, however, the communications were heard before testimony was given, it may have indicated a bias, implicating the jurors' qualifications to serve.

In dissent, Judge Rivera asks where the "weight of the evidence" standard came from and what is to be achieved by this remittal. The AD had it right by reversing and ordering a new trial. The holding of the AD's decision would be incomprehensible if the trial court had not determined that the spectator's allegations were not credible enough to support a Buford inquiry. A sufficient record made by trial courts for denying a Buford request is not just the best practice, as the majority says; it is required. In essence, the majority has "defanged" Buford.